UNITED STATES V. LARA— FEDERAL POWERS COUCHED IN TERMS OF SOVEREIGNTY AND A RELAXATION OF PRIOR RESTRAINTS

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"[T]he tribes either are or are not separate sovereigns, and our federal Indian† law cases untenably hold both positions simultaneously."[1]

Imagine the following scenario: a non-Indian resident of Minnesota, a member of the Cherokee tribe residing in Oklahoma, who is visiting South Dakota for the first time, and a member of the Oglala Sioux tribe are traveling together through the Oglala member's reservation in South Dakota. There they find themselves in an encounter with federal officers. The situation quickly escalates, and ultimately the three passengers trade blows with the federal officers.

Under these facts, the Oglala member would be subject to the jurisdiction of his tribe as well as to the jurisdiction of the U.S. government and can be tried by both under the doctrine of dual sovereignty.[2] The non-Indian Minnesotan is not subject to tribal jurisdiction and will only be subject to the jurisdiction of the U.S. federal government. Interestingly, the resident of the state of Oklahoma, who is also classified as an Indian, is subject to both the jurisdiction of the U.S. government and the Oglala tribal government as a result of this classification. He is subject to the tribal jurisdiction not because he is a member of that tribe, or lives in that area, or has contacts with the forum, but solely because he is a member of an Indian tribe by birth.[3]

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†Author's note: Throughout this article the term "Indian" is used in reference to American Indians. The term is used solely to avoid any undue confusion due to the fact that case law and legislation in this subject area utilize the term Indian exclusively when referring to American Indians.

1. United States v. Lara, 541 U.S. 193, 215 (2004) (Thomas, J., concurring).

2. *See, e.g.*, Bartkus v. Illinois, 359 U.S. 121, 128-39 (1959).

3. *See Lara*, 541 U.S. at 193-94 (recognizing the "inherent power" of a tribe to prosecute nonmember Indians).

Part I of this article will briefly review the traditional constitutional role of Congress in negotiations with American Indian tribes, its plenary powers, and the treaty powers. It will examine the Supreme Court's early decisions regarding Indian tribes as well as its decision in *Oliphant v. Suquamish Indian Tribe*,[4] *U.S. v. Wheeler*,[5] and *Duro v. Reina*[6] and the theories of sovereignty that the Supreme Court used in deciding those cases.

Part II will look at the legislation that gave rise to the potentially problematic issues involving tribal jurisdiction, 25 U.S.C. § 1301,[7] and at the Ninth Circuit's decision in *United States v. Enas*,[8] as well as the competing decision *United States v. Lara*[9] handed down by the Eighth Circuit. It will address the decision by the Ninth Circuit and analyze the difficulties with its arguments as pointed out by district courts within that circuit. Additionally, this part will analyze the Eighth Circuit's interpretation of 25 U.S.C. § 1301 and its premise that the decision in *Duro* was constitutional. Part III will provide an analysis of the Supreme Court's 7-2 decision in *United States v. Lara*,[10] which reversed the Eighth Circuit.[11] It will evaluate Justice Breyer's majority decision and Justice Kennedy's concurrence in *Lara*, and point out potential issues in the premises employed in arriving at those decisions. It will also examine Justice Thomas's concurrence and evaluate whether or not the concurrence should have come out differently under his analysis.[12] Finally, it will look at Justice Souter's dissent and the Eighth Circuit's en banc decision in *Lara* and argue that the Supreme Court incorrectly decided *Lara*. Part IV will attempt to provide two possible, and substantially different solutions to the problem. This article will conclude that the Supreme Court's decision further clouded the issue of tribal sovereignty *vis-à-vis* congressional authority to act in Indian affairs, and it will provide a simple solution to the constitutional underpinnings present that the Court could have utilized in *Lara*.

4. 435 U.S. 191 (1978).
5. 435 U.S. 313 (1978).
6. 495 U.S. 676 (1990).
7. 25 U.S.C. § 1301 (2007).
8. 255 F.3d 662 (9th Cir. 2001).
9. 324 F.3d 635 (8th Cir. 2003).
10. 541 U.S. 193 (2004).
11. *Lara*, 541 U.S. at 210.
12. *Id.* at 1641-48.

I. TRADITIONAL ROLE OF CONGRESS AND INDIAN SOVEREIGNTY

A. CONSTITUTIONAL PROVISIONS AND EARLY JURISPRUDENCE REGARDING INDIAN SOVEREIGNTY

Article I, Section 8 of the U.S. Constitution states that Congress shall have the authority to regulate commerce with the Indian tribes.[13] This clause has often been cited as the source of Congress's plenary power to deal with the Indian nations.[14] If Congress does indeed have plenary power to regulate the Indian tribes, then 25 U.S.C. § 1301 is a valid exercise of that power. Interestingly, however, the Framers' intent may not have been for Congress to act in this fashion.[15] Article II, Section 2 of the U.S. Constitution provides that the President shall have the authority, by and with the consent of the Senate to enter into treaties.[16] Further, the United States' dealings with the Indian tribes were generally formalized through the treaty process until 1871.[17]

The premise that Congress has plenary power to act with regard to the Indian tribes presents two troublesome issues. First, why did the executive branch choose to act in a manner that, at least implicitly, conferred sovereign status on Indian tribes when they were defined separately from foreign nations in the Constitution? Second, why did Congress then feel the need to, after having acquiesced in this approach and commissioned groups to negotiate treaty rights, pass a law explicitly affirming a supposed constitutional right?[18] Case law in this subject matter, as noted by Justice Thomas

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13. U.S. CONST. art. I, § 8, cl. 3. ("To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."). From the framing of the Constitution, the U.S. government had already decided to treat Indian tribes different than foreign nations, and thus not as traditional sovereigns.

14. *See* Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 655 (2006) (noting, however, that this "Indian Commerce Clause" is limited to the governance of commerce without more).

15. *See* Vine Deloria, Jr., *"Congress in its Wisdom": The Course of Indian Legislation*, *in* THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880S, 106-08 (Sandra L. Cadwalader & Vine Deloria, Jr. eds., 1984). Until about 1850, Congress had not even begun to assume a more active role. *Id.* at 106. Indeed, the U.S. government's actions with the U.S. Indian tribes had largely been in the form of treaties. *Id.* at 106-07.

16. U.S. CONST. art. II, § 2, cl. 2.

17. *See* Deloria, *supra* note 15, at 106-07.

18. *See* 16 Stat. 544, 544 (1871). Curiously, this bill declared that no tribe would thereafter be recognized as capable of making treaties with the United States, but that existing treaties would be honored. *Id.* at 570. The bill is superfluous if Indian nations are exclusively within the province of congressional authority. Deloria, *supra* note 15, at 107. The fact that existing treaties would be honored may not have been even necessary, and was not completely accurate as over

in *Lara*,[19] is full of conflicting logic as the courts found themselves forced to decide between competing theories of sovereignty espoused by the same government.

One of the most famous statements of the era, and perhaps of all U.S. jurisprudence concerning Indian tribes, fittingly comes from Chief Justice John Marshall when he declared that the tribes are "domestic dependent nations."[20] Marshall's decisions in the *Cherokee Nation* case as well as in *Johnson v. M'Intosh*[21] and *Worcester v. Georgia*[22] provided the foundation for all future jurisprudence regarding Indian sovereignty.[23]

There are three basic principles that underlie these three temporary close yet contradictory cases: (1) Indian tribes possess certain elements of preexisting sovereignty due to their occupation of the land and self-governance that predated the Constitution;[24] (2) even though they possessed some type of sovereignty, it was subject to control and/or restrictions or elimination by the federal government, but not by the states;[25] and, (3) the tribes' limited inherent sovereignty and their "domestic dependent" status

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100 agreements with Indian tribes were made after the act, and "the congressional attitude was that treaties could be violated at whim because Congress in its wisdom would act in the best interest of Indians." *Id.*

19. United States v. Lara, 541 U.S. 193, 214-15 (2004) (Thomas, J., concurring). Justice Thomas noted:

> [M]uch of the confusion reflected in our precedent arises from two largely incompatible and doubtful assumptions. First, Congress (rather than some other part of the Federal Government) can regulate virtually every aspect of the tribes without rendering tribal sovereignty a nullity. Second, the Indian tribes retain inherent sovereignty to enforce their criminal laws against their own members.

Id. (internal citations omitted).

20. Cherokee Nation v. Georgia, 30 U.S. 1, 47 (1831). Essentially Marshall invented the "trust" relationship and said that the U.S. government is to protect the tribes from interference and intrusion from state governments and citizens. *Id.* It was in reply to this decision that President Jackson supposedly quipped: "John Marshall has made his decision, now let him enforce it!" DAVID LOTH, CHIEF JUSTICE: JOHN MARSHALL AND THE GROWTH OF THE AMERICAN REPUBLIC 365 (1949).

21. 21 U.S. 543 (1823). Marshall held that Indian tribes could not convey land to private parties without the consent of the federal government. *M'Intosh*, 21 U.S. at 603-05.

22. 31 U.S. 515 (1832). This case essentially held that the state of Georgia had no authority over the Indian Territory located within its boundaries, and further that states cannot tax Indians residing in Indian Territory. *Worcester*, 31 U.S. at 559-61.

23. *See* Fletcher, *supra* note 14, at 627; *see also Cherokee Nation*, 30 U.S. at 16.

24. *See Worcester*, 31 U.S. at 560-61 (1832) (concluding that a weaker power does not relinquish its sovereignty solely due to the fact that it has agreed to the protection of a more powerful nation).

25. *See id.* at 561. "The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress." *Id.*

on the federal government imposed on the U.S. government a trust responsibility.[26]

Especially interesting is that, although criminal jurisdiction remained with the Indian tribes for some time,[27] the passage of the Major Crimes Act by Congress in 1885 removed all doubt as to the extent of the jurisdiction of the federal government on Indian reservations.[28] Prior to the enactment of the Major Crimes Act, one case in particular propelled Congress to revisit its authority in the criminal arena in the Indian territories.[29] In *Ex Parte Crow Dog*,[30] federal agents sought to prosecute a Sioux Indian, Crow Dog, for the murder of another, even though he had already been found guilty in a tribal proceeding.[31] The federal authorities pursued this federal prosecution even while believing that they lacked such authority.[32] The Supreme Court granted Crow Dog's petition for writ of habeas corpus on the ground that extending jurisdiction "would be to reverse in this instance the general policy of the government toward the Indians, as declared in many statutes and treaties, and recognized in many decisions of this court, from the beginning to the present time."[33] In its conclusion, the court noted that to allow the granting of federal jurisdiction in the case would "require[] a clear expression of the intention of Congress, . . . [which] we have not been able to find."[34]

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26. *See Cherokee Nation*, 30 U.S. at 11-12. *See generally* AMERICAN INDIAN LAW DESKBOOK (3d ed. 2004) (providing a comprehensive analysis of developments in the field of Indian law).

27. *See Ex Parte* Crow Dog, 109 U.S. 556, 559-60 (1883) (holding that the ability of the tribe to deal with certain criminal offenses was an attribute of tribal sovereignty that had not been restricted by an act of Congress).

28. *See* Major Crimes Act, ch. 341, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1135 (2000)).

29. *See Crow Dog*, 109 U.S. at 559-60. Crow Dog, a member of the Brule Sioux band of the Sioux nation, murdered a fellow tribe member. *Id.* He was tried and found guilty in a customary tribal proceeding following the offense. *See* Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 801 (2006).

30. 109 U.S. 556 (1883).

31. *Crow Dog*, 109 U.S. at 557. *See* Washburn, *supra* note 29 at 801 (noting that Crow Dog and his family paid to the victim's family $600 in cash, eight horses, and one blanket—an amount which would have represented "a small fortune at the time").

32. *Id.* at 800 (citing Sidney L. Harring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 AM. INDIAN L. REV. 191, 202-03, 223 (1989)) (discussing how the federal authorities were determined to proceed with the prosecution, and the prosecution of other Indians, even without the authority to do so, until finally being admonished by the Secretary of Interior to adhere to the Supreme Court's ruling in *Crow Dog*).

33. *Crow Dog*, 109 U.S. at 572.

34. *Id.*

Congress did not delay its response, and enacted the Major Crimes Act soon thereafter.[35] The Department of the Interior lobbied for new legislation to allow punishment for major crimes, claiming that tribal law and sanctions provided insufficient remedies.[36] Congress agreed with the Department of Interior and passed the Major Crimes Act which acted as a swift and authoritative overruling of the holding in *Ex Parte Crow Dog*, and further demonstrated Congress's absolute power and authority to restrict and regulate the Indian tribes.[37]

Yet, even though many decisions had concluded that Congress had plenary power,[38] the crux of the question the Supreme Court is still trying to solve today is whether tribes have inherent powers of sovereignty that predate the Constitution, or whether they only have those attributes of sovereignty that Congress has delegated to them.

B. THE EVOLUTION OF THE COURT'S ANSWER TO SOVEREIGNTY IN LATER CASES—*OLIPHANT V. SUQUAMISH INDIAN TRIBE* AND *UNITED STATES V. WHEELER*

Two of the most important cases regarding the constitutional and sovereign status of Indian tribes were decided within three weeks of each other in 1978.[39] *Oliphant v. Suquamish Indian Tribe*[40] decided the issue of whether or not Indians had territorial jurisdiction over crimes on reservations, whereas *United States v. Wheeler*[41] decided the issue of whether or not tribal jurisdiction was a delegation of power from the federal

35. Major Crimes Act, ch. 341, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153 (2000)).

36. *Id.*; *see also* Washburn, *supra* note 29, at 803 (noting that the Secretary of the Interior, in a report to Congress in 1884, falsely portrayed Indian Country as a "lawless place" where the inhabitants were "the next of kin was duty-bound to avenge murder"). The Secretary also argued that, lacking any intervention by Congress to extend jurisdiction, no court system would have the authority to hear any similar case. *Id.* at 803. A claim which was patently false as Crow Dog had been tried and convicted by in a tribal proceeding. *Id.*

37. Washburn, *supra* note 29, at 803-04. Coming shortly after the decision in *Crow Dog*, Congress filled any potential vacuum regarding the tribes' authority to provide criminal punishment for specific offenses. *Id.*; *see also* Morton v. Mancari, 417 U.S. 535, 551 (1974) ("The plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes."). *See generally* Gloria Valencia-Weber, *Racial Equality: Old and New Strains and American Indians*, 80 NOTRE DAME L. REV. 333, 344 (2004).

38. *See* United States v. Lara, 541 U.S. 193, 200 (2004) (holding that Congress has "plenary and exclusive" authority to legislate in Indian affairs); *Morton*, 417 U.S. at 551-52; United States v. Clark, 435 F.3d 1100, 1112-13 (9th Cir. 2006).

39. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 191 (1978) (noting that the case was decided on March 6, 1978); United States v. Wheeler, 435 U.S. 313, 313 (1978) (noting that the case was decided on March 22, 1978).

40. 435 U.S. 191 (1978).

41. 435 U.S. 313 (1978).

government.[42] Though both cases were decided by the same members of the Court within a three-week period, the cases present striking differences.

1. Oliphant v. Suquamish Indian Tribe

Justice Rehnquist, delivering the opinion of the Court in *Oliphant*, delved deeply into the historical circumstances of the Port Madison reservation on which the Suquamish Indian Tribe resides.[43] The Court noted that the Tribe had placed notices at the entrances to the reservation that stated that entry onto the Reservation by any person would be deemed implied consent to the criminal jurisdiction of the Suquamish Tribal Court.[44] In this case, two non-Indians were arrested on the Port Madison reservation, and arraigned before the tribal court.[45]

The Tribe argued that its jurisdiction flowed from the "Tribe's retained inherent powers of government over the Port Madison Indian Reservation."[46] The Ninth Circuit decided this case in favor of the Tribe, and stated that criminal jurisdiction occasioned by offenses committed on the reservation, other than those that are assumed by the federal government, is a sine qua non of its powers.[47] The Supreme Court reversed and held that an Indian tribe may not assume criminal jurisdiction over non-Indians without the express permission of Congress.[48]

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42. *Wheeler*, 435 U.S. at 332.

43. *Oliphant*, 435 U.S. at 192-93. It is important to note that this case involves the distinction solely between non-Indians and Indians and the language of the case so follows. This case was decided when the majority of the Indian reservation was owned by non-Indians (sixty-three percent) and the two groups were in constant contact. DAVID EUGENE WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT, THE MAKING OF JUSTICE 187 (1997).

44. *Id*. at 193-94 n.2. The idea of territorial/personal jurisdiction which the tribe tried to extend has been the basis of criminal jurisdiction in the United States from its inception, and is the most common way that jurisdiction is obtained. *See* Pennoyer v. Neff, 95 U.S. 714, 723 (1877) (holding that physical presence in the forum, for however brief a time, is sufficient to grant that forum jurisdiction over the individual).

45. *Oliphant*, 435 U.S. at 194. Mark David Oliphant was charged with assaulting a tribal officer and resisting arrest. *Id*. Daniel B. Belgarde was arrested after an alleged high-speed race along reservation highways that ended when Belgarde collided with a tribal police vehicle. *Id*. Belgarde was charged with "recklessly endangering another person." *Id*.

46. *Id*. at 196.

47. *Id*.; Oliphant v. Schlie, 544 F.2d 1007, 1012-14 (1976). Indeed, at the time of this case, thirty-three of the 127 reservation court systems claimed to extend their jurisdiction over non-Indians, and twelve others had ordinances which would permit the assumption of such jurisdiction over non-Indians. *Oliphant*, 435 U.S. at 196.

48. *Oliphant*, 435 U.S. at 212. In footnote 8, Justice Rehnquist acknowledged that the tribes were indeed granted jurisdiction over non-Indians in some treaties in the case of non-Indians entering Indian land without the consent of the federal government. *Id*. at 197-98 n.8. Justice Rehnquist concludes, however, that "[f]ar from representing a recognition of any inherent Indian criminal jurisdiction over non-Indians . . . these provisions were instead intended as a means of discouraging non-Indian settlements on Indian territory . . . ." *Id*. at 198 n.8. Thus, even when the

The *Oliphant* Court examined the history of the issue, and stated that, beginning with the passage of the Trade and Intercourse Act of 1790, Congress assumed federal jurisdiction over offenses by non-Indians against Indians.[49] The Court also examined the Major Crimes Act of 1885, and stated that it was enacted to place Indian offenders under the jurisdiction of federal courts when certain major offenses are committed.[50] The Court explained that one of its primary worries in the *Oliphant* case was that, "[i]f tribal courts may try non-Indians, . . . those tribal courts are free to try non-Indians even for such major offenses as Congress may well have given the federal courts *exclusive* jurisdiction to try members of their own tribe committing the exact same offenses."[51]

The Court correctly noted that Congress cannot have intended to give Indian tribes jurisdiction for violent crimes over non-Indians when they clearly lack that jurisdiction over their own *members*.[52] The Court then stated that the Suquamish, in their treaty with the United States, "*in all probability* recogniz[ed] that the United States would arrest and try non-Indian intruders" on their reservation.[53] The Court read the treaty provision in conjunction with the law that extended federal enclave law to non-Indian offenses and stated that this "*implies*" that the Suquamish are to promptly turn over any non-Indian offenders to the United States.[54] In drafting the treaty, Commissioners of the Bureau of Indian Affairs rejected treaty language that specified that the United States would retain criminal jurisdiction in favor of language that did not address the issue.[55] The Court stated that "*it seems probable*" that the Commissioners simply preferred such language, and that it "*could well have been understood*" as acknowledging that the federal government had exclusive criminal jurisdiction over non-Indians.[56]

Court was faced with evidence of expressly granted jurisdiction, the Court held that no such jurisdiction existed. *Id.* at 198-99 n.8.

49. Trade and Intercourse Act of 1790, § 5, 1 Stat. 138 (1790). In 1817, Congress extended federal enclave law to Indian territory. *Oliphant*, 435 U.S. at 201.

50. Major Crimes Act, ch. 341, 23 Stat. 385 (codified as amended 18 U.S.C. § 1153 (2000)).

51. *Oliphant*, 435 U.S. at 203.

52. *Id.* (emphasis added).

53. *Id.* at 207 (emphasis added).

54. *Id.* at 208 (emphasis added).

55. *Id.* at 207 n.16.

56. *Id.* (emphasis added). The Court proffers this analysis and then notes ironically in a footnote that:

> In interpreting Indian treaties and statutes, "[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." But treaty and statutory provisions which are not clear on their face may "be clear from the surrounding circumstances and legislative history."

Regardless of any ambiguity, the Court held that absent affirmative delegation of such by power by Congress, Indians do not have criminal jurisdiction over non-Indians. The Court concluded, as all history and precedent dictated, that "[w]hile Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions."[57]

Though the holding in *Oliphant* did not raise many eyebrows, the Court provided a valuable insight when it adopted the Ninth Circuit's summation of the state of Indian sovereignty:[58] "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers "*inconsistent with their status*."[59] This last clause came to have constitutional importance in the *Duro* case.[60]

2. United States v. Wheeler

Wheeler decided the issue of whether the Fifth Amendment's double jeopardy clause barred the prosecution of an Indian in federal court under the Major Crimes Act when he had previously been convicted in a tribal court of a lesser included offense arising out of the same conduct.[61] Thus, the essential question in *Wheeler* was whether tribal courts receive their authority from the federal government. If they do, the subsequent prosecution would be barred by the double jeopardy clause as a second prosecution by the same sovereign.[62] If not, case law is clear that the theory of dual sovereignty provides that a federal prosecution does not bar a future prosecution by a separate sovereign (usually a state) for the same acts.[63]

Id. at 208 n.17 (internal citations omitted). The Court concluded that the surrounding circumstances and legislative history were dispositive.

57. *Id*. at 204.

58. *Id*. at 208.

59. *Id*. at 221 (quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (1976)).

60. Duro v. Reina, 495 U.S. 676, 677 (1989).

61. United States v. Wheeler, 435 U.S. 313, 314 (1978). The defendant Indian was arrested and convicted of disorderly conduct and contributing to the delinquency of a minor. *Id*. at 314-15. He was convicted and sentenced to fifteen days in jail or a fine of $30 on the first charge and to sixty days in jail or a fine of $120 on the second. *Id*. at 315. A year later the federal government charged the defendant with statutory rape with a possible penalty of fifteen years imprisonment. *Id*. at 315 n.3.

62. *Id*. at 318-19.

63. *Id*. at 318-20. *See, e.g*., Bartkus v. Illinois, 359 U.S. 121, 122-24 (1959). The logic underlying this assumption is that an offense is a violation of a law. Separate sovereigns may each classify a certain act as an offense under their law. Therefore, one act results in two distinct offenses. However, in a relationship such as a city-state or territory-federal government, the city and territory are both acting as agents of the sovereign and therefore a prosecution in one, bars a

The Ninth Circuit held that the concept of dual sovereignty should not apply to this case because "Indian tribes are not themselves sovereigns, but derive their power to punish crimes from the Federal Government."[64] The Court reversed and stated that the dispositive issue was the "ultimate source of the power under which the respective prosecutions were undertaken."[65] The Court framed the issue as to whether the ability to punish tribal offenders was an inherent part of tribal sovereignty or whether Congress had delegated this power to the tribes.[66]

Though Indian tribes no longer possess the full attributes of sovereignty, the Court noted that their powers are "inherent powers . . . which ha[ve] never been extinguished."[67] Whatever sovereignty remains, it is of a "unique and limited character. *It exists only at the sufferance of Congress and is subject to complete defeasance*."[68] The Navajo Tribe never gave up the authority to punish tribal offenders, and subsequent federal statutes have recognized that Indian tribes have jurisdiction over their own members.[69] Finally, the Court noted that the power of a tribe to prosecute its own members was not part of the sovereignty lost implicitly when Indians gave up their independent status.[70] The Court, therefore, stated that it is "undisputed" that Indian tribes have criminal jurisdiction over their own members and that, "[t]heir right of internal self-government includes the right to prescribe laws *applicable to tribe members* and to enforce those laws by criminal sanctions."[71]

In answering the question presented by *Wheeler*, the Court held that any power which had not been expressly restricted by the federal

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further prosecution by the same sovereign. *See, e.g.*, Puerto Rico v. Shell Co. (P.R.), Ltd., 302 U.S. 253, 264-68 (1937).

64. *Wheeler*, 435 U.S. at 319.

65. *Id.* at 320. The Court extensively analyzed the analogies drawn between cities and states as well as those between the federal government and territories. *Id.* at 320-22. The Court concluded that both cities and states act as the agent of their respective sovereign and their power is derived exclusively from those sovereigns. *Id.* at 321-22.

66. *Id.* at 322.

67. *Id.* at 323 (citing F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945)) (emphasis omitted).

68. *Id.* at 323. (emphasis added). The Court also noted that until Congress acts, expressly or by implication, the tribes retain their existing sovereign powers. *Id.*

69. *Wheeler*, 435 U.S. at 324; *see* Trade and Intercourse Act of 1790, § 5, 1 Stat. 138; Act of Mar. 3, 1817, § 2, 3 Stat. 383.

70. *Wheeler*, 435 U.S. at 326. It is interesting to note that the Court, three weeks after its decision in *Oliphant* described its holding as saying that Indian tribes "cannot try *nonmembers* in tribal courts." *Id.* (emphasis added).

71. *Id.* at 322 (emphasis added). It is important to take notice, though future cases make the argument that this is not so, that the Court decided this case as the right of the tribe to regulate its own *members*. *Id.* The entire opinion consistently distinguished *only* the ability of a tribe to regulate its members versus any authority to regulate all other third parties. *Id.*

government arose solely from the tribes' inherent sovereignty, and was not a delegation of power from the federal government.[72] Thus, *Wheeler* concluded that the Tribes had sovereign authority for some criminal prosecutions. "The power to punish offenses against tribal law *committed by Tribe members* . . . has never been taken away . . . ."[73]

Justice Stewart, writing for the majority, noted, "we do not mean to imply that a tribe which was deprived of [a sovereign power] by statute or treaty and then regained it by Act of Congress would necessarily be an arm of the Federal Government. That interesting question is not before us, and we express no opinion thereon."[74] That question would be partly resolved twelve years later in *Duro v. Reina*.[75]

C. *DURO V. REINA*—THE LIMITS OF INDIAN SOVEREIGNTY

In 1990, the Supreme Court decided the interesting question that Justice Stewart declined to address in *Wheeler*.[76] The defendant, a member of a different tribe, was charged with the illegal firing of a weapon on the Salt River Pima-Maricopa Indian Reservation.[77] From the outset of the decision, the Court held that "retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership."[78]

In analyzing the issue of whether tribes have criminal jurisdiction over nonmembers, the Court noted that several issues had been raised in the courts below, most importantly, the violation of equal protection based on racial classification.[79] The district court initially held that the assertion of tribal jurisdiction over a nonmember would violate the equal protection

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72. *Id*. at 328. In reaching this conclusion, and allowing subsequent prosecution of the defendant by the tribal court, the Court delineated powers that were implicitly lost when Indian tribes became dependents of the United States. *Id*. at 326. Most important to this article, one of the powers that was lost was the freedom to determine external relations; a Tribe is only allowed to govern the relations among members of the tribe. *Id*.

73. *Id*. at 328 (emphasis added).

74. *Id*. at 328 n.28. This issue is essentially the one that the Court faced in *Duro* as well as in the title case of this article.

75. 495 U.S. 676 (1990).

76. *Duro*, 495 U.S. at 685-86.

77. *Id*. at 679-81. The defendant was initially charged with murder and aiding and abetting murder in violation of 18 U.S.C. § 1153, but the federal indictment was later dismissed by the United States Attorney. *Id.*

78. *Id*. at 679.

79. *Id*. at 683; *see* Duro v. Reina, 851 F.2d 1136, 1143-45 (1987).

guarantees of the Indian Civil Rights Act of 1968.[80] The court of appeals rejected this argument when it found "no racial classification in subjecting petitioner to tribal jurisdiction that could not be asserted over a non-Indian."[81] The Supreme Court reversed the decision.[82]

Justice Kennedy, writing for the Court, framed the question as "whether the sovereignty retained by the tribes in their dependent status within our scheme of government includes the power of criminal jurisdiction over nonmembers."[83] The Court stated that the rationale in *Oliphant* and *Wheeler*, as well as subsequent case law, compelled the conclusion that Indian tribes lack criminal jurisdiction over nonmembers.[84] The Court found the language in *Wheeler* that differentiated between member and nonmember to be controlling.[85] Further, it concluded that a basic attribute of sovereignty is the right to regulate those who enter the sovereign's territory.[86]

Oliphant recognized that the tribes are not sovereigns in regard to territorial jurisdiction, and *Wheeler* held that the retained sovereignty of the tribes is "that needed to control their own internal relations and to preserve their own unique customs and social order."[87] The Court noted, "*[t]he areas in which . . . implicit divestiture of sovereignty has been held to have*

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80. *Duro*, 495 U.S. at 683; *see* 25 U.S.C. § 1302 (2007). The district court looked at the situation and held that subjecting a nonmember Indian to tribal jurisdiction would constitute discrimination based on race. *Duro*, 851 F.2d at 1144-45. The court noted that both non-Indians and nonmembers have neither the right to participate in the tribal government, nor a lesser fear of discrimination in a court system that bars the participation of their peers. *Id.* at 1145.

81. *Duro*, 495 U.S. at 683. Interestingly, the court of appeals rested this conclusion on the fact that the defendant had *significant contacts* with the Pima-Maricopa community. *Duro*, 851 F.2d at 1144. Such contacts included residing with a tribal member and working for a tribal company. *Id.* However, it appears that a contacts-based test such as the one utilized by the Ninth Circuit would not have been considered sufficient to grant the Tribe jurisdiction over a non-Indian.

82. *Duro*, 495 U.S. at 698.

83. *Id.* at 684.

84. *Id.* at 684-85.

> Our decisions in *Oliphant* and *Wheeler* provide the analytic framework for resolution of this dispute. *Oliphant* established that the inherent sovereignty of the Indian tribes does not extend to criminal jurisdiction over non-Indians who commit crimes on the reservation. *Wheeler* reaffirmed the longstanding recognition of tribal jurisdiction over crimes committed by tribe members. The case before us is at the intersection of these two precedents, for here the defendant is an Indian, but not a member of the Tribe that asserts jurisdiction.

Id. at 684.

85. *Id.* at 685-86.

86. *Id.* at 685.

87. *Id.* at 685-86. The Court went on to note that the "power of a tribe to prescribe and enforce rules of conduct *for its own members* 'does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status.'" *Id.* at 686 (quoting United States v. Wheeler, 435 U.S. 313, 326 (1978)) (emphasis added).

occurred are those involving the relations between an Indian tribe and nonmembers of the tribe."[88] Further, the dependent status of Indian tribes is inconsistent with any attempt to independently determine their external relations.

In resolving the issue at hand, the Court recognized that the defendant's relationship to this Tribe was similar to the non-Indian's relation in *Oliphant*, and as such, it was subject to the same limitations.[89] The Court correctly noted that evidence preventing criminal jurisdiction over non-members was not overwhelming, but opinions by the solicitors of the Department of the Interior, as well as past case law, favor the holding that tribal courts have criminal jurisdiction over members only.[90] On the issue of equal protection guarantees, the Court was reluctant to "single out another group of citizens, nonmember Indians, for trial by political bodies that do not include them . . . [and] *no delegation of authority to a tribe has to date included the power to punish nonmembers in tribal court*."[91]

The *Duro* Court concluded that the logic and precedent that prevented jurisdiction over non-Indians, who share the same characteristic as non-members, required a holding that tribal courts have no criminal jurisdiction over nonmembers as well.[92] In its summation, the Court held that it could not accept the arguments in favor of "finding tribal jurisdiction that is inconsistent with precedent, history, and the equal treatment of Native American citizens."[93] That concluding statement would have been sufficient to decide future cases on the same matter had Congress not attempted to intervene and legislatively overrule *Duro*.

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88. *Id*. at 686 (quoting *Wheeler*, 435 U.S. at 326) (emphasis added).

89. *See id*. at 695 ("[T]ribes are not mere fungible groups of homogenous persons among whom any Indian would feel at home.").

90. *See* 1 Op. Sol. 699 (1936) ("Inherent rights of self government may be invoked to justify punishment of members of the tribe but not of non members."); 1 Op. Sol. 849 (1938) (mentioning only adoption of nonmembers into the tribe or receipt of delegated authority as means of acquiring jurisdiction over nonmember Indians). *See, e.g.*, *Wheeler*, 435 U.S. at 326-27.

91. *Duro*, 495 U.S. at 693-94 (emphasis added).

92. *Id*. at 696. The Ninth Circuit and Justice Brennan, in dissent, made the argument that prohibiting jurisdiction in this case would create a jurisdictional void because no sovereign would have the power to try the defendant for the crime charged. *See Duro*, 495 U.S. at 704-06 (Brennan, J., dissenting); Duro v. Reina, 851 F.2d 1136, 1145-46 (1987). That argument is somewhat disingenuous because the federal government did initially charge the defendant with murder and with aiding and abetting murder, crimes encompassed by the Major Crimes Act, and Arizona only lacked authority because it had specifically disclaimed jurisdiction over Indian Country Crimes. *Id*. at 696-98.

93. *Duro*, 495 U.S. at 698.

II. *UNITED STATES V. ENAS* AND *UNITED STATES V. LARA*—DELEGATION VERSUS RELAXATION AND WHY THE EIGHTH CIRCUIT GOT IT RIGHT

Enas and *Lara* deal with the same factual situation. A nonmember Indian is tried for a criminal offense by the tribe, and then subsequently tried by the federal government. This type of prosecution, which was prohibited in *Duro*, received new life shortly thereafter. In 1990, Congress amended the Indian Civil Rights Act (ICRA).[94] Previously, the ICRA defined tribal "powers of self-government" as "all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses."[95] The 1990 amendments changed the definition to include [the] *means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians*."[96]

Essentially, Congress legislatively attempted to rewrite the history of Indian sovereignty that the Supreme Court had recently penned, and, surprisingly to some, it succeeded.

A. *UNITED STATES V. ENAS*—THE NINTH CIRCUIT'S ANALYSIS OF AMENDED § 1301(2)

In *Enas*, the defendant, a member of the San Carlos Apache Tribe, was charged, convicted, and sentenced for assault with a deadly weapon and assault with intent to cause serious bodily injury in the tribal court of the White Mountain Apache Tribe.[97] The defendant was then indicted in federal district court.[98] The district court granted the defendant's motion to dismiss, holding that it was a violation of the Double Jeopardy Clause.[99] The Ninth Circuit Court of Appeals heard this case to identify the "ultimate source of the power under which the respective prosecution[] [was] undertaken."[100]

The Ninth Circuit carefully analyzed the Supreme Court's decision in *Duro*, and summarized the Supreme Court's conclusion as being "that the

94. *See* 25 U.S.C. § 1301(2) (2000) (providing the definition of "powers of self-government").

95. *Id.*

96. *Id.* (emphasis added).

97. United States v. Enas, 255 F.3d 662, 665 (9th Cir. 2001).

98. *Id.*

99. *Id.*

100. *Id.* at 666 (quoting United States v. Wheeler, 435 U.S. 313, 320 (1978)).

tribes' inherent authority never included [the power to prosecute non-members.]"[101] The Ninth Circuit also added an aside from the American Indian Law Review: "Everyone assumes Congress could have created new law by delegating federal power to tribes to try nonmember Indians. . . . [But,] if the delegatee has no power in a particular area, the delegatee exercises the power of the person doing the delegation."[102] Though these two arguments appear straightforward, the Ninth Circuit framed the question at hand as to whether Congress had the authority to rewrite history.[103] Congress was sure to make clear in the legislative history of the ICRA amendments that these "amendments were not a congressional delegation of authority, but rather a recognition of power that always existed."[104]

The Ninth Circuit had previously examined this issue in *Means v. Northern Cheyenne Tribal Court*.[105] In *Means*, the court stated that Congress was without the authority to rewrite history in this fashion—Congress, intended the 1990 amendments "to 'legislatively overrule' the Supreme Court's decision."[106] But, Congress could not do so:

> While the legislative history of [the 1990 amendments] suggests that Congress did not intend to delegate . . . to the tribes [the authority to prosecute nonmember Indians], that is essentially the amendments' effect. While Congress is always free to amend laws it believes the Supreme Court has misinterpreted, it cannot somehow erase the fact that the Court did interpret the prior law. In other words, once the Supreme Court has ruled that the law is "X," Congress can come back and say, "no, the law is 'Y,'" but it cannot say that the law was never "X" or always "Y." . . . Thus, regardless of Congress' intent to declare that tribes always had the

101. *Id.* at 668.

102. *Id.* at 667 (quoting Nell Jessup Newton, *Permanent Legislation to Correct* Duro v. Reina, 17 AM. INDIAN L. REV. 109, 112 (1992)).

103. *Enas*, 255 F.3d at 670; *see also* United States v. Weaselhead, 156 F 3d 818, 823 (8th Cir. 1998). "[W]e are presented with a legislative enactment purporting to recast history in a manner that alters the Supreme Court's stated understanding of the organizing principles by which the Indian tribes were incorporated into our constitutional system of government." *Id.*

104. *Enas*, 255 F.3d at 669. *See, e.g.*, 137 CONG. REC. H2988-02 (daily ed. May 14, 1991) (statement of Rep. Miller) ("This bill recognizes an inherent tribal right which always existed. It is not a delegation of authority but an affirmation that tribes retain all rights not expressly taken away.) It is plain that Congress wanted to make clear that the tribes had jurisdiction over nonmembers. *Id.* However, Congress also wanted to allow separate prosecutions of the same persons for the same acts, and it knew it could not do so if that authority was a delegation of power to the tribes from itself. *Id.*

105. 154 F.3d 941, 946 (9th Cir. 1998) (internal citations omitted) (emphasis omitted).

106. *Means*, 154 F.3d at 946.

> inherent authority to try nonmember Indians, that simply cannot be what the amendments accomplished.[107]

With these arguments in hand, it appeared that the Ninth Circuit would adopt the logical premises of *Means* and *Duro* and rule that the Indian tribes did not have inherent sovereignty over nonmembers, and therefore the new power was a delegation of congressional authority. That did not happen.[108]

The Ninth Circuit stated that *Duro* was based on federal common law,[109] and did not rest on any constitutional principles.[110] As such, the court of appeals held that Congress is the final arbiter of federal common law, and Congress's power in that realm is supreme.[111] Though the Ninth Circuit permitted Congress's revised history, it did not place much credence in its own arguments.[112] Additionally, *Means* is overruled only in a footnote, and only partially.[113] Therefore the Ninth Circuit rejected the holdings of *Duro* and *Means*, but noted, "[w]ere this an issue of constitutional history, the outcome would be different."[114] As the *Enas* court was unwilling to go that far, Congress's new and reinterpreted history of Indian sovereignty became the law of the land in the Ninth Circuit.

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107. *Id.*

108. *See generally Enas*, 255 F.3d at 675.

109. Federal common law is court made law that is neither constitutional nor statutory. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 349 (3d ed., 1999).

110. *Enas*, 255 F.3d at 674.

> It would be disingenuous to suggest that this question presents a simple answer. On the contrary, "history" falls outside of the usual litany of authorities controlled by designated branches of government. It is neither "constitution" nor "statute," and can only roughly be labeled "federal common law." This rough fit is, however, the best one.

Id.

111. *Id.* at 675.

112. *See id.* at 675. The Ninth Circuit devoted less than one page of its analysis to the issue of federal common law and Congressional authority. The entire discussion of federal common law and the role of Congress is confined to a single paragraph that ultimately decides the case. The issue that arose in *Duro* and *Means*, whether equal protection guarantees are violated when a nonmember is subjected to tribal jurisdiction, was not raised. *Id.* at 675 n.8. In its final footnote the Ninth Circuit makes clear that this issue was not raised in the present case, and the outcome might have been different if it had. *Id.*

113. *Id.* (overruling *Means* only to the extent that it held that Congress did not have the authority to reinterpret federal common law).

114. *Id.* at 675 (noting that Congress does not have the authority to "override a constitutional decision by simply rewriting the history upon which it is based").

B. *UNITED STATES V. LARA*—THE EIGHTH CIRCUIT'S RULING THAT HISTORY CANNOT BE REWRITTEN

Following the decision in *Enas*, the Eighth Circuit Court of Appeals examined a nearly identical set of facts and yielded a different outcome.[115] The Eighth Circuit reviewed the holdings of *Oliphant, Wheeler, Duro*, and *Montana v. United States*[116] and quickly framed the issue similar to the Ninth Circuit, as to whether the tribal court "exercised sovereign authority emanating from a sovereign source distinct from that of the overriding federal sovereign."[117] The Eighth Circuit also noted that in response to *Duro*, Congress had amended the ICRA to its current broad definition.[118] Whereas the Ninth Circuit permitted Congress to rewrite history to suit its legislative needs, the Eighth Circuit did not. The Eighth Circuit held that *Duro* was a constitutional decision:

> With all due respect to the holding in *Enas*, we conclude that the distinction between a tribe's inherent and delegated powers is of constitutional magnitude and therefore is a matter ultimately entrusted to the Supreme Court. Absent a delegation from Congress, a tribe's powers are those "inherent powers of a limited sovereignty which has never been extinguished." Once the federal sovereign divests a tribe of a particular power, it is no longer an inherent power and it may only be restored by delegation of Congress's power.[119]

The Eighth Circuit noted that Congress's power over Indian affairs is derived from and limited by the Constitution.[120] Then, the Eighth Circuit did what the Ninth Circuit had decided against, and declared that *Duro*'s

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115. *See* United States v. Lara, 324 F.3d 635, 636-37 (8th Cir. 2003) (en banc). The defendant struck a Bureau of Indian Affairs officer while being arrested on the Spirit Lake Nation Reservation of which he was not a member. *Id.* at 636. He plead guilty to tribal code violations that included violence to a policeman. *Id.* The defendant was also indicted for assault on a federal officer and argued against that indictment on the basis of the Double Jeopardy Clause. *Id.*

116. In *Montana v. United States*, the Supreme Court again emphasized the distinction between the sovereignty of a tribe over members versus nonmembers, and that all tribal sovereignty over external relations, i.e., nonmembers, had been necessarily divested from the tribes. 450 U.S. 544, 563-64 (1981) (citing United States v. Wheeler, 435 U.S. 313, 326 (1978)).

117. *Montana,* 450 U.S. at 637.

118. *Id.* at 638. The Eighth Circuit noted that the Supreme Court, after the ICRA amendments, had "repeatedly reaffirmed its holding limiting tribal sovereign authority to tribe members." *Id.*; *see, e.g.*, Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645, 649 (2001) (rejecting the imposition of a hotel occupancy tax on a nonmember owned hotel within the reservation owned in fee by nonmembers); Nevada v. Hicks, 533 U.S. 353, 359 (2001) (citing *Oliphant* for the general proposition that the inherent sovereign powers of a tribe do not extend beyond regulation of their members).

119. *Lara*, 324 F.3d at 639 (internal citations omitted).

120. *Id.*

decision regarding Indian sovereignty in the U.S. federal system of government was a decision for the courts, and that after *Montana*, "tribal sovereignty over nonmembers 'cannot survive without express congressional delegation,' and is therefore *not* inherent."[121]

The Eighth Circuit echoed the argument first put forth in *Means* and detailed fully in the Ninth Circuit's decision in *Enas*, that Congress cannot retroactively legislate a reversal of *Duro*. The Eighth Circuit did not declare the ICRA amendments to be null, but correctly noted that Congress has plenary powers in this field, and that "[i]t is apparent that Congress wished to allow tribes to exercise criminal misdemeanor jurisdiction over nonmember Indians."[122] However, the Eighth Circuit was not willing to concede this grant of power without cost, as the Ninth Circuit had. The Eighth Circuit declared that the Tribe exercised only that authority that had "*been delegated to it by Congress*."[123] Therefore, the subsequent federal prosecution of the defendant was barred by the Double Jeopardy Clause.[124]

The decision by the Eighth Circuit in *Lara* reached what logically appears to be the correct result, but the lack of support for its argument that *Duro* is a constitutional decision is troublesome. Perhaps the principal reason that the Supreme Court in *Lara* adopted the result in *Enas*, was this lack of constitutional foundation. This lack of constitutional support exists partly because the results in *Duro* and subsequent case law were clear on the issue that the power of tribes over nonmembers was not inherent and did not exist neither did it provide a greater depth of analysis.

III. *UNITED STATES V. LARA*—ALLOWING A RELAXATION OF A *PRIOR* RESTRICTION OVER TRIBAL AUTHORITY

A. MAJORITY OPINION BY JUSTICE BREYER

Justice Breyer framed the question as "whether Congress ha[d] the constitutional power to relax restrictions that the political branches ha[d] . . . placed on the exercise of a tribe's inherent legal authority."[125]

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121. *Id.* at 640 (internal citations omitted) (emphasis in original).

122. *Id.*

123. *Id.* (emphasis added).

124. *Id.* As a result of the Eighth Circuit's decision in *Lara*, the equal protection violation did not need to be argued. Under this result, the current racial classification that would be presented and allowed in the hypothetical situation presented in the Introduction to this article would be prohibited without more.

125. United States v. Lara, 541 U.S. 193, 196 (2004). This question could likewise be framed as follows without losing any significance in its practical application: Does Congress have the constitutional authority to re-grant powers to Tribes that have previously been eliminated or restricted by the federal government? The rephrased question is essentially the same in terms of

The Court referenced to *Wheeler* and *Duro* and then focused on the fact that Congress amended the ICRA shortly after *Duro* was decided.[126] The Court believed the amendment to the ICRA did "not purport to delegate the Federal Government's own *federal* power. Rather, [the amendment] enlarges the *tribes'* own 'powers of self-government' to include 'the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over *all* Indians,' including nonmembers."[127]

The Court, similar to the Eighth and Ninth Circuits, framed the question as whether the source of the tribes' power to punish nonmember Indians was inherent federal sovereignty or delegated federal authority.[128] The Court then noted that Congress probably intended for the latter.[129] The language of both the amended version of 25 U.S.C. § 1301(2) and its legislative history leave no doubt that Congress intended the tribe to have inherent tribal power over nonmember Indians.[130]

The Court put forth six arguments as to why the Constitution permits Congress to lift the restriction on the tribes' criminal jurisdiction over nonmember Indians. Thus, the Court is able to bypass the question of whether the source of tribal power in criminal matters is sovereign or delegated. The Court's arguments, in order, are the following: (1) the Constitution grants plenary powers to Congress to legislate in respect to Indian tribes;[131] (2) Congress has, with the Supreme Court's approval, interpreted the Constitution's "plenary" grant of power over Indian affairs as enabling it to enact legislation that restricts and relaxes restrictions on tribal sovereignty;[132] (3) "Congress' statutory goal—to modify the degree of autonomy enjoyed by a dependent sovereign that is not a State—is not an unusual legislative

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practical application, yet opposite to what Justice Breyer posited. This difference in construction is ultimately the dispositive issue in the case.

126. *Id.* at 197-98.

127. *Id.* at 198 (emphasis in original).

128. *Id.* at 199.

129. *Id.* Obviously both the Eighth and Ninth Circuits are in complete agreement. Were it otherwise there would have been absolutely no discussion of Congress's attempt to rewrite history through a legislative act.

130. *See supra* note 104; 25 U.S.C. § 1301(2) (2000). The statute's legislative history is a record of Senators and Representatives providing their intentions with the Act, stating that the "premise [of the legislation] is that the Congress affirms the *inherent jurisdiction of tribal governments*." 137 CONG. REC. S. 5223 (1991) (statement of Sen. Inouye) (emphasis added). The "statute is not a delegation of authority but an affirmation that tribes retain all rights not expressly taken away." 137 CONG. REC. at 10712-714 (statement of Rep. Miller, House manager of bill).

131. *Lara*, 541 U.S. at 203.

132. *Id.* at 202; *see* Government-to-Government Relations With Native American Tribal Governments, 59 Fed. Reg. 22,951, 22,951 (May 4, 1994). Congressional policy has ranged from favoring Indian removal, to assimilation, to the breaking-up of tribal lands, to the protection of the tribal land base. F. COHEN HANDBOOK OF FEDERAL INDIAN LAW 78-202 (1982) (detailing the progress of federal policy with native American tribal governments).

objective;"[133] (4) there is "no explicit language in the Constitution suggesting a limitation on Congress' institutional authority to *relax restrictions* on tribal sovereignty *previously imposed* by the political branches;"[134] (5) the change at issue is a limited one;[135] and, (6) the conclusion that Congress has the power to relax previously imposed restrictions is consistent with prior case law.[136]

Justice Breyer, writing for the 7-2 majority noted:

> True, the Court held in . . . [*Wheeler, Oliphant,* and *Duro*] that the power to prosecute nonmembers was an aspect of the tribes' external relations and hence part of the tribal sovereignty that was divested by treaties and by Congress. But these holdings reflect the Court's view of the tribes' retained sovereign status *as of the time* the Court made them. They did not set forth constitutional limits that prohibit Congress from changing the relevant legal circumstances, *i.e.*, from taking actions that modify or adjust the tribes' status.[137]

The *Lara* Court specifically noted that the *Duro* Court drew upon a variety of different sources in arriving at its holding.[138] The *Lara* Court "referred to historic practices, the views of experts, the experience of forerunners of modern tribal courts, and the published opinions of the Solicitor of the Department of the Interior."[139] The Court stated, however, that the decisions in *Wheeler*, *Oliphant*, and *Duro* were based on the inherent tribal authority as it existed at the time the Court made its decision, and that such authority was subject to change.[140]

The Court then stated that prior cases "simply did not consider whether a statute, like the present one, could constitutionally achieve the same end by removing restrictions on the tribes' inherent authority."[141] In this manner, the Court avoided the question of whether or not a "*relaxation of a restriction*" previously imposed upon a sovereign power is equivalent to a

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133. *Lara*, 541 U.S. at 203.

134. *Id.* at 204 (emphasis added).

135. *Id.* The Court noted that this change largely concerns a tribe's authority to control events that occur upon the tribe's own land. *Id.* However, this is precisely what the Court and Congress have disavowed with regard to non-Indians and nonmembers. *Lara*, therefore, effectively allows race-based territorial jurisdiction.

136. *Id.* at 205.

137. *Id.* (internal citations omitted) (emphasis in original).

138. *Id.* at 206.

139. *Id.* (citing Duro v. Reina, 495 U.S. 676, 689-92 (1990)).

140. *Id.* at 206-07.

141. *Id.* at 207.

new "*delegation*" to exercise that power.[142] The Court held that *Wheeler, Oliphant*, and *Duro* were not determinative because the amendment to the ICRA relaxed restrictions which changed the calculus of what inherent sovereignty tribes possessed.[143] "And that fact makes all the difference."[144]

B. JUSTICE KENNEDY'S CONCURRENCE LIMITED TO THE FACTS AT HAND

The crux of Justice Kennedy's concurrence was that "Congress was careful to rely on the theory of inherent sovereignty, and not on a delegation. [The dissent's] position that it was a delegation nonetheless, . . . is by no means without support, but I would take Congress at its word. . . . That is all we need say to resolve this case."[145] However, Justice Kennedy went on to note that "[i]t is a most troubling proposition to say that Congress can relax the restrictions on inherent tribal sovereignty in a way that extends that sovereignty beyond those historical limits."[146] Essentially, Congress did that with the 2000 revision to the ICRA.

Again, Justice Kennedy noted the language being employed in the Court's opinion, and stated that "[t]he Court resolves, *or perhaps avoids*, the basic question of the power of the Government to yield authority inside the domestic borders . . . by using the *euphemistic* formulation that in amending the ICRA Congress merely relaxed restrictions on the tribes."[147] For all intents and purposes, thus far Justice Kennedy's concurrence reads much more like a dissenting opinion.[148] Justice Kennedy concluded that if the defendant truly wanted to challenge Congress's actions in this case, the

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142. *Id.* The Court, in passing on the question, noted that "we do not read any of the . . . [specific cases referring to the need to obtain a congressional statute that *"delegated"* power to the tribes] as holding that the Constitution forbids Congress to change 'judicially made' federal Indian law through this kind of legislation." *Id.* By construing the amendment as a "change" rather than specifically a delegation of new authority or a relaxation of a prior restraint, the Court is able to proceed without more.

143. *Id.*

144. *Id.* Unlike *Enas*, the defendant in *Lara* did raise the equal protection claim. *Id.* at 209. However, the Court stated that such a claim is irrelevant to the double jeopardy claim at hand, and refused to address it. *Id.*

145. *Id.* at 211. It is perhaps somewhat surprising that Justice Kennedy would be the one to make this statement as he was the author of the opinion that caused Congress to further amend the ICRA. *See* Duro v. Reina, 495 U.S. 676, 679 (1990).

146. *Lara*, 541 U.S. at 212.

147. *Id.* at 213 (emphasis added).

148. *Id.* at 211. Justice Kennedy notes "[t]he Court's holding is on a point of major significance to our understanding and interpretation of the Constitution; and, in my respectful view, it is most doubtful." *Id.* Justice Kennedy also stated that he is clearly aware of what Congress was attempting and noted "it should not be doubted that what Congress has attempted to do is subject American citizens to the authority of an extraconstitutional sovereign to which they had not previously been subject." *Id.* at 213.

proper place would have been in tribal court.[149] By the time the second proceeding was brought by the federal government, "*whether legitimate or not*," the rationale behind the tribal court's actions was inherent sovereignty, and therefore there is no violation of the Double Jeopardy Clause.[150]

Justice Kennedy provided some insight of what may come if a similar case were to be challenged at an earlier stage. An uncomfortable Justice Kennedy noted that the decision of the Court rests upon the phrasing of Congress's grant of power, and he noted that the Court is "*trying to evade the important structural question by relying on the verbal formula of relaxation*."[151] Though Justice Kennedy formally concurred in *Lara*, his opinion and analysis suggest that future challengers to the ICRA amendments may reach a different outcome.

C. JUSTICE THOMAS'S CONCURRENCE

Justice Thomas wrote separately to specifically comment on the Court's "inadequate constitutional analysis."[152] Justice Thomas did not agree that Congress had the authority to revise the limits on Indian sovereignty whenever it saw fit.[153] In his concurrence, Justice Thomas noted a problem in Supreme Court case law that has been stated often and never resolved, "[i]n my view, the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously."[154]

Justice Thomas took a strong position on the Court's theory of Indian sovereignty, and stated that a sovereign is an entity "in which independent and supreme authority is vested."[155] He further noted that such a statement is logically at complete odds with Congress's plenary powers over the tribes.[156] However, as those are exactly the two positions espoused by the United States, "this confusion continues to infuse federal Indian law and

149. *Id.* at 214. "The proper occasion to test the legitimacy of the Tribe's authority, that is, whether Congress had the power to do what it sought to do, was in the first, tribal proceeding." *Id.*

150. *Id.*

151. *Id.* at 213.

152. *Id.* at 215.

153. *Id.* Justice Thomas noted that there are two largely incompatible assumptions at play in all of the Supreme Court's decisions regarding the Indians tribes, resulting in many poorly written opinions: (1) "Congress . . . can regulate virtually every aspect of the tribes without rendering tribal sovereignty a nullity;" and (2) "the Indian tribes retain inherent sovereignty to enforce their criminal laws against their own members." *Id.* at 214-15 (internal citations omitted).

154. *Id.* at 215.

155. *Id.* at 218 (quoting BLACK'S LAW DICTIONARY 1395 (6th ed. 1990)).

156. *Id.* "It is quite arguable the essence of sovereignty not to exist merely at the whim of an external government." *Id.*

[the Court's] cases."[157] Justice Thomas then followed Justice Kennedy's concurrence and concluded that both the Executive Branch and the Legislative Branch believe that the tribes possess inherent authority to prosecute nonmember Indians.[158]

> In my view these authoritative pronouncements of the political branches make clear that the exercise of this aspect of sovereignty is not inconsistent with federal policy and therefore with the position of the tribes. Thus, while *Duro* may have been a correct federal-common-law decision at the time, the political branches have subsequently made clear that the tribes' exercise of criminal jurisdiction against nonmember Indians is consistent with federal policy. The potential conflicts on which *Duro* must have been premised, *according to the political branches, do not exist*.[159]

Although Justice Thomas expressed strong reservations regarding the opinion of the Court, he concluded that the alternative espoused by Justice Souter was also logically untenable.[160] Justice Thomas, struck by the fact that both Justice Souter and the Eighth Circuit concluded that the decision in *Duro* had constitutional underpinnings, would not adopt their reasoning. He was unwilling to reach the conclusion that prior federal common law decisions limiting tribes authority to exercise their inherent sovereignty be construed as a constitutional holding that Congress could not alter.[161]

Yet, similar to Justice Kennedy, Justice Thomas offers a glimpse of the possibility of change.[162] He challenged the Court to admit that it was

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157. *Id.* at 219.

158. *Id.* at 222.

159. *Id.* at 222-23 (emphasis added).

160. *Id.* at 223-24.

161. *Id.* Justice Thomas found equally troubling the fact that the opinion of the Court did not find any provision of the Constitution that would grant to Congress the authority to alter tribal sovereignty. *Id.* at 224. Justice Thomas did not agree that the Indian Commerce Clause provides plenary powers for Congress to legislate Indian affairs at their whim. *Id.*

162. *Id.* at 215-16. Justice Thomas began his concurrence by noting the conflicting precedent in the area of tribal sovereignty and constitutional law, and stated:

> I write separately principally because the Court fails to confront these tensions, a result that flows from the Court's inadequate constitutional analysis. I cannot agree with the Court, for instance, that the Constitution grants to Congress plenary power to calibrate the "metes and bounds of tribal sovereignty." Unlike the Court, I cannot locate such congressional authority in the Treaty Clause, U.S. Const., Art. II, § 2, cl. 2, or the Indian Commerce Clause, Art. I, § 8, cl. 3.

Id. at 215 (internal citations omitted). Justice Thomas later stated "I believe that we must examine more critically our tribal sovereignty case law. Both the Court and the dissent, however, compound the confusion by failing to undertake the necessary rigorous constitutional analysis." *Id.* at 223.

unable to find a source of Congress's power to alter Indian tribal sovereignty.[163] Such an admission

> might allow the Court to ask the logically antecedent question *whether* Congress (as opposed to the President) had this power. . . . *We might find that the Federal Government cannot regulate the tribes through ordinary domestic legislation and simultaneously maintain that the tribes are sovereigns in any meaningful sense*. But until we begin to analyze these questions honestly and rigorously, the confusion that I have identified will continue to haunt our cases.[164]

The tone of Justice Thomas's and Justice Kennedy's concurrences ring hollow as being concurrences in name alone. They appear more as concurrences based on the precise facts of this case. As a result of *Lara*, there remains a glaring hole in federal Indian case law which could have been cured while avoiding any issues of the constitutionality of prior federal common law as noted below.[165]

D. JUSTICE SOUTER'S DISSENT

Justice Souter's dissent, joined by Justice Scalia, argued that the decision of the Eighth Circuit should be affirmed. The dissent's argument attempts to logically compel the conclusion the Eighth Circuit reached.[166] Justice Souter noted that the holding in *Duro* was that "because tribes have lost their inherent criminal jurisdiction over nonmember Indians, any subsequent exercise of such jurisdiction '*could only have come to the Tribe*' (if at all) '*by delegation from Congress*.'"[167] Precedent clearly indicates that tribal criminal jurisdiction over nonmembers absolutely rests on a delegation of federal power, not a relaxation of a prior restraint on inherent power.

Justice Souter then tried to make clear that the prior case law, deciding questions of dependent sovereignty, criminal jurisdiction, and the Double Jeopardy Clause, was "constitutional in nature."[168] The basic question of

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163. *Id.* at 224. "The Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty." *Id.*

164. *Id.* at 226 (emphasis added).

165. *See infra* Part IV, pp. 31-38.

166. United States v. Lara, 541 U.S. 193, 231 (2004).

167. *Id.* at 227. Three years after *Duro*, in *South Dakota v. Bourland*, the Court clarified that "any such 'delegation' would not be a restoration of prior inherent sovereignty; . . . 'tribal sovereignty over nonmembers cannot survive without express congressional delegation, and is therefore *not* inherent.'" *Id.* at 227 (quoting South Dakota v. Bourland, 508 U.S. 679, 695 (1993)). *Bourland* was a civil case regarding the regulation of hunting and fishing by non-Indians. *Bourland*, 508 U.S. at 681-82.

168. *Lara*, 541 U.S. at 228-29.

whether a criminal prosecution was a delegation of federal power "turns on just this question of how far a prosecuting entity's inherent jurisdiction extends."[169] According to Justice Souter, to answer that question, the Court needed to undertake a constitutional analysis of whether or not an entity is an independent or dependent sovereign, which it failed to do.[170] "Thus, our application of the doctrines of independent and dependent sovereignty to Indian tribes in response to a double jeopardy claim must itself have had constitutional status."[171]

The most troublesome aspect of the argument pertaining to the constitutional status of prior cases regarding the sovereignty of Indian tribes, similar to the Eighth Circuit's conclusion, is that it does not rest on any specific clause of the Constitution. Essentially, the holding of the Court was that Congress, as the ultimate arbiter of federal common law, has the power to amend it.[172] In *Lara*, at both the Eight Circuit and the Supreme Court level, the reasoning that espoused a constitutional underpinning for its decision was flawed. Even so, the theory behind those constitutional arguments, that only law, not history may be amended is sound, and fits with the facts of the case and prior precedent. Justice Souter's analysis deals with the two weakest aspects of the majority opinion in that the result provided by Justice Souter is both rational (i.e., it would not allow for the seemingly "unfair" result presented in the hypothetical) and does not give credence to revisionist history. Further, Justice Souter states that this federal delegation of authority will fill any jurisdictional gap that may have been present, as the government argued, when *Duro* was decided.[173]

Many would argue that such a conclusion is nothing more than looking at the ends desired and then justifying the means by which they are obtained. Even so, the Supreme Court in *Duro* supported this conclusion.[174]

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169. *Id.* at 229 (citing Grafton v. United States, 206 U.S. 333, 354-55 (1907)).

170. *Id.* at 229.

> When we inquire "whether the two [prosecuting] entities draw their authority to punish the offender from distinct sources of power," . . . we are undertaking a constitutional analysis based on legal categories of constitutional dimension (*i. e.* [sic], is this entity an independent or dependent sovereign?). Thus, our application of the doctrines of independent and dependent sovereignty to Indian tribes in response to a double jeopardy claim must itself have had constitutional status.

Id. (quoting Heath v. Alabama, 474 U.S. 82, 88 (1985)). Justice Souter also stated his fear that the legacy of *Lara* would cause further confusion in an area of case law already lacking in clarity due to the Court's "failure to stand by what . . . [it has] previously said reveals that [its] conceptualizations of sovereignty and dependent sovereignty are largely rhetorical." *Id.* at 230.

171. *Id.* at 229.

172. *Id.* at 199-210 (explaining the Court's reasoning).

173. *Id.* at 223-30.

174. *See* Duro v. Reina, 495 U.S. 676, 697-98 (1990).

The validity of the decision was only questioned when Congress attempted to reinterpret its policies regarding the sovereignty of the Indian tribes.

IV. CONCLUSIONS AND PROPOSALS FOR A POSSIBLE SOLUTION

As noted above, there are several problems in both the majority's and dissent's conclusion and analysis. Principally, when does the relaxation of powers, to the point of actually increasing prior powers, amount to delegation? According to the Court's opinion in *Lara*, never. The conclusion that it compels is that Congress could, tomorrow, amend 25 U.S.C. § 1301(2) to state that Indian tribes never had inherent sovereignty to try nonmember Indians. Though the declaration would again reverse the "history" of tribal sovereignty, according to *Lara*, that would be a legitimate exercise of congressional power.

With the strength and recentness of past precedent that had held that any change in the inherent status of tribal sovereignty would necessarily be a delegation of power, it is remarkable to follow the Court's reasoning in reaching its conclusions in *Lara*. Further, there are racial undertones in a decision such as this one, even though no racial animosity was intended.[175] The Court's decision ultimately leads to the deeper questions of who is an Indian and who deserves to be subject to additional prosecution for equivalent conduct as a result of that classification. There does not appear to be any public policy in favor of granting Indian tribes criminal jurisdiction over nonmember Indians. There are two policy arguments that are generally put forth: (1) such power will increase the strength of tribal sovereignty; and (2) it will fill a jurisdictional void that left when *Duro* prohibited tribal criminal jurisdiction over misdemeanors committed on the reservation by nonmember Indians.

A relaxation on the restraints on tribal sovereignty does appear to increase tribes' inherent jurisdiction.[176] In fact, as *Lara* is written, Congress can further expand on the tribes' inherent jurisdiction and still characterize it as a relaxation. Therefore, due to this relaxation of a prior restriction, the

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175. The distinction between an Indian and non-Indian is essentially a racial classification. The decision in *Lara* reinforces the importance of race as the dispositive factor in a line of case law that has long suffered from racial bias. *See* Fletcher, *supra* note 14, at 674 (noting that no discussion of the foundation of constitutional law is complete "without a full reckoning of the racism inherent in the holdings or the racism of the reasoning behind the holdings"). *See also* Cherokee Nation v. Georgia, 30 U.S. 1, 14 (1831) (Johnson, J., concurring) ("I cannot but think that there are strong reasons for doubting the applicability of the epithet '*state*,' to a people so low in the grade of organized society as our Indian tribes most generally are.") (emphasis added).

176. Ipso facto, by removing a limitation on the scope of tribal jurisdiction, the reach of that jurisdiction has been increased. *See* Washburn, *supra* note 29, at 807, n.158 (recognizing Congress's authority to relax prior restrictions on the scope of tribal jurisdiction).

Indian tribes were indeed granted increased sovereignty. The question of why *Lara* is wrongly decided is answered in part by analyzing who bears the cost of this increased sovereignty. The federal government is not ceding any authority by allowing the tribes an increased scope of sovereignty, nor is any of the states. The true bearer of cost of this increased sovereignty happens to be any person who subjected to the jurisdiction of an Indian tribe who will, solely because of his or her race, face dual prosecution. In the initial hypothetical scenario, the Cherokee and the non-Indian deserve equal punishment as none has a greater degree of culpability. But that will not be the outcome. Understandably, the Oglala member, being a part of the tribal community, is subject to its jurisdiction. The Cherokee member, like the non-Indian, is not a member of that community, however, since Congress has, as Justice Kennedy noted, affirmatively decided to treat all Indians as "fungible groups of homogenous persons," the Cherokee member will face dual prosecution.[177]

The second policy argument, that granting Indian tribes criminal jurisdiction over nonmembers will fill the jurisdictional void left by *Duro*, lacks merit. Congress is free to fill this jurisdictional void by granting such power directly to the tribes. However, once that power is delegated to the tribes, it must be treated as a delegation, and any subsequent federal prosecution would be barred by the Double Jeopardy Clause.

There are at least three potential solutions, unlikely as they may be, to resolve the existing confusion in tribal sovereignty case law presented by *Lara*. The first would be to further expand the scope of tribal jurisdiction to recognize the fact that tribal governments and legal systems have advanced greatly and provide competent legal systems. A second possible, though equally unlikely, solution would be for Congress to amend the ICRA and explicitly state that the amendment is to be construed as a delegation of new authority. The final potential solution, which is also the cleanest, easiest to implement, but most unlikely, would be for the Supreme Court to accept another case similar to *Lara* and overrule itself on the basis that history cannot be amended.

A. TERRITORIAL JURISDICTION FOR INDIAN TRIBAL COURTS

If the quality of the tribal court system and processes were proven to be fair, efficient and effective, territorial jurisdiction could be granted to the tribal courts for all misdemeanors committed on their territory by both Indians and non-Indians. This approach could offend non-Indians who do

177. *See supra* note 89 and accompanying text.

not look favorably upon Indians being granted the authority to try non-Indians for a criminal offense, and it could also offend those who believe that the tribal court systems are too lenient in their sentencing. Indeed, tribal courts lack the authority to hand out sentences greater than the maximum currently imposed, which is one year of incarceration, a fine of $5000, or both.[178] Congress sets the maximum which may be modified at any time. The present limits represent an upward increase from the prior limits of imprisonment of six months, or a fine of $500 or both.[179]

The other primary argument against such an expanse of jurisdiction, essentially, that non-Indians should not be tried by Indian tribal courts, is functionally and socially different. Though all tribes could certainly do as the tribes did in *Oliphant* and post notices that all entering the territory are subject to their jurisdiction and thereby provide notice of the fact that the tribes are claiming jurisdiction, the essential objection presented by those non-Indians who do not wish to face tribal court jurisdiction remains the same—they refuse to submit to an entity which they do not perceive as a separate sovereign.

Even though the risk of a sovereign exercising jurisdiction over an individual by virtue of presence in that territory is, after all, the same risk one runs by driving through a neighboring state,[180] and even though tribal courts grant procedural protections which are subject to judicial challenge if insufficient, the fundamental social basis that exists for resisting such a change is likely to impede any such modification. Regardless of the strength of any such biases, the fact remains that contact-based jurisdiction in the Indian tribes' territories would present the fairest and simplest solution to the current state of the law under *Lara*.

B. DELEGATED AUTHORITY RESULTING IN SINGLE PROSECUTIONS WITH EQUAL PENALTIES

A second, equally unlikely, alternative is for Congress to again amend the ICRA to state that the prior amendment to the Act was a delegation and not a relaxation of a prior restraint. As Congress presented testimony, however self-serving, specifically on this issue, it is unlikely that it will revisit

178. 25 U.S.C. § 1302(7) (2007).

179. 25 U.S.C. § 1302 (2007).

180. *See* Burham v. Sup. Ct. of California, 495 U.S. 604, 610 (1990) (reaffirming the precedent that "[a]mong the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State").

the issue.[181] Nevertheless, Congress should revisit the issue because the holding in *Lara* provides that any future grant of power will be held to be a relaxation of a prior restraint is illogical and will yield future litigation and case law on the subject matter. It is imperative for both the Congress and the courts to speak with one voice on this issue to avoid further confusion and expense.

Significantly, Congress should declare that the authority over nonmember Indians was indeed a delegation of powers. As a consequence, little would be lost in the arena of criminal jurisdiction and law enforcement on the reservation. Furthermore, a racial inequity based on whether or not one is classified as an Indian would be solved. Fears of the severity or fairness of sentences could be allayed if Congress would set sentencing guidelines for tribal courts. By amending § 1301(2) in this way, the result in the hypothetical presented in Part I would be that the non-Indian and Cherokee member would be tried in separate forums due to the ICRA's classification based on Indian status, but with similar penalties under a sentencing guideline structure that would equate with their degree of culpability. The Oglala member, as a result of his membership in the tribe, would rightly be the only individual required to face two separate trials under the theory of dual sovereignty.

The result, though imperfect due to a continued lumped classification of Indians, is better than the current situation under *Lara*. At the very least, the Oglala member is tried by his peers in a system he understands, in front of a court system that is not foreign to him. There is not the sense of injustice in the Oglala member being tried twice, due to his membership in the tribe, as there would be in the Cherokee member being tried twice solely on the basis of being congressionally classified as an Indian.

The crux of the matter, and the reason the hypothetical stirs emotion, is the notion of fairness and also the idea that a jury of peers shall try an

181. United States v. Lara, 541 U.S. 193, 199 (2004) ("The Committee of the Conference notes that . . . this legislation is not a delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations." (citing *e.g.*, H.R. REP. NO. 102-261, at 3-4 (1991) (Conf. Rep.)); *accord* H.R. REP. NO. 102-61, at 7 (1991); *see also* S. REP. NO. 102-168, at 4 (1991) ("[R]ecogniz[ing] and reaffirm[ing] the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians."); 137 CONG. REC. 9445, 9446 (1991) (remarks of Sen. Inouye) ("[The] premise [of the legislation] is that the Congress affirms the *inherent* jurisdiction of tribal governments over nonmember Indians.") (emphasis added); *Id.* at 10,712-10,714 (remarks of Rep. Miller, House manager of the bill) (the statute "is not a delegation of authority but an affirmation that tribes retain all rights not expressly taken away" and the bill "recognizes an inherent tribal right which always existed"); *Id.* at 10,713 (remarks of Rep. Richardson, a sponsor of the amendment) ("[The] legislation . . . reaffirms Indian tribes' criminal misdemeanor jurisdiction over nonmember Indians. . . .").

accused.[182] By trying a Cherokee member due to his Indian heritage in the Oglala system, both the notions of fairness and of a jury trial by peers are violated. This result should not be the desired outcome of the amendment to the ICRA, and for these reasons alone the Act should be amended.

C. CONSTITUTIONAL IMPLICATIONS — WHERE DO WE GO FROM HERE?

Assuming, arguendo, that *Oliphant*, *Wheeler*, and *Duro* were decided as federal common law cases, does that necessarily dictate the outcome in *Lara*? The answer must be no. As the Court noted, the context of federal common law is different from both statutory and constitutional interpretation. In this case, 25 U.S.C. § 1301 is important to the decision of the case, but what the decision ultimately turns on is history.[183] As the *Lara* decision turns on history, and the Supreme Court passed once on the argument, the opportunity to implement the final alternative solution may have already passed.

The Court had it right when it said that Congress can change the federal common law regulating tribal sovereignty,[184] but it should only be able to change it *in most cases*. Congress should be able to fix the result in *Duro* to permit tribal criminal jurisdiction over nonmember Indians, though it should properly be classified as a delegation. It should be recognized, though, that Congress does *not* have the power to change history, as it was allowed to do in *Lara*.[185]

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182. U.S. CONST. amend VI ("[T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."). Though the constitutional protection of a trial by a jury of one's peers is not present in the Constitution, the idea has been ingrained in the lexicon of United States legal opinions. *See, e.g.*, *In re* Tiffany Green, No. 96-022, 1996 WL 660949, at *1 (E.D.P.A., Nov. 15, 1996) ("The right to a trial by jury of one's peers is one of the cornerstones of the American judicial system. It is a birthright cherished by generations of American citizens."); Duncan v. Louisiana, 391 U.S. 145, 156 (1968) ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt, or overzealous prosecutor and against the compliant, biased, or eccentric judge.").

183. *See supra* note 107 and accompanying text; *see also supra* Part II.B (noting that the Eighth Circuit in *Lara* refused to allow Congress to amend *history* rather than federal common law). Ultimately, the Supreme Court decided that Congress, having the authority to amend federal common law, had the authority to do so in a manner that allows them to state that the former law never was as it was. *See Lara*, 541 U.S. at 206-07. "[W]e do not read any of these cases as holding that the Constitution forbids Congress to change 'judicially made' federal Indian law through . . . [the amendment to the ICRA]." *Id.* at 207.

184. *Lara*, 541 U.S. at 206-07. The Court recognized in the past that the Supreme Court had decided cases based on several sources of authority, including specifically, congressional legislation. *Id.* at 206. "And that source was subject to change." *Id.*

185. *Id.*

The Court did not need to base the holdings in past tribal authority cases on the Constitution, which was a major weakness in the argument of both the Eighth Circuit, en banc, and Justice Souter.[186] Past cases did not need to be read as immutable constitutional decisions for *Lara* to be decided differently. Perhaps the easiest solution, and one which may not be unavailable, would have been for the Court to hold that history cannot be revised to meet the current desires of Congress. As stated above, Congress should have the authority in dealing with the federal common law to say that the law is X, but it should be logically restrained from having the authority to say that it was never Y.[187]

Basing prior case law on history eliminates the need for the Court to classify Congress's action as a relaxation of prior restraint instead of a new delegation of authority. The Court would still have been able to conclude that Congress is the ultimate authority over federal common law, and the Court would still have been able to conclude that Congress has plenary power over the Indian tribes. Instead, the Court leaves us with the decision in *Lara* and the certainty that, since almost no uncertainty has been resolved, we will be seeing similar cases in the future that continue to struggle with the attempt to balance the sovereignty and dependence of a people whose authority exists only at the whim of a separate sovereign.

186. *See id*. at 226-31; United States v. Lara, 324 F.3d 635, 637 (8th Cir. 2003) (en banc).
187. *See supra* note 107 and accompanying text.