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There is nothing too absurd but what authority can be found for it.[1]

I. INTRODUCTION

Generality and constancy are said to be fundamental requirements of "law."[2] Both go to the essential predictability associated with fairness and, in a more analytical context, with economic efficiency. Western liberal tradition views arbitrariness as a great demon. A fair system provides an equal opportunity for all persons to anticipate legal decisions and adjust their lives accordingly through general rules that apply with reasonable consistency over time.[3] The same moral objectives dictate concern for the publicity of rules, and explain an historical abhorrence of ex post facto laws and bills of attainder. Generality and constancy also reduce economic uncertainty and thus increase the value of property and contracts.[4] Investors and traders do not need to insure themselves against unforeseeable decisions affecting the enforceability of bargains or the consequences of their conduct.

From this perspective, it is doubtful whether the recent judicial record concerning Indian affairs merits categorization as "law." The Supreme Court's decisions have been characterized by an absence of general principles, which the Justices rationalize as the "particularization" of their analysis.[5] The standards that do appear from time to time, such as "balancing interests" and "implied repeal," are merely euphemisms for discretion. There has been no consistent authorship of opinions because the Justices hold little enthusiasm for Indian law cases,[6] and the Court seems

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1. Henderson v. Preston, 4 T.L.R. 632, 633 (1888) (Manisty, J.).

2. L. FULLER, THE MORALITY OF LAW 46–49, 79–81 (rev. ed. 1969). "Generality" refers to the collective or class character of rules, as opposed to particularity or individualization. A rule that applies to all persons is general; one that applies to blondes or men named Harry is not.

3. *See* R. UNGER, KNOWLEDGE AND POLITICS 73–76 (1975).

4. *See* G. TULLOCK, THE LOGIC OF THE LAW 46–49, 57–75 (1971).

5. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980). This should be distinguished from the cyclical growth and transformation of individual rules, which may be inherent in any system of case law. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 6–7 (1949).

6. *See, e.g.*, B. WOODWARD & S. ARMSTRONG, THE BRETHREN 57–58, 359, 412 (1980).

to treat each dispute as if it were a matter of first impression. "Generalizations on this subject have become . . . treacherous"[7] as a result of the Court's failure to make and stick to general guiding principles. The Court's 1982 Term, its busiest ever for Indian decisions, was no exception. In the four opinions reviewed in detail here,[8] the Court abandoned any pretense that the scope of tribal sovereignty or the nature of federal "trusteeship" can be determined save on the facts of each case. At the same time, it strengthened the notion that state and national interests, as construed by the Justices, override any rights Indians may yet have.

II. TRIBAL SOVEREIGNTY AND JURISDICTIONAL CONFLICTS

Since it accepted Felix Cohen's notion of residual tribal sovereignty twenty-five years ago,[9] the Supreme Court has embraced a number of seemingly inconsistent principles for navigating the frontier between state and tribal jurisdiction. First there was "infringement,"[10] then "preemption,"[11] "balancing interests,"[12] and "inherent limitations,"[13] not to mention occasional references to the significance of treaties,[14] state enabling acts,[15] and congressional policy.[16] Since 1973, the Court has

7. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).

8. New Mexico v. Mescalero Apache Tribe, 103 S. Ct. 2378 (1983); Rice v. Rehner, 103 S. Ct. 3291 (1983); United States v. Mitchell, 103 S. Ct. 2961 (1983); Nevada v. United States, 103 S. Ct. 2906 (1983). Two decisions involving Indian reserved water rights are treated only briefly: Arizona v. California, 103 S. Ct. 1382 (1983), and Arizona v. San Carlos Apache Tribe of Ariz., 103 S. Ct. 3201 (1983).

9. Williams v. Lee, 358 U.S. 217, 220 (1959). Residual tribal sovereignty, discussed at greater length *infra* Part II*B*, is the principle that Indian tribes retain all those powers of internal self-government not given up by treaty or expressly limited by federal legislation.

10. Williams v. Lee, 358 U.S. 217, 220 (1959); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142–43 (1980); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 179 (1973).

11. *See* Fisher v. District Court, 424 U.S. 382, 386–87 (1976); McClanahan v. Arizona Tax Comm'n, 411 U.S. at 172; Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 688 (1965).

12. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. at 144; Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153–54 (1980).

13. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208–9 (1978); *see also* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. at 152.

14. McClanahan v. Arizona Tax Comm'n, 411 U.S. at 174–75; Williams v. Lee, 358 U.S. at 221–22.

15. Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 479–81 (1979); McClanahan v. Arizona Tax Comm'n, 411 U.S. at 175.

16. United States v. Mazurie, 419 U.S. 544, 557–58 (1975); Mescalero Apache Tribe v. Jones, 411 U.S. at 152; Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. at 686–88; Williams v. Lee, 358 U.S. at 223.

relegated both tribal sovereignty[17] and federal legislation[18] to the status of mere "backdrops," and has dismissed the utility of general principles in favor of a "particularized inquiry";[19] into the circumstances of each case. Some measure of apparent chaos in past decisions can be eliminated, however, by realizing that the Court was struggling with two different sets of rules: one set for looking at state jurisdiction, and the other for looking at tribal jurisdiction.

A. State Power: Preemption and Infringement

According to the Court's earliest decisions, an Indian tribe's territorial independence was limited only by the powers and responsibilities it had delegated to Congress by treaty.[20] During the period of allotment and settlement of western reservations, however, the Court acknowledged a state's power to regulate non-Indian conduct in "Indian country," undoubtedly expecting tribes' separate geographical and political identities to vanish quickly.[21] After the extension of United States citizenship to Indians in 1924, state jurisdiction over reservation Indians was often exercised, without judicial scrutiny.[22] In 1959, however, the Court concluded that treaties and the congressional policy of Indian self-government[23] preserved tribes' rights "to make their own laws and be ruled by them."[24] State regulation of reservation conduct was permissible only to the extent it did not "infringe" on tribal self-government. The collection of Indians' debts to non-Indians for reservation transactions, for example, was plainly a tribal matter.

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17. McClanahan v. Arizona Tax Comm'n, 411 U.S. at 172: "The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read."

18. Oliphant v. Suquamish Indian Tribe, 435 U.S. at 206: " 'Indian law' draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments . . . form the backdrop for the intricate web of judicially made Indian law."

19. White Mountain Apache Tribe v. Bracker, 448 U.S. at 145; *see also* Mescalero Apache Tribe v. Jones, 411 U.S. at 148.

20. Worcester v. Georgia, 31 U.S. 515, 555–56 (1832). The Court did concede, however, that the United States had prevented the tribes from ceding territory to other European states, a unilateral restraint of tribal independence. Johnson v. McIntosh, 21 U.S. 543, 574 (1823).

21. *See, e.g.*, Draper v. United States, 164 U.S. 240 (1896); United States v. McBratney, 104 U.S. 621 (1882). This jurisdiction was concurrent, of course, with that of the United States. *See generally* Barsh, *Kennedy's Criminal Code Reform Bill and What It Doesn't Do for the Tribes*, 6 AM. INDIAN J. 2 (1980).

22. *See* Surplus Trading Co. v. Cook, 281 U.S. 647, 651 (1930); New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946).

23. Especially as Congressional policy is expressed in §§ 16, 17 of the Indian Reorganization Act, Pub. L. No. 383, 48 Stat. 987 (1934), codified at 25 U.S.C. §§ 476, 477 (1982); Williams v. Lee, 358 U.S. at 220.

24. Williams v. Lee, 358 U.S. at 220.

A few years later, the Court reasoned that an "all-inclusive" federal licensing requirement for "Indian traders"[25] left no room for state taxation or control of non-Indians doing business on reservations.[26] Although the relevant legislation made no explicit reference to taxation or to any other conditions of doing business, the Court believed that the implicit purpose of the licensing scheme was to protect Indians from sharp practices and high prices.[27] This could only be accomplished through exclusively federal supervision. Hence the preemptive scope of the licensing program was governed by its policy, and by the potential effect of state taxation on Indians, rather than by express statutory words.

Subsequent decisions left it doubtful whether the Court had fashioned one test or two.[28] After finding sufficient preemptive intent in the general congressional policy of tribal autonomy to exclude state taxation of Indians' reservation income[29] and state adjudication of reservation Indians' custody of children,[30] for example, the Court emphasized the effect of these state intrusions on Indians' independence. Since "preemption" apparently required no specific legislative expression, it was nothing more than a restatement of "infringement." That is, whatever interferes with the broad and implicit federal goal of Indian self-government is an infringement and is, therefore, preempted by federal law.[31]

Although the Court continues ostensibly to base some of its decisions against state jurisdiction on particularly "pervasive" federal regulatory schemes, as in the areas of reservation logging[32] and Indian education,[33] it maintains that preemption need not depend on express legislation but can be found in "the tradition of Indian sovereignty" or the "firm federal policy of promoting tribal self-sufficiency and economic

25. *See* 25 U.S.C. §§ 261–264 (1982).

26. Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 690 (1965).

27. *Id.* at 691.

28. The Court has insisted that "either [test], standing alone, can be a sufficient basis" for ousting state jurisdiction. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980); *see also* Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832, 836 (1982) (quoting *White Mountain Apache Tribe*).

29. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973).

30. Fisher v. District Court, 424 U.S. 382 (1976).

31. A finding that states may intrude into some aspect of reservation life does not in itself preclude tribal regulation of the same subject. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149–52 (1982); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 158 (1980); Fort Mohave Tribe v. County of San Bernadino, 543 F.2d 1253, 1258 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977). Nor does the absence of tribal authority automatically invite state intrusion—the matter may be exclusively federal. *See generally* Barsh, *supra* note 21, at 3.

32. White Mountain Apache Tribe v. Bracker, 448 U.S. at 148. But in the same breath the Court discussed infringement. *Id.* at 149.

33. Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832, 837 (1982).

development."[34] There is, however, little a state can do in Indian country that does *not* have some effect on tribal life or the tribes' economies. To compensate for this, the Court recently added another layer of analysis. Notwithstanding the tribes' general right to self-government, "any applicable regulatory interest of the State must be given weight."[35] In essence, the Court is collapsing the doctrines of preemption, infringement, and non-Indian interests into a single balancing test: "a particularized inquiry into the nature of the state, federal, and tribal interests at stake."[36]

Is this a "legal" test at all? Thus far, the Court has offered little guidance. The ethnicity of the parties is at least implicitly a factor, since the Court has never permitted states to prosecute, tax, or adjudicate the rights of reservation Indians directly.[37] Situs is also a factor—not only whether the transaction or property in controversy is located within an Indian reservation, but also whether it is located on land actually owned by an individual Indian or Indian tribe.[38] State interests are given greater weight on fee-patent lands owned by non-Indians although naturally these small islands within reservations can be sources of considerable environmental and social "spillover" onto adjacent Indian-occupied parcels.[39] Lastly, the Court has indicated that the state's interest must be more than pecuniary.[40] It must have some regulatory significance related to public welfare.

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34. White Mountain Apache Tribe v. Bracker, 448 U.S. at 143; *see also* Merrion v. Jicarilla Apache Tribe, 455 U.S. at 152 (quoting *White Mountain Apache Tribe*).

35. White Mountain Apache Tribe v. Bracker, 448 U.S. at 144.

36. *Id.* at 145; *see also* Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S 832, 837 (1982); *cf.* Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 481 n.17 (1976).

37. *But see* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), and Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976), in which Indian retailers were required to collect state excise taxes from non-Indian consumers—and thus bear part of the state tax burden. The Court evaded this problem by ruling that the tax burden falls entirely on consumers *as a matter of law*. 447 U.S. at 481–82; *see* Barsh, *Issues in Federal, State and Tribal Taxation of Reservation Wealth*, 54 WASH. L. REV. 531 (1979). There are also limited circumstances in which Congress has *expressly delegated* reservation jurisdiction to the states, but such legislation is ordinarily construed strictly against any implied limitations of tribal self-government. *See* Bryan v. Itasca County, 426 U.S. 373, 391–92 (1976).

38. Montana v. United States, 450 U.S. 544, 557 (1981) (non-Indians hunting and fishing on reservation fee-patent lands). *See* Organized Village of Kake v. Egan, 369 U.S. 60 (1962); Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968) (Indians exercising off-reservation fishing rights).

39. *E.g.*, Cardin v. De La Cruz, 671 F.2d 363, 366 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982) (sustains tribal authority to enforce health and safety regulations against a non-Indian's fee-patent land). Conduct on fee land is subject to tribal control "when that conduct threatens or has some effect on the political integrity, the economic security, or the health or welfare of the tribe." Montana v. United States, 450 U.S. 544, 566 (1981)

40. Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832, 845 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 150 (1982). *Compare* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) (state taxation of

In sum, the scope of state power has something to do with ethnicity, situs, and subject matter. These factors are flexible, and there is sufficient room in them to enable the Court to arrive at almost any result.

B. Tribal Power: Residual Sovereignty and Implied Exceptions

American courts originally assumed that an Indian tribe's independence could be diminished only by treaty.[41] This was entirely consistent with the new nation's contractual theory of democracy: "Governments . . . deriving their just Powers from the Consent of the Governed." [42] The Northwest Ordinance assured Indians that "their lands and property shall never be taken from them without their consent,"[43] and most of the 366 ratified treaties with Indian tribes contained provisions expressly apportioning criminal jurisdiction and commercial authority.[44] After the Civil War, however, expansionist pressures overwhelmed the country's principles. Congress began by confiscating railroad easements and mineral lands within territories reserved by treaty,[45] subjecting reservation Indians to a federal disciplinary code backed by special police and courts,[46] and finally subdividing many reservations and opening the unallotted "surplus" acreage to non-Indian homesteaders.[47] The Supreme Court responded by retroactively affirming Congress' "plenary" power to govern Indians and dispose of their property as it thought fit.[48] Not only was Indian consent no longer necessary, the Court reasoned, but as a "political" matter Congress' treatment of Indians was not amenable to judicial review.[49]

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reservation sales to non-Indians was permitted although it apparently served no regulatory purpose and may have deprived the tribe of revenues needed for human services.

41. *See, e.g.*, The Kansas Indians, 72 U.S. 737, 755–56 (1866); *cf.* Worcester v. Georgia, 31 U.S. 515, 553–54 (1832).

42. The Declaration of Independence para. 2 (U.S. 1776).

43. Ordinance of July 13, 1787, 32 JOURNALS OF THE CONTINENTAL CONGRESS 334, 340 (1936).

44. *See generally* 2 C. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES (1904).

45. *See, e.g.*, the historical record in United States v. Sioux Nation of Indians, 448 U.S. 371 (1980), and *more generally* Royce, *Indian Land Cessions in the United States*, EIGHTEENTH ANNUAL REPORT OF THE BUREAU OF AMERICAN ETHNOLOGY, Part 2 (1899).

46. *See generally* W. HAGEN, INDIAN POLICE AND JUDGES (1966); F. PRUCHA, AMERICANIZING THE AMERICAN INDIANS 300–05 (1st Bison Book printing 1978).

47. Indian General Allotment Act of 1877, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331–371 (1982)). *See generally* D. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (1972).

48. Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902), *relying on* Stephens v. Cherokee Nation, 174 U.S. 455 (1899); Cherokee Nation v. Southern Kan. Ry. Co., 135 U.S. 641 (1890).

49. Cherokee Nation v. Hitchcock, 187 U.S. at 308, *followed in* Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903). This principle was finally rejected in Delaware Tribal Business Comm v. Weeks, 430 U.S. 73, 83–84 (1977), and United States v. Sioux Nation of Indians, 448 U.S. 371, 410–16 (1980).

As part of its New Deal policy of "reorganizing" Indian tribes for chartered self-government and economic enterprise, the Roosevelt Administration advocated restraint in the exercise of congressional power, and recognition of a substantial residuum of unextinguished tribal authority.

> An Indian tribe possesses, in the first instance, all the powers of any sovereign State. . . . These powers are subject to be qualified by treaties and by express legislation of Congress, but *save as thus expressly qualified,* full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.[50]

The Supreme Court quickly adopted the view that "an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards."[51] In other words, congressional policy favoring tribal self-government and economic security makes it doubtful that any limitation is intended unless it is clearly expressed.[52]

All this changed in 1978, when the Court struggled to find some basis for limiting tribes' criminal jurisdiction over non-Indians.[53] Writing for the Court, Justice Rehnquist searched the historical record for evidence of United States recognition *or* limitation of a tribe's authority to prosecute whites. Finding neither,[54] he concluded that all three branches of the national government had always shared an unspoken assumption that this kind of political authority was *"inconsistent with* [a tribe's] *status,"* and could not be exercised absent an express congressional delegation.[55] Reading congressional silence for the absence of a power, rather than

50. Powers of Indian Tribes, 55 Decisions of the Dept. of Interior 14, 22 (1934) (emphasis added); *accord* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1942); FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 231–32 (R. Strickland & C. Wilkenson, eds. 1982) [hereinafter cited as HANDBOOK].

51. United States v. Santa Fe Pac. Ry., 314 U.S. 339, 353–54 (1941). For recent cases, see Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586 (1977); Bryan v. Itasca County, 426 U.S. 373, 391–92 (1976); DeCoteau v. District County Court, 420 U.S. 425, 447 (1975); Mattz v. Arnett, 412 U.S. 481, 505 (1973); Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968).

52. There have been several exceptions to this rule, most notably a tribe's implied taxability under the Internal Revenue Code, 26 U.S.C. (1982), which does not refer to them expressly. It is discussed most recently in Confederated Tribes of the Warm Springs Reservation of Or. v. Kurtz, 691 F.2d 878, 881 (9th Cir. 1982), *cert. denied,* 103 S. Ct. 1433 (1983).

53. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

54. *Id.* at 197, 203. He was able to find a single 1878 circuit court decision, and an 1834 congressional committee report (tabling a bill that failed to pass), supporting his view. The balance of the historical evidence was negative, i.e., that tribal power over whites was mentioned in only one treaty and never affirmed by any act of Congress.

55. *Id.* at 206, 208; *see also* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 136–41 (1982); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152–53 (1980).

proof that it had never been taken away, stood the residual-powers conception of tribal sovereignty on its head. Subsequent decisions of the Court have rephrased the conventional formula accordingly. Tribes retain a right or power "unless divested of it by federal law or necessary implication of their dependent status."[56]

This invites a reconsideration of all tribal powers not already clearly vested by treaty, statute, or judicial decisions, especially to the extent that they affect non-Indians' conduct or property. The Court still maintains that, at a minimum, a tribe's "power to prescribe the conduct of tribal members has never been doubted," and that their "power to exclude nonmembers [from tribal lands] entirely or to condition their presence on the reservation is equally well established."[57] The Justices have nonetheless already invoked implied limitations to curtail a tribe's authority to regulate non-Indian hunting and fishing on fee-patent reservation lands.[58] Whatever has not been delegated explicitly to tribes remains at risk—and Congress, laboring for a half-century under the residual-sovereignty theory, has delegated or affirmed very little.

The Court has also hinted that tribes may lose some aspects of historical sovereignty for merely being "inconsistent with the overriding interests of the National Government."[59] Thus construed, implicit divestiture is a judicial analogue of the "plenary power" doctrine: not only Congress, but the courts as well may invoke national policy to extinguish tribal rights. In recently upholding a tribe's power to tax non-Indian mining activities on reservation lands—an otherwise unexceptional decision in view of the long-standing recognition of tribal taxing powers[60]—the Court moreover warned that "Congress has . . . provid[ed] a series of federal check-points that must be cleared before a tribal tax can take effect."[61]

Of course, the Tribe's authority to tax nonmembers is subject to constraints not imposed on other governmental entities: the federal government can take away this power, and the Tribe must obtain the approval of the Secretary of the Interior before any tax on nonmembers can take effect. These additional constraints minimize potential concern that Indian

56. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. at 152; *see also* United States v. Wheeler, 435 U.S. 313, 323 (1978).

57. New Mexico v. Mescalero Apache Tribe, 103 S. Ct. at 2385.

58. Montana v. United States, 450 U.S. 544, 557–67 (1981).

59. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. at 153.

60. *See* Barsh, *supra* note 37, at 574 n.179.

61. Merrion v. Jicarilla Apache Tribe, 455 U.S. at 155. The issue of equitable treatment was raised because the tribal tax violated a tax-concession clause in the mining lease. Probably deprived of a federal remedy on constitutional grounds under the holding of Santa Clara Pueblo v. Martinez, 36 U.S. 49 (1978), the lessee challenged the tribe's power to levy the tax in the first place.

tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies.[62]

This invites the Interior Department to screen tribal actions for consistency with the national interest, rather than concerning itself solely with the Indians' protection. In effect, all three branches of the national government share some degree of discretion to subordinate tribal autonomy to non-Indian interests.

C. Mescalero: *The Balance-of-Interests Test Prevails*

New Mexico v. Mescalero Apache Tribe[63] self-consciously counterpoints the Supreme Court's 1981 decision in *Montana v. United States,*[64] which upheld state control of non-Indian fishing on state-owned riparian lands within the Crow Indian Reservation. The Crows originally were hunters, later farmers and ranchers.[65] They took little interest in fishing until the 1970's, when they began to license non-Indian sportsmen to supplement tribal income from agricultural and mineral leases. The Mescaleros, also aboriginally hunters, used federal aid to develop a profitable big-game resort offering "package hunts" for deer, elk, antelope, and bear.[66] Federal and tribal agencies were involved in a "sustained cooperative effort" to rebuild wild herds, and hunting was subjected to a "comprehensive scheme" of regulation under "federally approved Tribal ordinances."[67] There was no evidence that reservation hunting on the Mescalero reservation was affecting off-reservation, state-managed wildlife,[68] although there were differences in bag limits, seasons, and license requirements.[69] Nevertheless, the State of New Mexico charged and convicted several non-Indians in 1976 and 1977 for hunting on the Mescalero Apache Reservation out of season.[70] Fearful of losing non-Indian

62. 102 S. Ct. at 903; *see also* Conoco, Inc. v. Shoshone and Arapaho Tribes, 569 F. Supp. 801, 806 (D. Wyo. 1983); Southland Royalty Co. v. Navajo Tribe of Indians, 715 F.2d 486, 488–90 (10th Cir. 1983). Interior Department approval, where not required by specific statutes such as 25 U.S.C. § 398a (1982), is often required by a tribe's own constitution. *See* Barsh, *The Red Man in the American Wonderland,* 11 HUM. RTS. 14, 38 (Winter 1984).

63. 103 S. Ct. 2378 (1983).

64. 450 U.S. 544 (1981). The distinction is clearly drawn by the Court, 103 S. Ct. at 2384, 2387–88 & n.19.

65. 450 U.S. at 556.

66. 103 S. Ct. at 2381–83.

67. Virtually all of the Mescalero Apache reservation is tribally-owned, and 90% of its residents are Indians. *Id.* at 2381–82. Apparently, harvest levels were recommended by the Interior Department and routinely adopted by the tribal council. *Id.* at 2382–83, 2389.

68. *Id.* at 2390–91.

69. *Id.* at 2383.

70. *Id.* The real issue may have been the state's use of the reservation's acreage in computing its

business, the Tribe filed for declaratory and injunctive relief from state licensing and regulation of non-Indian reservation hunting and fishing activities.[71]

In framing the issues, Justice Marshall makes no reference to "infringement." State authority "over the on-reservation activities of nonmembers" is limited only by federal preemption, he explains, and this does not depend on "an express congressional statement" or expressions of specific intent in legislative history.[72] *Any conflict between federal and state interests* is sufficient.[73] Federal interests include "promoting tribal self-government" and the "overriding goal of encouraging 'tribal self-sufficiency and economic development.' "[74] Tribal autonomy in land and wildlife management, business regulation, and taxation is a "necessary implication" of these national policies absent some significant countervailing state interest.[75] Here, the state's interest was entirely pecuniary and amounted only to sharing unjustifiably in "value generated on the reservation by activities involving the trib[e]."[76] Even concurrent state licensing could "nullify" the effectiveness of tribal hunting ordinances and frustrate the wildlife management plan agreed to by the tribe and the United States.[77] Moreover, state licensing would frustrate the purpose *of the federal investment* in the Mescalero's hunting resort by reducing the tribe's income.[78] That conflict is fatal to state jurisdiction. Thus, the Court held New Mexico's licensing and regulation of non-Indian reservation hunting and fishing to be preempted by federal law.

Mescalero puts an end to speculation about the nature and extent of residual tribal sovereignty. According to the Court there is none, at least not in any meaningful sense. There is only federal policy, as inferred by the Court from history and surrounding circumstances. State authority is ousted when it conflicts with what the Court thinks Congress or the Executive Branch is trying to achieve on a particular reservation. At least the

financial entitlements under 16 U.S.C. §§ 669c(a), 777c (1982), which provide federal aid for state wildlife conservation programs on the basis of an acreage formula. *Cf.* Joint Appendix to Briefs at 194a, New Mexico v. Mescalero Apache Tribe, 103 S. Ct. 2378 (1983).

71. 103 S. Ct. at 2383.

72. *Id.*

73. *Id.* at 2385–86.

74. *Id.* at 2386–87 (quoting in part White Mountain Apache Tribe v. Bracker, 448 U.S. at 143).

75. 103 S. Ct. at 2387.

76. *Id.* at 2390–91.

77. *Id.* at 2388–90.

78. *Id.* at 2389–90. This looks a little like the "federal instrumentality" theory of tribal immunity from state jurisdiction expressly rejected by the Court (and by the same author, Justice Marshall) in McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 169–70 (1973). According to this theory, a tribe's immunity from state jurisdiction had nothing to do with the tribe's inherent or historical sovereignty. Rather, the tribal government was viewed as a part of the federal administrative system, sharing the intergovernmental immunity of the United States and its agencies.

"infringement" principle tested state intrusions against *tribal* interests. Under Marshall's new balancing-of-interests test, the effect on tribal members and their property is of secondary importance at best. Moreover, since the "federal interest" is merely a judicial construct based on a "particularized inquiry," there is little hope of consistency or predictability in application.

D. Rice: *A Broader Theory of Implied Limitations*

Pervasive federal administration of Indian lands, the relative isolation of reservations, generally poor transportation and utilities, the volatility of tribal politics, and uncertainties over the law governing business activities combine to depress the value of reservation investment and reduce the availability of business capital to reservation Indians. Entrepreneurs are reluctant to sink significant sums in fixed assets such as buildings and machinery without substantial wage, rent, or tax concessions, preferring short-term, extractive ventures like mining or logging. Reservations that lack quantities of natural resources cannot readily turn to manufacturing or retailing. Like many small countries, they often feel they have only one valuable advantage they can use to attract commerce: tax and regulatory relief. This tends to favor gambling, cut-rate cigarettes, and liquor, where there are high excise taxes and severe competitive restrictions to be avoided and a high cash value per unit sold. Money is often to be made, but at the expense of negative public opinion and bitter disputes with state agencies.[79]

A 1953 "local option" law [80] waives the long-standing federal prohibition of Indian liquor traffic wherever sales are "in conformity . . . with the laws of the State" and with an approved tribal ordinance. *Rice v. Rehner*[81] originally involved both California, where state law limits the number of liquor retailers in each geographical area under a lottery system that grandfathers established dealers, and Washington, where there is a state liquor monopoly.[82] Tribal vendors argued that these anticompeti-

79. The states may tax reservation cigarette sales to non-Indians under Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976), and Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980). The status of reservation gambling remains in dispute. *Compare* Duffy v. Barona Group of Captain Grande Band of Mission Indians, 694 F.2d 1185 (9th Cir. 1982) (rejecting state jurisdiction), *cert. denied*, 103 S. Ct. 2091 (1983), *with* Penobscot Nation v. Stilphen, 461 A.2d 478 (Me. 1983) (upholding state jurisdiction), *appeal dismissed*, 104 S. Ct. 323 (1983). H.R. 4566, 98th Cong. 1st Sess., if passed would legislatively settle the matter in the tribe's favor.

80. 18 U.S.C. § 1161 (1982).

81. 103 S. Ct. 3291 (1983).

82. *See id.* at 3294 n.5. The Washington cases were remanded by the circuit court, 678 F.2d 1340 (9th Cir. 1982), for reconsideration in light of Washington v. Confederated Tribes of the

tive restrictions go beyond what is reasonably necessary to protect public health and safety, and should not apply to reservation sales. They interpreted 18 U.S.C. § 1161 as requiring only that the controlling tribal ordinance incorporate the *substantive standards* of state law such as drinking age, operating hours, and sanitary norms. Licensing and taxing of retailers was meant to remain exclusively within tribal and federal control.[83]

The legislative intent behind the statutory phrase, "in conformity with the laws of the State," should have been dispositive. In her first Indian-affairs opinion for the Court, however, Justice O'Connor found it necessary first to determine whether tribes had previously enjoyed recognized authority over liquor traffic. She explained somewhat circularly that

> [r]epeal by implication of an established tradition of immunity or self-governance is disfavored. If, however, we do not find such a tradition, or if we determine that the balance of state, federal, and tribal interests so requires, our pre-emption analysis may accord less weight to the "backdrop" of tribal sovereignty.
>
> . . . [W]e must determine whether there is a tradition of tribal sovereign immunity that may be repealed only by an explicit directive from Congress.[84]

In plain language, tribal self-government is limited to what tribes traditionally or historically have exercised. By a nice legal fiction, anything not "traditional" has been "implicitly repealed."

Moreover, according to Justice O'Connor, "[t]here can be no doubt that Congress has divested the Indians of any inherent power to regulate in this area."[85] Since the first days of the Republic, federal suppression of Indian liquor traffic has been "comprehensive."[86] Although state prosecution of non-Indians for reservation liquor offenses had been tolerated,[87] the pervasive federal regulatory scheme had left no room for the tribes themselves to exercise concurrent authority. Justice O'Connor conveniently fails to mention, however, that tribes have, in fact, regulated liquor sales at least as long as they have had American-style justice systems.[88]

Colville Indian Reservation, 447 U.S. 134 (1980), since they involved not merely licensing limitations but taxation of reservation liquor sales. Whether a state can prohibit tribal liquor sales entirely by adopting a public monopoly system is at issue in Squaxin Island Tribe v. State of Washington, No. 84-48 (W.D. Wash. filed Jan. 30, 1984).

83. Squaxin Island Tribe v. State of Washington, No. 84-48 (W.D. Wash. filed Jan. 30, 1984).

84. 103 S. Ct. at 3295-96 (citations omitted).

85. *Id.* at 3298; *see also id.* at 3297.

86. *Id.* at 3296-97.

87. *See id.* at 3297-98 (citing United States v. McGowan, 302 U.S. 535 (1938); *see also* United States v. McBratney, 104 U.S. 621 (1882). But the existence of state jurisdiction does not in itself discount the possibility of concurrent tribal authority, *see supra* note 31.

88. *See, e.g.*, An Act Preventing the Introduction of Whiskey, Oct. 1834, *reprinted in* THE CONSTITUTION AND LAWS OF THE CHOCTAW NATION 17 (1975); An Act Prohibiting the Introduction and

Having built this shaky foundation for federal preemption of tribal authority, Justice O'Connor boilerplates by arguing that the states have a greater interest in regulating reservation liquor sales than the tribes. Notwithstanding the Court's own previous ruling that reservation liquor traffic "affect[s] the internal and social relations of tribal life,"[89] Justice O'Connor contends that nondiscriminatory state regulation of Indian liquor retailers "simply does not 'contravene the principle of tribal self-government.' "[90] Then she explains the state's interest:

> Rehner's distribution of liquor has a significant impact beyond the limits of the Pala Reservation. . . . Liquor sold by Rehner to other Pala tribal members or to non-members can easily find its way out of the reservation and into the hands of those whom, for whatever reason, the State does not wish to possess alcoholic beverages, or to possess them through a distribution network over which the State has no control.[91]

But this "spillover effect" appears to be exactly the same as the tribe's interest or, for that matter, the interest of neighboring states in one another's liquor policies. There is no more reason why California should license Rehner than the Palas should license nearby California distributors, or that Nevada should license California distributors along its western border. Spillovers spill over both ways.

Justice O'Connor's interpretation of the legislative history of 18 U.S.C. § 1161 is somewhat more satisfying. The original bill was introduced with the aim of ending the blanket federal prohibition of the purchase or consumption of liquor by Indians, on grounds that it was an unseemly and archaic form of racial discrimination.[92] The Interior Department expressed concern that tribes be able to remain "dry," even if they were located in "wet" states, and this resulted in the insertion of language requiring an authorizing tribal ordinance "not contrary to state law."[93] The bill's sponsor understood this to mean that "Indians would still have to comply with State law in every regard."[94] According to Justice O'Connor, this delegates to the tribes power to impose *further*

Vending of Spirituous Liquors, Oct. 25, 1841, *reprinted in* LAWS OF THE CHEROKEE NATION PASSED DURING THE YEARS 1839–1867 28 (1973). Both laws prohibit "any person" from transporting liquor into tribal territory. See also P. PRUCHA, *supra* note 45, at 300–05, for the regulations enforced in the 1880's by tribal courts organized by the Interior Department.

89. United States v. Mazurie, 419 U.S. 544, 557 (1975).

90. 103 S. Ct. at 3296 n.7. She writes in the context of "sales to non-Indians or nonmembers of the Pala Tribe," but how can the state license sales to nonmembers alone? Any licensing scheme necessarily affects retailers' sales to all consumers, regardless of ethnicity.

91. *Id.* at 3298.

92. *See id.* at 3299–3300 (Court relied on unpublished 1953 House hearings).

93. 103 S. Ct. at 3300; *see also* S. REP. NO. 722, 83d Cong., 1st Sess. 1 (1953), *reprinted in* 1953 U.S. CODE CONG. & AD. NEWS 2399.

94. 103 S. Ct. at 3300.

restrictions on reservation liquor sales than those already imposed by the states.[95] If there was a relatively explicit delegation of regulatory power to the states and tribes in 1953, however, why was it necessary for Justice O'Connor to suggest that state regulation had filled a vacuum left by the absence of tribal authority? Accordingly, Justice O'Connor and the Court rejected the Indians' claims.

The dissenters[96] challenge the relevance of "traditions," observing that tribes also did not operate public schools in the nineteenth century, yet the Court recently upheld their right to do so today free from state taxation or control.[97] Nor were the dissenters persuaded that 18 U.S.C. § 1161 was intended to confer regulatory *jurisdiction* on the states, as opposed to merely a requirement that tribal jurisdiction be exercised in a manner consistent with state standards.[98] They also propose an entirely different line of reasoning. Rehner was a federally licensed "Indian trader," and the Court has long held that this federal licensing scheme completely preempts state licensing or taxation of reservation retailers.[99] That alone should have been sufficient to dispose of the immediate controversy, but the majority had been distracted by its "activism."[100]

Rice suggests a more aggressive use of "implicit divestiture" by the Court, to the extent that powers of self-government not long exercised will be presumed lost. But should the historical exercise of a power determine whether a tribe—or any other political subdivision—has the right to exercise it? The powers of Congress, states, and municipalities are never lost through nonuse. The real issue is whether federal "preemption" reflects a policy of protecting a tribe's right to develop its own institutions of self-government, or whether it amounts to little more than the temporary preservation of a dwindling sphere of residual tribal control over reservation life. Since 1970 both Congress and the President have associated themselves unequivocally with the first view.[101] Unfortunately, the Court appears to be taking the second.

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95. *See id.*

96. Blackmun, joined by Marshall and Brennan.

97. 103 S. Ct. at 3305.

98. *Id.* at 3306–08.

99. Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685, 690 (1965); Cent. Mach. Co. v. Arizona State Tax Comm'n, 448 U.S. 160, 165–66 (1980).

100. 103 S. Ct. at 3308.

101. *See* Indian Financing Act of 1974, Pub. L. No. 93-262, 88 Stat. 77 (codified at 25 U.S.C. § 1451 (1982)); Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S.C. § 450a(a) (1982)); Indian Health Care Improvement Act, Pub. L. No. 94-437, 90 Stat. 1400 (1976) (codified at 25 U.S.C. § 1601(a) (1982)); Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 24 U.S.C. § 1901 (1982)); Act of Nov. 1, 1978, Pub. L. No. 95-561, § 1130, 92 Stat. 2321 (codified at 25 U.S.C. § 2010 (1982)). *See also* President Nixon's message to Congress on "Indian Affairs," 6 WEEKLY COMP PRES DOC 894,

III. FEDERAL "TRUSTEESHIP" AND ACCOUNTABILITY

Federal "trusteeship" of Indian tribes is invoked religiously by Congress, the Executive, and the tribes themselves, but there is little agreement as to its nature. A "trust" is ordinarily both a source of power and a basis for strict accountability, but private trust law does not necessarily transpose readily to what is essentially a putatively benevolent colonial administration.[102]

> The trust relationship between the United States and the Indians is broad and far reaching, ranging from protection of treaty rights to the provision of social welfare benefits. . . . [T]he trust doctrine . . . is not static and sharply delineated, but rather is a flexible doctrine which has changed and adapted to meet the changing needs of the Indian community. This is to be expected in the development of any guardian-ward relationship.[103]

Flexibility in meeting the Indians' own perceptions of their changing needs can be a blessing, but flexibility in accumulating power and avoiding responsibility is antithetical to any notion of individual rights and freedoms.

At least five questions of considerable practical relevance remain unresolved in the law of Indian "trust responsibility." (1) Does the Executive's power as trustee extend beyond specific congressional delegations or directive? (2) Under what circumstances can the Executive be compelled to act on Indians' behalf? (3) Does federal "trusteeship" entitle Indians to any particular level of financial aid or protection, other than what Congress may from time to time choose to provide? (4) Is the United States financially liable for its administration of Indians' property to the same extent as a private fiduciary? (5) Are Indians bound by the federal trustee's actions, even when those actions are tainted by misfeasance or conflicts of interest? The fourth and fifth questions were considered in the Supreme Court's 1982 term.

A. The Scope of Executive Power

Federal legislation commits a large part of Indians' lives to Interior Department supervision (Table 1). Although this involves discrimination for or (depending upon one's point of view) against Indians as a class, the

896–97 (July 8, 1970), and President Reagan's message to Congress on "Indian Affairs," 19 WEEKLY COMP. PRES. DOC. 98, 99–100 (Jan. 24, 1983).

102. On viewing federal "trusteeship" as a colonial concept, *see* Barsh, *Indigenous North America and Contemporary International Law*, 62 OR. L. REV. 73, 74–77 (1983).

103. St. Paul Intertribal Housing Bd. v. Reynolds, 564 F. Supp. 1408, 1413–14 (D. Minn. 1983).

Court has long held that the distinction is permissibly political, rather than impermissably racial.[104] That is, Indians supposedly are not subjected to an extraordinary measure of administrative discretion because of their race, but because they enjoy, under treaties and historical federal policies, a "special relationship" with the national government in the nature of a trust. At the outset, then, the notion of trusteeship has been employed to immunize discriminatory regulation from fifth and fourteenth amendment scrutiny, and to afford the executive branch a measure of discretionary power over Indians not otherwise constitutionally permissible.

The Interior Department apparently believes that its "trust responsibility" involves a degree of *implied* power over Indians as well, power that requires no specific statutory foundation. It has advanced this theory chiefly to justify its refusal to recognize the results of tribal elections where it felt there were procedural errors or improprieties. Permitting a tribal council to be seated improperly is a breach of trust, the Department argues, because the "illegal" council would have an opportunity to spend tribal funds and dispose of tribal property.[105] Federal courts have thus far divided[106] on this contention which, if accepted, would permit the Department to regulate every aspect of tribal life by implication of its possible effect on "trust" assets.[107]

B. Scope and Finality of Executive Discretion

There is considerable division of opinion over the scope of executive discretion in Indian affairs. The Supreme Court originally ruled that Indian administration is inherently discretionary, leaving no room for judicial review.[108] More recent decisions have backed away from that

104. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 555 (1974); Livingston v. Ewing, 601 F.2d 1110 (10th Cir.), *cert. denied*, 444 U.S. 870 (1979); St. Paul Intertribal Housing Bd. v. Reynolds, 564 F. Supp. at 1412.

105. St. Pierre v. Commissioner of Indian Affairs, 9 I.B.I.A. 203, 241–45 (1982). The tribal election board felt that a student commuting from the reservation to an off-reservation university was still a "resident" eligible to run for office. The Bureau of Indian Affairs disagreed and suspended the newly elected tribal council. An administrative appeal to the Interior Board of Indian Appeals upheld the Bureau's action as implied in trust.

106. Ike v. United States Dep't of the Interior, 9 I.L.R. 3043 (D. Nev. 1982), and Milam v. United States Dep't of the Interior, 10 I.L.R. 3013 (D.D.C. 1982), both sustain the Bureau of Indian Affairs' non-recognition of tribal elections, but Goodface v. Grassrope, 708 F.2d 335 (8th Cir. 1983), ruled that election properties are an internal tribal matter.

107. Another fruitful area of implied trust power is water, which is not specifically decribed as "trust" property, or committed to federal administration by legislation. The Interior Department nevertheless devotes a significant portion of its "rights protection" budget to managing and litigating tribal water claims such as Nevada v. United States, discussed *infra*, notes 172–85 and accompanying text.

108. Morrison v. Work, 266 U.S. 481 (1924).

position. Indian affairs regulations are subject to the usual requirements of public rulemaking,[109] and the "presumption of reviewability" applies, at least in principle, to the Interior Department's supervisory activities.[110] The Department's veto of Indian actions must have a reasonable basis,[111] and is subject in some cases to express statutory guidelines.[112] In any event, the Department must clearly consider Indian interests.[113] Determinations nevertheless have been upheld that benefit non-Indians more than Indians,[114] or that appear to have been motivated by government self-interest.[115]

It is somewhat less clear whether tribes can compel the executive branch to act affirmatively on their behalf. In at least one case, the Interior Department was ordered to promulgate rules implementing regulatory legislation,[116] but efforts to force the executive branch to take legal action to protect Indian rights have rarely been successful.[117]

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109. Morton v. Ruiz, 415 U.S. 199, 236 (1974).

110. Tooahnippah (Goombi) v. Hickel, 397 U.S. 598, 600 (1970). There is, however, at least one area in which the finality of Interior's decision is established by statute—determination of the heirs of Indians who die intestate, under 25 U.S.C. § 372 (1982). *See, e.g.*, Johnson v. Kleppe, 596 F.2d 950 (10th Cir. 1979).

111. *See* Tooahnippah (Goombi) v. Hickel, 397 U.S. at 610.

112. Particularly in the investment of trust funds under 25 U.S.C. § 162a (1982). Cheyenne-Arapaho Tribes of Indians of Okla. v. United States, 512 F.2d 1390 (Ct. Cl. 1975); Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238 (D. Cal. 1973).

113. Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1973) (allocating irrigation water under 43 C.F.R. § 418 (1982)), *rev'd*, 499 F.2d 1095 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); Coomes v. Adkinson, 414 F. Supp. 975 (D.S.D. 1976) (selecting bids for grazing leases under 25 U.S.C. § 393 (1982)). *But see* Yellowfish v. City of Stillwater, 691 F.2d 926, 931 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 2087 (1983).

114. Scholder v. United States, 428 F.2d 1123 (9th Cir. 1970), *cert. denied*, 400 U.S. 942 (1970) (using Indian appropriations to build irrigation project supplying water chiefly to non-Indian property).

115. Leaf v. Udall, 235 F. Supp. 366 (N.D. Cal. 1964) (veto of contract retaining attorney to file claims against the United States); *see also* Baciarelli v. Morton, 481 F.2d 610 (9th Cir. 1973). *Cf.* Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364 (10th Cir.) (giving the Secretary of Interior virtually unreviewable discretion in opposing tribal membership rolls for the purpose of distributing federal financial awards), *cert. denied*, 385 U.S. 831 (1966).

116. Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971) (licensing Indian traders under 25 U.S.C. §§ 261–262 (1982)); *see* United States *ex rel.* Keith v. Sioux Nation Shopping Center, 634 F.2d 401 (8th Cir. 1980).

117. Joint Tribal Council of Passamaquoddy Tribe v. Morton, 388 F. Supp. 649 (D. Me.), *aff'd*, 528 F.2d 370 (1st Cir. 1975). *But compare* Rincon Band of Mission Indians v. Escondido Mutual Water Co., 459 F.2d 1082 (9th Cir. 1972) (cannot force Justice Department, by requiring Indian representation, to take inconsistent positions in sequential cases) *with* Salt River Pima-Maricopa Indian Community v. Arizona Sand & Rock Co., 353 F. Supp. 1098 (D. Ariz. 1972) (within discretion of Attorney General to refuse to represent tribe where to do so would create conflict of interest). The United States Attorney is authorized to represent Indians, 25 U.S.C. § 175 (1982), and tribes also can sue in their own rights, 28 U.S.C. §§ 1362, 2415 (1982). In at least one recent case, the tribal claimant in a water-rights adjudication unsuccessfully tried to prevent the Attorney General from

Few statutes conferring supervisory veto powers on the Interior Department contain time limits. One that does is Public Law No. 93–134, the 1973 law governing the distribution of tribal funds won in land-claim judgments.[118] The Secretary of the Interior is given six months to prepare a distribution plan for each award and submit it to Congress. In nearly every case, however, the Secretary failed to meet this deadline, and two federal courts held that Congress would have to remedy the situation legislatively—which it did in 1981.[119]

C. *Special Entitlements*

Although federal trusteeship has been invoked to justify special financial entitlements for Indians as a constitutional matter[120]—to prevent the executive branch from arbitrarily restricting an Indian's eligibility for Indian programs,[121] and to excuse states from sharing their own federally subsidized human services with reservation Indians[122]—it has never yet been a sufficient basis for demanding aid or services beyond what Congress has been pleased to provide legislatively. On the contrary, aid and benefits already extended can apparently be limited or terminated at will by legislation.[123] Hence, the trust is truly one created and defined by the trustee, without implicit benefits or fixed responsibilities. Although the termination of benefits may be subject to judicial review under the fifth amendment,[124] no court has yet suggested that federal human services—as opposed to lands or funds held in trust—can be regarded as vested property rights for fifth amendment purposes.

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intervening on its behalf, fearing opposition from its own "trustee." White Mountain Apache Tribe v. Smith, 675 F.2d 1341 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 3569 (1983).

118. Codified at 25 U.S.C. §§ 1401–1408 (1982).

119. *See Indian Judgment Funds Use or Distribution Plans: Hearings Before the Senate Select Comm. on Indian Affairs*, 96th Cong., 1st Sess. (1979).

120. *See supra* note 97.

121. Morton v. Ruiz, 415 U.S. 199, 236 (1974).

122. White v. Califano, 437 F. Supp. 543 (D.S.D. 1977) (based on the notion of federal preemption under the Indian Health Care Improvement Act, 25 U.S.C. § 1601 (1982)), *aff'd per curiam*, 581 F.2d 697 (8th Cir. 1978). *See* Acosta v. San Diego County, 272 P.2d 92 (Cal. App. 1954); Arizona State Bd. of Public Welfare v. Hobby, 221 F.2d 498 (D.C. Cir. 1954) (no competing special federal aid program).

123. Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968); Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972) (narrowly construing, but upholding, legislation "terminating" federal responsibilities altogether); *see also* United States v. Jim, 409 U.S. 80 (1972) (sustaining the redesignation of eligible Indian beneficiaries for a mineral leasing program).

124. Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 83–85 (1977).

D. Financial Liability

The law of federal financial liability for breach of trust has been complicated by the 1946 Indian Claims Commission Act.[125] The act established a special tribunal for resolving historical tribal claims against the United States both on conventional legal grounds and based on the special, broader notion of "fair and honorable dealings."[126] The commission's decisions took a rather broad view of federal liability for mismanaging Indian property, holding the government to the same strict standards of loyalty,[127] care,[128] and income-maximization[129] as private fiduciaries. Decisions involving more contemporary federal supervision of reservation lands and funds have been less aggressive in financially disciplining the executive branch. Where there are explicit statutory directions for conserving or maximizing income, financial accountability is plainly warranted.[130] The United States is not, however, an insurer when it acts on a tribe's behalf.[131] It may have to compensate for failing to implement all of the express terms of congressional social-welfare programs,[132] or failing to take legal steps to protect Indian lands from adverse claims,[133] but it is not liable for losses under approved business contracts,[134] for allegedly incompetent social and health services,[135] or for complying uncritically with state laws that conflict with tribal interests.[136]

On the whole, federal financial liability in trust has been a function of the legislative specificity of the duties involved. Where Congress has dictated specific actions or set standards for performance, as in the

125. 25 U.S.C. § 70a (1976).

126. *Id.* § 70a(5), *discussed in* Osage Nation of Indians v. United States, 1 I.C.C. (Indian Claims Comm'n) 43, 82–86 (1948).

127. Navajo Tribe of Indians v. United States, 364 F.2d 320, 324 (Ct. Cl. 1966).

128. United States v. Creek Nation, 427 F.2d 743 (Ct. Cl. 1970); Fort Belknap Indian Community v. United States, 11 IND. CL. COMM. 479, 489–95 (1962).

129. Seminole Nation v. United States, 17 IND. CL. COMM. 67 (1966); *Fort Belknap*, 11 IND. CL. COMM. 479, 508–19.

130. *See supra* note 105.

131. United States v. Mason, 412 U.S. 391, 398 (1973).

132. Duncan v. United States, 667 F.2d 36 (Ct. Cl. 1981) (failure to install water and sewer lines as required by special act of Congress), *cert. denied*, 103 S. Ct. 3569 (1983).

133. United States v. Oneida Nation of New York, 477 F.2d 939 (Ct. Cl. 1973), *cited with approval in* Cayuga Indian Nation v. Cuomo, 565 F. Supp. 1297, 1321 n.13 (N.D.N.Y. 1983); Pechanga Band of Mission Indians v. Kacor Realty, Inc., 680 F.2d 71 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

134. Fort Belknap Indian Community v. United States, 679 F.2d 24 (Ct. Cl. 1982), *cert. denied*, 103 S. Ct. 1186 (1983).

135. Gila River Pima-Maricopa Indian Community v. United States, 427 F.2d 1194 (Ct. Cl.), *cert. denied*, 400 U.S. 819 (1970).

136. United States v. Mason, 412 U.S. 391, 398 (1973); *cf.* Yellowfish v. City of Stillwater, 691 F.2d 926, 931 (10th Cir. 1982).

conservation of Indian trust funds, there has been no difficulty recovering damages for misfeasance. Bare supervisory power, such as the approval of tribal leases and contracts, has generally been treated differently—although it is here that undisciplined administrative discretion can have the most catastrophic environmental and economic effects.

E. Conclusiveness of Executive Action

The Supreme Court long ago ruled that the executive branch, acting as the Indians' trustee, can conclusively litigate Indians' rights without their participation or consent.[137] Although tribes now have standing to participate as plaintiffs, co-plaintiffs with the government, or intervenors in actions involving their property,[138] this is no guarantee against federal action waiving or losing tribal interests in court. Compensation may be owed if the loss was due to negligence,[139] but this may be little consolation for the loss of critical renewable resources such as water or agricultural land on which a sustained and independent economy could be built.

Federal approval of a mining lease or other development contract may result in an environmental as well as financial disaster. Compensation, if available at all,[140] may be inadequate, and in at least two instances the Secretary of the Interior has cancelled leases administratively on the grounds that they should never have been approved.[141] Thus far, the Secretary's authority to renege on approved contracts has not been tested judicially. Neither is it clear whether tribes could obtain a writ of mandamus for such action in their own interests.

F. Mitchell II: *Liability in Trust Implied from Power*

United States v. Mitchell (Mitchell II)[142] involved the narrow issue of federal mismanagement of logging on the Quinault Reservation, but the larger issue before the Court was whether the United States' financial liability in trust is coextensive with its supervisory powers. According to the government, the management and disposal of Indian property does not itself imply any legal accountability, at least not in money damages. Congressional legislation granting the executive branch "trust" authority

137. Heckman v. United States, 224 U.S. 413, 445–46 (1912).

138. Under 28 U.S.C. §§ 1362, 2415–2416 (1982). *See* Poafbybitty v. Skelly Oil Co., 390 U.S. 365, 370–72 (1968); New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977).

139. United States v. Oneida Nation of New York, 477 F.2d 939 (Ct. Cl. 1973).

140. *See, e.g.*, Navajo Tribe v. United States, 364 F.2d 320 (Ct. Cl. 1966).

141. HANDBOOK, *supra* note 49, at 536–37.

142. 103 S. Ct. 2961 (1983).

would have to accept financial responsibility for misfeasance in separate and express terms. In rejecting this line of reasoning, the Court has given tribes much hope but little guidance.

Between 1905 and 1935, the United States divided most of the heavily forested Quinault Reservation in coastal Washington into eighty acre family allotments. In 1910, Congress authorized the Interior Department to manage and sell timber growing on Indian lands, with or without the consent of the Indians.[143] "[I]n many instances the timber is the only valuable part of the allotment," the Department explained, "or is the only source from which funds can be obtained for the support of the Indian or the improvement of his allotment."[144] As part of the Roosevelt Administration's "larger program of attention to intelligent land use,"[145] the Department was subsequently directed to manage Indian forests "on the principle of sustained-yield management,"[146] scheduling harvests to assure the maximum continuous supply of lumber. Finally, in 1964, Congress required that consideration be given to "the needs and best interests of the Indian owner and his heirs."[147]

In a 1971 application to the Court of Claims, Quinaults sought damages for forty years of waste and mismanagement, charging that the Interior Department had overharvested, underpriced, and overtaxed their timber.[148] They prevailed, but not on the basis of federal Indian timber legislation. Instead, the Court of Claims ruled that the United States is generally responsible for the conservation and development of Indian lands and resources under section 5 of the 1887 General Allotment Act,[149] which provides that lands distributed to Indian families at Quinault and other reservations be held by the United States "in trust for the sole use and benefit of the Indian" owners, and not be disposed of without the United States' approval.[150] As legal owner in trust, the Court of Claims concluded, the government is strictly liable for waste and lost income as if it were a private fiduciary.[151]

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143. Act of June 25, 1910, ch. 431, §§ 7–8, 36 Stat. 855, 857 (codified at 25 U.S.C. §§ 406–407 (1982)).

144. H.R. REP. No. 1135, 61st Cong., 2d Sess. 3 (1910).

145. Act of June 18, 1934, ch. 576, § 6, 48 Stat. 984, 986 (codified at 25 U.S.C. § 466 (1982)).

146. *Readjustment of Indian Affairs: Hearings Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess. 21, 35 (1934).

147. Act of Apr. 30, 1964, Pub. L. No. 88–301, 78 Stat. 187 (codified at 25 U.S.C. §§ 406–407 (1982)). The Department of Interior is permitted to deduct a service fee from timber proceeds. Act of Feb. 14, 1920, ch. 75, § 1, 41 Stat. 408, 415 (codified as amended at 25 U.S.C. § 413 (1982)).

148. Mitchell v. United States, 591 F.2d 1300 (Ct. Cl. 1979), *rev'd*, 445 U.S. 535 (1980).

149. 25 U.S.C. §§ 331–381 (1982).

150. Act of Feb. 8, 1887, ch. 119, § 5, 24 Stat. 388, 389 (codified at 25 U.S.C. § 348 (1982)).

151. *Mitchell*, 591 F.2d at 1302, *rev'd*, 445 U.S. 535 (1980).

The Supreme Court disagreed. In *United States v. Mitchell (Mitchell I)*,[152] Justice Marshall explained that the United States' duties under the General Allotment Act are limited to what the Act itself expressly commands—that is, that the Executive Branch prevent improvident alienation of Indian lands by the Indians themselves.[153] Nothing in the General Allotment Act authorizes the sale or disposal of Indian timber; hence, government liability for timber mismanagement, if any, "must be found in some source other than" that law.[154] The Court remanded for consideration of possible alternative statutory grounds for the Quinaults' claims,[155] and the Court of Claims again found in their favor.[156] This time, it relied on the 1910, 1934, and 1964 federal laws specifically authorizing the Interior Department's control of Indian logging.

The government objected to liability on two grounds. It pointed out that none of the federal Indian timber laws refer to a "trust," or make the United States the Indians' trustee.[157] It also noted that none of these provisions expressly direct the Interior Department to maximize Indians' timber income or to assume financial responsibility for failure to do so.[158] Since Congress created this supervisory power without express limitations or objectives, the government contended, no limitations or accountability should be implied.

In *United States v. Mitchell (Mitchell II)*,[159] once again writing for the majority, Justice Marshall rejects the United States' arguments. Justice Marshall begins by conceding the government's underlying theory: it is "axiomatic that the United States may not be sued without its consent."[160] Congress consented generally to damage suits by citizens in the Tucker Act,[161] and in 1946 expressly extended this opportunity to Indian tribes.[162] According to the House sponsor of the "Indian Tucker Act," tribes needed a legal remedy for the "misappropriation of Indian funds or of any other Indian property by Federal officials,"[163] as for example

152. United States v. Mitchell (Mitchell I), 445 U.S. 535 (1980).

153. *Id.* at 544.

154. *Id.* at 542, 546.

155. *Id.* at 546. On this point, see Barsh, U.S. v. Mitchell *Decision Narrows Trust Responsibility*, 6 AM. INDIAN J. 2 (Aug. 1980).

156. 664 F.2d 265 (Ct. Cl. 1981), *rev'd*, 103 S. Ct. 2961 (1983).

157. United States v. Mitchell (Mitchell II), 103 S. Ct. 2961, 2977, 2977 n.8 (1983) (Powell, Rehnquist, and O'Connor, dissenting).

158. *Id.* at 2975 n.1.

159. 103 S. Ct. 2961 (1983).

160. *Id.* at 2965.

161. Act of June 25, 1948, ch. 646, 62 Stat. 869, 940 (codified as amended at 28 U.S.C. § 1491 (1982)).

162. Act of May 24, 1949, ch. 139, § 89a, 63 Stat. 89, 102 (codified as amended at 28 U.S.C. § 1505 (1982)).

163. 92 CONG REC 5313 (1946) (remarks of Sen. Henry M. Jackson).

"when trust funds have been improperly dissipated or other fiduciary duties have been violated."[164] Congress clearly intended that there be a remedy in damages for any adminstrative breach of trust involving Indian property—but is the United States a "trustee" for Indian timber? Federal laws specifically refer to a federal "trust" in only three areas: conserving and investing the cash proceeds of Indian lands, preventing the alienation of allotted Indian lands, and holding legal title to Indian lands acquired after 1934.[165]

Neither the Tucker Act nor the "Indian Tucker Act" creates substantive rights. They merely authorize the Court of Claims to entertain substantive disputes.[166] The Burger Court has, moreover, raised the threshold for making out a substantive claim. It is no longer enough that a federal official has failed to execute a statutory duty; it now must also be shown that the statute creating the duty "can be fairly interpreted as mandating compensation" for a breach.[167] This does not necessarily require an explicit statutory reference to compensation (as the dissenters maintain[168]), but at a minimum there must be some evidence of congressional intent from legislative history or the surrounding circumstances.

Justice Marshall adopts the theory of the Court of Claims that a fiduciary relationship can be implied from the *degree of federal control* of Indian property. "[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists . . . even though nothing is said expressly in the authorizing or underlying statute . . . about a trust."[169] The Interior Department unquestionably has a "pervasive role" in Indian logging in which "[v]irtually every stage of the process is under federal control."[170] At a minimum, the governing legislation expressly directs "that the Indian forests will be permanently productive and will yield continuous revenues to the tribes" under sustained-yield principles.[171] "[A] fiduciary relationship necessarily arises when the Government assumes such elaborate

164. COMMITTEE ON INDIAN AFFAIRS, CREATING AN INDIAN CLAIMS COMMISSION, H.R. REP. NO. 1466, 79th Cong., 1st Sess. 4 (1945).

165. 25 U.S.C. §§ 151, 158, 161, 161a–161d, 162a, 348, 465 (1982).

166. 103 S. Ct. at 2967; *see also Mitchell I*, 445 U.S. at 538.

167. 103 S. Ct. at 2968 (relying on United States v. Testan, 424 U.S. 392 (1976)). For another discussion of this issue, see Note, *Money Damages for Breach of the Federal-Indian Trust Relationship after* Mitchell II, 59 WASH. L. REV. 675 (1984).

168. 103 S. Ct. at 2974, 2978.

169. *Id.* at 2972, quoting from Navajo Tribe of Indians v. United States, 624 F.2d 981, 987 (Ct. Cl. 1980) (involving the sale of fire damaged timber belonging to the tribe; holding the government must account for its handling of the timber).

170. 103 S. Ct. at 2971; *see also* White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), in which the Court described federal control of Indian logging as comprehensive in the context of preempting state taxation.

171. 103 S. Ct. at 2970 (quoting from 78 Cong. Rec. 11730 (1934)).

control over forests and property belonging to Indians.''[172] Since Indians have an express statutory right to receive the cash proceeds of logging, they must also have an implied right to damages if forest income is withheld or unjustly reduced.[173] Equitable remedies in case of misfeasance would be ''totally inadequate.'' ''A trusteeship would mean little if the beneficiaries were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagement.''[174]

On first impression, *Mitchell II* is a significant tribal victory, imposing the discipline of financial liability on federal administration of Indian property. It remains to be seen, however, how far this rule can be extended. The Interior Department enjoys a vast array of supervisory powers in Indian country (see Table 1). Just how ''pervasive'' must federal intrusions be before a ''trust'' can be implied? Is it relevant whether the tribes have a specific statutory right to cash proceeds, before a right to damages can ''fairly'' be read into the authorizing legislation? Most federal administration on the reservations is regulatory rather than entrepreneurial—that is, it involves vetoing or setting limits on tribal action, rather than acting as a broker in the disposal of tribal resources. This does not, however, minimize the degree of harm that tribes may suffer as a result of federal misfeasance.

The ''pervasiveness'' standard of *Mitchell II* means that the Court is not yet prepared to agree with the tribes' argument that the United States is a general fiduciary or insurer of Indian affairs. Some federal intrusions evidently will not rise to the level of ''pervasiveness'' required to imply fiduciary duties. To this extent, the government will continue to be able to exercise extraordinary administrative powers over Indians' lives without assuming coextensive accountability.[175] This suggests in turn an interesting constitutional question: whether Congress can impose discriminatory restraints or burdens on one part of the population without necessarily exposing itself to fifth amendment liability for consequential losses of property.

172. 103 S. Ct. at 2972.

173. *Id.* at 2973.

174. *Id.*

175. The Supreme Court had an opportunity to clarify *Mitchell II* in Duncan v. United States, 667 F.2d 36 (Ct. Cl. 1982), *cert. denied*, 103 S. Ct. 3569 (1983), which held the United States liable for failing to install water and sewer lines on the Robinson Rancheria in accordance with the 1958 Indian Rancheria Act, and in Fort Belknap Indian Community v. United States, 679 F.2d 24 (Ct Cl. 1982), *cert. denied*, 103 S. Ct. 1186 (1983), which held the government not liable for approving (under 25 U.S.C. § 81 (1982)) an economically unsound contract between the tribe and a non-Indian contractor.

G. Nevada: *Conclusiveness of "Trustee" Litigation Affirmed*

In *Winters v. United States,*[176] the Supreme Court ruled that the establishment of an Indian reservation implies a federal withdrawal of sufficient water rights for the Indians' present and future needs. Since the chief object of the nation's nineteenth century reservation policy was to encourage Indian agriculture, the usual measure of Indians' implied water rights has been the reservation's "practicably irrigable acreage."[177] That is, the United States is presumed to have intended the full utilization of each reservation's arable lands. If the tribe historically relied on fisheries, the withdrawal of waters necessary to maintain fish populations may also be implied.[178]

Until 1966, Indian tribes had limited standing to sue in their own right without the consent or participation of the United States.[179] Land and water claims were often raised by the United States on a tribe's behalf, either in fulfillment of specific statutory duties of protection,[180] or on the general theory of United States ownership of Indian lands "in trust" for the tribes.[181] This gave government lawyers an opportunity to waive tribal claims in favor of other parties or their conception of the national interest.[182] The finality of such a waiver was considered in the 1982 Term in *Nevada v. United States.*[183]

Lands surrounding Pyramid Lake in Nevada were withdrawn from settlement in 1859 and set aside as an Indian reservation in 1874, chiefly because of Paiute dependence on fishing for trout and suckers. In 1903 the Interior Department began an ambitious 230,000 acre "Newlands Project" adjacent to the reservation, diverting irrigation water from the

176. 207 U.S. 564 (1908).

177. Arizona v. California, 373 U.S. 546, 600 (1963).

178. Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918); Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251 (9th Cir. 1983), *cert. denied,* 104 S. Ct. 1324 (1984); United States v. Washington, 694 F.2d 188, 189 (9th Cir. 1982), *cert. denied,* 103 S. Ct. 3536 (1983); Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir.), *cert. denied,* 103 S. Ct. 314 (1982). Other federal land withdrawals such as national parks and forests also include implied withdrawals of water "necessary to fulfill the[ir] purpose." Cappaert v. United States, 426 U.S. 128, 141 (1976); United States v. New Mexico, 438 U.S. 696, 700 (1978).

179. Act of Oct. 10, 1966, Pub. L. No. 89-635, 80 Stat. 880 (codified at 28 U.S.C. § 1362 (1982)). *See* S. REP. No. 1507, 89th Cong., 2d Sess. 2 (1966); H.R. REP. No. 2040, 89th Cong., 2d Sess. 2 (1966).

180. *E.g.,* the duty to prevent the alienation of allotted lands, 25 U.S.C. § 348 (1982).

181. United States v. Minnesota, 270 U.S. 181 (1926); Brewer-Elliott Gas Co. v. United States, 260 U.S. 77 (1922); Heckman v. United States, 224 U.S. 413, 444 (1912).

182. Or simply to let them languish. United States v. Ahtanum Irrigation Dist., 236 F.2d 321, 330 n.12 (9th Cir. 1956).

183. 103 S. Ct. 2906 (1983).

Truckee River at the expense of the Pyramid Lake fishery downstream.[184] When the Department went to state court in 1913 to secure its priority in Truckee River water, it made an internal administrative decision to protect the Paiute fishery only so far as "consistent with the larger interests involved in . . . the reclamation of thousands of acres of arid and now useless land for the benefit of the country as a whole,"[185] forcing the Paiutes "to look forward to a different means of livelihood, in part at least, from the ancestral one."[186] Government lawyers consequently did not actively seek, and the state court's final decree in 1944 did not provide for, any water to sustain the Pyramid Lake fishery. Water was, however, set aside for Paiute agriculture.

As Newlands diversions increased the Pyramid Lake fishery declined, until the species on which the Paiutes traditionally had relied faced extinction. The Interior Department tried to mitigate the situation by building hatcheries and restoring some Newlands water to the lake,[187] then brought suit in 1973 to modify the 1944 state court decree, admitting that "the United States plainly breached its trust obligations" by failing to protect the tribe's fishing rights.[188] The original decree should not be res judicata between the Paiutes and Newlands irrigators, the government argued, because both groups had been represented by the same federal lawyers. Furthermore, Newlands irrigators have no standing to challenge an adjustment in the Paiutes' water allocation, because Truckee River water is still owned by the United States and is delivered to them only under contract. The Ninth Circuit agreed.[189]

Writing for a unanimous Court, Justice Rehnquist reversed the Ninth Circuit. The Court first disposed of the argument that the controversy was merely between the United States and the Paiutes. Waters diverted by the United States under the 1902 Reclamation Act have always been subject to private appropriation under state law. "The government was and remained simply a carrier and distributor of water," with little more than a "nominal" legal title and statutory lien to secure the payment of delivery

184. Authority for Newlands was the Reclamation Act of June 17, 1902, ch. 1093, 32 Stat. 388 (codified as amended in scattered sections of 43 U.S.C. (1982)).

185. 103 S. Ct. at 2921–22 n.15.

186. Joint Appendix to Briefs of Appellant and Respondent at 436, Nevada v. United States, 103 S. Ct. 2906 (1983).

187. 103 S. Ct. at 2913 n.7. The tribe successfully challenged the reallocation of water in Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1972), *rev'd*, 499 F.2d 1095 (1974). The district court noted evidence of the government's failure to give adequate consideration to the tribe's needs, and to the waste of water by irrigators. Only about one-fourth of Newlands has ever been brought under cultivation. 103 S. Ct. at 2912 n.3.

188. Brief for the United States at 37, Nevada v. United States, 103 S.Ct. 2906 (1983); *see also id.* at 26, 34–42.

189. 649 F.2d 1286 (9th Cir. 1981).

fees.[190] Newlands irrigators therefore had a legitimate legal interest in the finality of the 1944 decree. The remaining issue was whether the United States' simultaneous representation of both the Paiutes and private irrigators with adverse interests violated the requirements of due process.

According to Justice Rehnquist, conflicts of interest are inherent in the United States' trusteeship of Indian tribes and, as such, should not be subjected to the same scrutiny as conflicts of interest of private fiduciaries.

> [I]t is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obliged it to represent other interests as well. In this regard, the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent. The Government does not "compromise" its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.[191]

This is simply another form of "implicit divestiture." [192] When Congress directs the Interior Department to promote some private interest, such as irrigated agriculture, conflicting Indian rights and claims are implicitly subordinated and may be lost.

Justice Rehnquist undoubtedly was influenced by his view of the facts. "The record suggests that the BIA [Bureau of Indian Affairs] alone may have made the decision not to press claims for a fishery water right, for reasons which hindsight may render questionable, but which *did not involve other interests represented by the Government.*"[193] That is, there may have been a theoretical conflict of interest, but there was no actual considered decision to sacrifice tribal claims. This plainly ignores the record. Interior officials explicitly chose to waive tribal fisheries' interests in favor of non-Indian agriculture ("the larger interests . . . of the country as a whole"). Officials charged with protecting Indians decided, in camera, to donate Indian water to non-Indians. The conflict was scarcely theoretical.[194]

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190. 103 S. Ct. at 2916 (quoting Ickes v. Fox, 300 U.S. 82, 95 (1937); Nebraska v. Wyoming, 325 U.S. 589, 614 (1945)).

191. 103 S. Ct. at 2917; *see also id.* at 2921 n.15, 2923–24.

192. Discussed *supra* at notes 52–57 and accompanying text.

193. 103 S. Ct. at 2921 n.15 (emphasis added). *See* Justice Brennan's characterization of the facts in his concurring opinion, *Id.* at 2926.

194. In a related decision, Arizona v. California, 103 S. Ct. 1382 (1983), the United States conceded overlooking some of the tribes' "practicably irrigable acreage" when it litigated their water rights in the 1950's. *Id.* at 1391. The majority noted that only unforeseen changes in circumstances warrant reopening an equitable decree. There had been one here, and in light of the shortage of water

The state maintained that "[t]he whole civilization of western Nevada [has] been built in reliance on [the 1944] water decree,"[195] and the Court agreed that disturbing the 1944 decree's finality would be a hardship for "thousands of small farmers."[196] This may have been the visceral rationale for the decision, but it too reflects a material misapprehension of the facts. Both the tribe and, as amici, a number of environmental groups noted evidence of substantial water waste by Newlands irrigators.[197] The irrigation district does not meter water or charge progressive rates. Wasteful flood and sprinkler methods of irrigation persist. Recognition of additional tribal water rights would have raised the cost of irrigation water and stimulated conservation, but there was no solid basis for anticipating the collapse of Nevada agriculture.

The real issue in this case was not the relevant standard of fiduciary care, but whether the United States can use the fiction of trusteeship to administer away Indian resources. The Interior Department is charged with managing national lands, waters, minerals, and timber. It serves a multitude of land-development and recreational land-use interests. Trade-offs among these interests in the management of the nation's own lands are commonplace and indeed inevitable. But according to Justice Rehnquist, Indian lands are also included as if they were part of the public domain. This subjects Indian property—unlike other private property—to a public power to take in the national interest without the formality of a fifth amendment proceeding.[198] Rather than a tool of protection, trusteeship thus construed is a license for confiscation.

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in the Colorado River Basin, the equities weighed heavily in favor of the finality of the 1963 decree. *Id.* at 1392–94. Nor was there any evidence of "actual" disloyalty on the part of the government. "[T]he government has taken seriously its responsibility to represent the Tribes' interests and we have no indication that the government's representation was legally inadequate." *Id.* at 1396. For the dissenters, Justice Brennan called for "sharp attention to the quality of the United States' fulfillment of its trust obligations, including the obligation to represent Indian interests in litigation." *Id.* at 1407–08. While there had been no "considered decision" by government lawyers to waive tribal claims, Justice Brennan noted that the United States is sometimes slow to press claims which conflict with "politically influential non-Indian interests." *Id.* at 1408. Moreover, any adverse impact of reallocating water could be mitigated by conservation. *Id.* at 1409. Interestingly, Justice Brennan concurred in *Nevada*, where there was a "considered decision" to compromise tribal rights—but also a considerably older decree.

195. Brief of Petitioner State of Nevada at 48, Nevada v. United States, 103 S. Ct. 2906 (1983).

196. 103 S. Ct. at 2926 (Brennan, J., concurring).

197. Brief of the Sierra Club et al., Amici Curiae, Nevada v. United States, 103 S. Ct. 2906 (1983).

198. This leaves the option of seeking retroactive compensation from the United States. 103 S. Ct. at 2921 n.14, 2925 n.16, & 2926 (Brennan, J., concurring). Prior to intervening in this action, the Paiutes were given an eight million dollar settlement after suing before the Indian Claims Commission for the loss of water rights. One wonders whether the Court was prejudiced by this fact against the equities of the Paiutes' claim.

IV. RECAPITULATION: NO ROOM FOR "RIGHTS"?

> The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.—Oliver Wendell Holmes[199]

Under the original "plenary power" conception of Indian law, Indians enjoyed only what had not yet been taken away by express legislation. Litigation tested whether the property or authority in controversy had been expropriated by sufficiently plain statutory words. While this left no room for "rights," in the constitutional sense of entrenched and inalienable freedoms, it offered a modest degree of certainty. Tribal autonomy consisted of what was left after the subtraction of federal legislative restrictions. It is evident from the Court's 1982 Term that even this modicum of predictability has been lost. Residual, unexpropriated freedoms are vulnerable to "traditional assumptions," the national interest, state interests, and judicial reconstructions of "unspoken" congressional policies. The Court has assumed the legislature's role of determining what is "desirable and good,"[200] not in a general manner but case-by-case.

The extinction of principles in Indian "law" has resolved an internal dilemma for the Court. After *Oliphant v. Suquamish Indian Tribe*,[201] the Justices have divided into two camps.[202] One, led by Justice Marshall,[203] holds tight to the residual sovereignty approach and strict construction of federal legislation. The other, led by Justice Rehnquist,[204] has tried to move the Court to an entirely new perspective in which tribes can exercise only those powers delegated to them by Congress, or confirmed by treaty. Rather than settle this dispute, the Court has given itself such broad discretion, under the notions of implicit divestiture and balancing interests, that it can arrive at any result the majority pleases in a particular case. In the 1982 Term, the only discernible difference between the two groups was their degree of hesitancy to favor federal and state over tribal interests.

Thus far, the disintegration of principled decisionmaking has chiefly involved questions of reservation jurisdiction. "Trust responsibility" appears to be the next candidate. The Court is shifting its inquiry from general principles to debatable implications and judicial intuitions of national

199. THE COMMON LAW 1 (1881).
200. Rice v. Rehner, 103 S. Ct. 3291, 3308 (1983) (Blackmun, J., dissenting).
201. 435 U.S. 191 (1978), discussed *supra* at note 52 and accompanying text.
202. Barsh, Merrion: *False Hopes for Clear Thinking*, 18 AM. INDIAN J. 6 (1982).
203. Typically with Blackmun and Brennan.
204. Usually with O'Connor, Powell, and Stewart.

policy. According to *Mitchell II*, government liability in trust depends on the "pervasiveness" of supervisory intrusions, a slippery slope if ever one existed. The "pervasiveness" standard shields the United States from strict accountability as a private fiduciary. In Nevada, moreover, the Court rejects as "unrealistic" any notion of strict fiduciary norms, and accepts government conflicts of interest as a routine and unobjectionable feature of Indian law.

What is worse, *Nevada* extends the "implicit divestiture" notion to executive branch action. It infers that Congress would not have entrusted both Indian and public lands to the Interior Department unless it had intended the Department to make policy decisions sacrificing Indian rights to satisfy non-Indian interests. Without a shred of legislative history, an administrative arrangement made in 1868 was construed to defeat all of Congress' recent, explicit pronouncements on "trust responsibility."[205] What is left of the idea of "law" or "rights" when legislative silence speaks louder than express statutory words, and when courts take away whatever Congress has failed to expropriate? The answer will be found in the record of the Court's next term.

205. The Court's expedient disregard for legislation is acutely evident in Arizona v. San Carlos Apache Tribe, 103 S. Ct. 3201 (1983), one of the four Indian water decisions rendered last term. The Court previously held in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976), that the McCarren Amendment (43 U.S.C. § 666 (1982)), waiving the sovereign immunity of the United States as to comprehensive water rights adjudications in state courts, included Indian waters held "in trust" by the United States. However, several states' own enabling acts and constitutions provide that the United States retains "absolute jurisdiction and control" of all Indian lands within their borders. In *San Carlos*, with Marshall, Blackmun, and Stevens dissenting, the Court dismisses these federal and state provisions as a "matter of fortuity that has more to do with historical timing than with deliberate congressional selection." 103 S. Ct. at 3210–11. Hence, when Congress is silent about Indian rights, those rights are "impliedly repealed," but when Congress speaks plainly, it is an immaterial "fortuity"!

Table 1

THE SCOPE OF FEDERAL SUPERVISION OF INDIAN COMMERCE

sector:		federal veto/approval of:	statutory authority (25 U.S.C.):
LAND	*allotted or tribal*	*LEASE OR DISPOSAL*	*393, 396, 402, 402a, 403, 405, 409, 415, 415a-415d, 464, 483, 483a*
TIMBER	*allotted or tribal*	*LEASE OR DISPOSAL*	*406, 407, 466*
MINERALS	*allotted or tribal*	*LEASE OR DISPOSAL*	*396a-396g, 398, 398a-398c*
WATER	*federally-constructed irrigation systems*	*ALLOCATION AND FEES*	*381, 388*
FUNDS	*proceeds of land use and development*	*INVESTMENT AND USE*	*151, 158, 161, 161a-161d, 162a*
TRADE	*with Indians*	*LICENSING*	*261-264*
CONTRACTS	*involving tribal or trust property*	*TERMS AND CONDITIONS*	*81, 82, 84, 85*
ESTATES	*involving trust land or funds*	*HEIRS AND WILLS*	*372, 373, 404, 408*
LAWYERS	*retained by tribe*	*CHOICE OF FEES*	*476*