

NOTE

RESERVATIONS ON TRIBAL SOVEREIGNTY: HOW *UNITED STATES V. LARA* WILL AFFECT INDIANS, TRIBES, AND THE FIGHT TO REGAIN INDEPENDENCE*

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I. INTRODUCTION

“Federal Indian Law is a struggle to fabricate a legal regime in the context of a text-based constitutional discourse when textual dictates are absent. . . . Constitutional text is not at work, but constitutional principles are, and those principles are not fixed but evolving.”¹

As the preceding observation suggests, the dynamic nature of federal Indian law provokes several questions relating to the complicated relationship between the federal government and Indian tribes. How are the tribes and their people to understand their place within the United States and its promise of opportunity? Are they part of the United States, or kept separate—in place and time? From a practical standpoint, who controls what happens on the reservations? When things go wrong, do the tribes handle everything themselves? Should the federal government step in? The states? Who should answer these questions?

The Supreme Court has struggled with these and other pressing questions of tribal sovereignty since its inception,² and recently attempted to provide answers in *United States v. Lara*.³ In *Lara*, the Court decided whether the federal government could prosecute a nonmember Indian⁴ who had already pleaded guilty in tribal court and served a short jail sentence in tribal jail for the same offense.⁵ Lara argued that his first conviction barred any subsequent proceedings for the same offense due to the U.S. Constitution’s Double Jeopardy Clause.⁶ However, the Supreme Court held that the Double Jeopardy Clause did not bar Lara’s federal prosecution because the dual sovereignty exception

1. Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and the Methods of Marbury v. Madison to Tribal Courts’ Criminal Jurisdiction*, 36 ARIZ. ST. L.J. 77, 130 (2004).

2. See *infra* Part III.A (discussing the role the Court has played in defining limits on tribal sovereignty throughout the years).

3. *United States v. Lara*, 124 S. Ct. 1628 (2004).

4. For purposes of this Note, the term “nonmember Indian” refers to someone of Native American ancestry who is not a member of the prosecuting tribe.

5. *Lara*, 124 S. Ct. at 1631.

6. *Id.*; U.S. CONST. amend. V (stating that the government may not subject any person “for the same offence to be twice put in jeopardy of life or limb”).

permitted both the tribal and federal governments, as separate sovereigns, to prosecute Lara.⁷

The implications of the Court's decision are potentially far-reaching. This Note will examine the effects *Lara* is likely to have on Native Americans, their tribes, and the fight to regain tribal sovereignty in the United States. The discussion begins in Part II by examining the factual background and procedural history of *Lara*, and follows with an examination of the Court's decision. Part III analyzes the implications of the Court's decision, beginning with a brief history of tribal sovereignty and then providing a short discussion of the Double Jeopardy Clause and its role in the *Lara* decision. This Note then examines both the positive and negative effects of *Lara*: (1) *Lara* will benefit tribes by providing them greater tribal enforcement for crimes occurring on reservations, (2) *Lara* will promote a step, albeit a small one, toward greater tribal sovereignty, and (3) *Lara* may adversely affect the equal protection and due process rights of Indians arrested on tribal lands, an issue that may soon come before the Roberts Court. This Note concludes by asserting that *Lara* represents significant progress in the federal government's recognition of tribal sovereignty.

The *Lara* decision will likely produce many results in federal Indian jurisprudence. While the duration and scope of its effects are yet to be determined, *Lara* and similar cases "are signs of hope in a world currently shaken by the capacity of the American government to exercise power rather than use law."⁸ While *Lara* is not the end of the discussion, it does appear to be a move toward increased tribal sovereignty.

II. *UNITED STATES V. LARA*

A. *Background*

On June 13, 2001, Bureau of Indian Affairs (BIA) police officers arrested Billy Jo Lara for public intoxication on the Spirit Lake Nation Reservation in North Dakota.⁹ Lara, a member of the Turtle Mountain Band of Chippewa Indians, lived with his wife, a member of the Spirit Lake Nation, and

7. *Lara*, 124 S. Ct. at 1639.

8. Resnik, *supra* note 1, at 133.

9. *United States v. Lara*, 324 F.3d 635, 636 (8th Cir. 2003) (en banc), *rev'd*, 124 S. Ct. 1628 (2004).

their children on the Spirit Lake reservation.¹⁰ After several reported incidents of misconduct, the Spirit Lake Nation prohibited Lara from entering the reservation; his violation of this prohibition led to the arrest at issue in this case.¹¹ During the arrest, Lara struck one of the BIA officers, and as a result, the Spirit Lake Tribe charged Lara with violence to a policeman in the Spirit Lake Tribal Court.¹² He pleaded guilty and served ninety days in tribal jail.¹³

On August 29, 2001, a federal grand jury indicted Lara for assault on a federal officer in violation of 18 U.S.C. § 111(a)(1).¹⁴ At the district court, Lara moved to dismiss the indictment on double jeopardy grounds, and his motion was denied.¹⁵ Lara then entered a conditional guilty plea and sought appellate review of his motion to dismiss.¹⁶

A panel of the Court of Appeals for the Eighth Circuit affirmed the denial of Lara's motion to dismiss, holding that the district court did not violate the Double Jeopardy Clause because the Spirit Lake Nation had the inherent sovereign power, rather than a congressionally delegated power, to prosecute Lara, and thus the dual sovereignty doctrine allowed for successive prosecutions by the separate sovereigns—the Spirit Lake Nation and the United States.¹⁷ On rehearing en banc, the court of appeals reversed the panel, holding that the dual sovereignty exception to the Double Jeopardy Clause did not apply because the tribal court's prosecution of Lara occurred pursuant to a congressional delegation of power rather than from the tribe's inherent powers, and thus the federal indictment was barred on double jeopardy grounds.¹⁸ Because of a circuit split on the

10. *Lara*, 124 S. Ct. at 1631.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Lara*, 324 F.3d at 636; *see also* 18 U.S.C. § 111(a)(1) (2000) (stating that this section is violated by anyone who “forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties”).

15. *Lara*, 324 F.3d at 636.

16. *Id.* at 637.

17. *United States v. Lara*, 294 F.3d 1004, 1005–06 (8th Cir. 2002) (citing *Heath v. Alabama*, 474 U.S. 82, 88 (1985) (stating the proposition that “[u]nder the separate sovereign doctrine, a defendant may be prosecuted by multiple governmental units for the same conduct if the governmental units draw their authority from separate sources of power”), *rev'd en banc*, 324 F.3d 635 (8th Cir. 2003)), *rev'd*, 124 S. Ct. 1628 (2004).

18. *Lara*, 324 F.3d at 640–41. The court reasoned that “[o]nce 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.” *Id.* at 639.

issue,¹⁹ the Supreme Court granted certiorari to resolve the debate.²⁰

B. The Supreme Court Weighs In

1. *Justice Breyer's Majority.* In a 7-2 decision with four separate opinions, Justice Breyer wrote for the majority and held that the Double Jeopardy Clause did not bar Lara's federal indictment because the Indian tribes had the inherent authority to prosecute nonmember Indians.²¹ In reaching this conclusion, the Court first reasoned that the plain language²² and legislative history²³ of § 1301(2) of the Indian Civil Rights Act (ICRA) make it clear that each tribe possesses the inherent power to prosecute nonmember Indians, thus relaxing prior restrictions placed on the tribes' inherent authority.²⁴ Second, the Court reasoned that Congress has the constitutional authority to relax the restrictions placed on the tribes' inherent prosecutorial powers.²⁵ The Court found several considerations important in reasoning that Congress has the constitutional power to relax these restrictions: first, the Constitution grants Congress "plenary and exclusive" powers to legislate with respect to Indian tribes;²⁶

19. Compare *id.* at 640, with *United States v. Enas*, 255 F.3d 662, 675 (9th Cir. 2001) (en banc) (concluding that tribes have inherent power to prosecute nonmember Indians, and thus subsequent federal prosecutions were permissible).

20. *United States v. Lara*, 539 U.S. 987 (2003).

21. *Lara*, 124 S. Ct. at 1639. Chief Justice Rehnquist, and Justices Stevens, O'Connor, and Ginsburg joined Justice Breyer's opinion. *Id.* at 1630.

22. *Id.* at 1632. The statute affirms the "inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians." Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. § 1301(2) (2000).

23. *Lara*, 124 S. Ct. at 1633. The Court cites several House and Senate Reports as historical legislative evidence that the ICRA amendment was enacted to affirm the inherent authority of tribes to prosecute nonmember Indians. See, e.g., H.R. REP. NO. 102-261, at 3-4 (1991) (Conf. Rep.), as reprinted in 1991 U.S.C.C.A.N. 370, 379-80 (clarifying the congressional understanding that Indian tribes' jurisdictional authority over nonmember Indians is inherent and stating that the Act did not intend to delegate any powers to the tribes).

24. *Lara*, 124 S. Ct. at 1632-33 (citing *Duro v. Reina*, 495 U.S. 676, 682 (1990) (providing an example of a prior restriction placed on tribal sovereignty), *superseded by statute*, Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)-(d), 104 Stat. 1856, 1892-93). Note that the ICRA amendments of 1990, originally enacted as a temporary measure, were made permanent in the next legislative session. See Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646. Subsequent references to these session laws will be to the 1990 act only, as it constitutes the only substantive change to ICRA.

25. *Lara*, 124 S. Ct. at 1633.

26. *Id.* at 1633-34 (acknowledging the power of Congress to legislate activities of Indian tribes through the Indian Commerce Clause and Treaty Clause). The Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, and the Treaty Clause, U.S. CONST. art. II, § 2, cl. 2, are traditionally cited by the Court as granting the U.S. government

second, Congress has previously interpreted these plenary powers as an authorization both to restrict tribal powers and to relax those restrictions;²⁷ and finally, the conclusion that Congress has the power to relax the restrictions on the tribes' inherent powers is consistent with earlier cases.²⁸ The Court pointed out that one such earlier case, while standing for the proposition that tribes do not have the inherent authority to prosecute nonmember Indians, asserted that this limitation was merely congressional and invited parties to take the problem to Congress.²⁹ Thus, the *Lara* Court found that the 1990 amendments to ICRA relaxed the congressional limitations on inherent tribal sovereignty, "[a]nd that fact makes all the difference."³⁰

2. *The Concurrences.* Justice Kennedy reasoned in his concurrence that the majority's holding went beyond what was necessary to determine the validity of Lara's double jeopardy claim.³¹ In Justice Kennedy's view, the majority unnecessarily determined that Congress had the constitutional authority to permit tribes to prosecute nonmember Indians.³² According to Justice Kennedy, it is unclear whether tribes have the inherent power to prosecute nonmembers, and thus the majority's acceptance of this assumption is premature and unnecessary.³³ He argued that in order to decide this case, the majority needed

legislative and executive powers, respectively, over tribes. *See, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 552 (1974); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973).

27. *Lara*, 124 S. Ct. at 1634–35; *see also* Frank Pommersheim, *Is There a (Little or Not So Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay*, 5 U. PA. J. CONST. L. 271, 274–83 (2003) (documenting the changing tribal sovereignty landscape from the nineteenth century to the present day).

28. *Lara*, 124 S. Ct. at 1636–37 (citing *Duro*, 495 U.S. at 686; *United States v. Wheeler*, 435 U.S. 313, 326 (1978), *superseded by statute*, Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)–(d), 104 Stat. 1856, 1892–93; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209–10 (1978), *superseded by statute*, Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)–(d), 104 Stat. 1856, 1892–93); *see also* L. Scott Gould, *Tough Love for Tribes: Rethinking Sovereignty After Atkinson and Hicks*, 37 NEW ENG. L. REV. 669, 675–81 (2003) (discussing the Court's shifting tribal sovereignty paradigm from territorial tribal jurisdiction to consent-based tribal jurisdiction).

29. *Lara*, 124 S. Ct. at 1637 (citing *Duro*, 495 U.S. at 698).

30. *Id.* The 1990 amendments to ICRA changed the definition of "self-government" powers to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." *See* Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)–(d), 104 Stat. 1856, 1892–93; *see also* 25 U.S.C. § 1301(2) (2000) (providing the current definition of "self-government" after the 1990 amendments).

31. *Lara*, 124 S. Ct. at 1639–41 (Kennedy, J., concurring in judgment).

32. *Id.* at 1640.

33. *Id.* at 1639–40 (examining whether Congress has authority to relax restrictions on tribal sovereignty beyond historical limits).

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only to examine the plain language of 25 U.S.C. § 1301(2) to realize that Congress recognized the inherent tribal authority to prosecute nonmember Indians.³⁴

Justice Kennedy also expressed concern that the majority failed to take into account the individual-rights ramifications of its decision:

Lara, after all, is a citizen of the United States. To hold that Congress can subject him, within our domestic borders, to a sovereignty outside the basic structure of the Constitution is a serious step. The Constitution is based on a theory of original, and continuing, consent of the governed. Their consent depends on the understanding that the Constitution has established the federal structure, which grants the citizen the protection of two governments, the Nation and the State. Each sovereign must respect the proper sphere of the other, for the citizen has rights and duties as to both. Here, contrary to this design, the National Government seeks to subject a citizen to the criminal jurisdiction of a third entity to be tried for conduct occurring wholly within the territorial borders of the Nation and one of the States. This is unprecedented. There is a historical exception for Indian tribes, but only to the limited extent that a member of a tribe consents to be subjected to the jurisdiction of his own tribe.³⁵

With astute prescience, Justice Kennedy realized that *Lara* would not be the end of this discussion.³⁶

Justice Thomas also wrote a separate concurrence, but took issue with the state of federal Indian law and the fact that *Lara* does nothing to help clear the morass.³⁷ Justice Thomas found fault with the majority opinion specifically because it failed to address the tension between the assertions that Congress has plenary power over the tribes and tribes have inherent power to prosecute member Indians.³⁸ Additionally, Justice Thomas criticized the majority for failing to identify a constitutional provision granting Congress plenary power to alter tribal

34. *Id.*

35. *Id.* at 1640 (citation omitted). Justice Kennedy further argued, “[I]t 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 1641.

36. *See infra* Part III.C.2.

37. *Lara*, 124 S. Ct. at 1641–48 (Thomas, J., concurring in judgment) (“Federal Indian policy is, to say the least, schizophrenic.”).

38. *Id.* at 1642 (stating that “tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously”).

sovereignty, emphasizing that the Indian Commerce Clause argument has previously troubled the Court,³⁹ and that the treaty power actually lies with the President, not Congress.⁴⁰ In the end, Justice Thomas agreed with the majority's result, but he pleaded for a reassessment of federal Indian law.⁴¹

3. *Justice Souter's Dissent.* Justice Souter, joined by Justice Scalia, dissented.⁴² Justice Souter argued that the tribes' power to prosecute nonmember Indians comes from a delegation of congressional power.⁴³ The dissent reasoned that the Court's previous decisions on the issue of inherent or delegated authority were constitutional in nature—rather than federal common law decisions—because the determination of whether a tribe is an independent or dependent sovereign requires a constitutional analysis.⁴⁴ “Thus, . . . [the] 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.”⁴⁵ Justice Souter therefore argued that the Court should give effect to the ICRA amendments as a delegation of congressional authority, rather than as recognition of inherent tribal authority.⁴⁶ This analysis would have the effect of negating Congress's ability to recognize the tribes' inherent authority to prosecute nonmembers because, he argues, allowing Congress such authority is at odds with the tribes' status as dependent sovereigns.⁴⁷

III. LARA: LOOKING BACK AND REACHING FORWARD

The path of tribal sovereignty in the United States has been a winding and ever-narrowing one.⁴⁸ Throughout much of U.S.

39. *Id.* at 1647 (proposing that the Indian Commerce Clause, given its limited scope, is an improper source of *plenary* power for congressional regulation of Indian affairs).

40. *Id.* at 1647–48; *see also* U.S. CONST. art. II, § 2, cl. 2 (establishing that the President, with the advice and consent of the Senate, retains the power to make treaties).

41. *Lara*, 124 S. Ct. at 1648 (Thomas, J., concurring in judgment).

42. *Id.* at 1648–51 (Souter, J., dissenting).

43. *Id.* at 1648–49.

44. *Id.* at 1650.

45. *Id.*

46. *Id.* (contending that the majority opinion has the effect of repudiating the doctrine of dependent sovereignty).

47. *Id.*

48. *See generally* L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 811 (1996) (considering the history of tribal sovereignty as a progression of federal doctrines, from the doctrines of trust responsibility and inherent sovereignty to the current doctrine of consent-based sovereignty, and observing that “Congress has more often exercised the trust doctrine to diminish

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history, the authority held by Indian tribes within their borders has diminished.⁴⁹ One question emerging from the *Lara* decision is what effect it will have on the power of Indian tribes to govern themselves, specifically their ability to enforce laws within their own borders. This Part examines this question by (1) briefly discussing the contextual background, including the relevant case law regarding tribal sovereignty,⁵⁰ a number of laws pertaining to the sovereignty of Indian tribes,⁵¹ and the relationship of the Double Jeopardy Clause to tribal criminal jurisdiction;⁵² (2) examining the potential positive effects *Lara* might have on tribes and tribal sovereignty; and (3) examining a possible setback of the *Lara* decision in relation to the individual rights of Native Americans, namely the infringement on Indians' equal protection and due process rights.

territorial sovereignty than to affirm tribal self-determination"); Terrill Pollman, *Double Jeopardy and Nonmember Indians in Indian Country*, 82 NEB. L. REV. 889, 906–26 (2004) (identifying the contours of tribal criminal jurisdiction on tribal lands from the days of the Constitution's signing to the present); Pommersheim, *supra* note 27, at 273–83 (outlining the major shifts in tribal authority throughout U.S. history).

49. See Gould, *supra* note 48, at 815–25 (“[A]s the Court unfailingly upheld congressional exercises of the trust responsibility, the territorial authority of tribes steadily declined.”).

50. See, e.g., *Duro v. Reina*, 495 U.S. 676, 679 (1990) (holding that an Indian tribe may not assert criminal jurisdiction over a nontribal member), *superseded by statute*, Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)–(d), 104 Stat. 1856, 1892–93; *United States v. Wheeler*, 435 U.S. 313, 332 (1978) (finding that federal preemption of tribes' criminal jurisdiction over their own members would substantially interfere with tribal self-government), *superseded by statute*, Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)–(d), 104 Stat. 1856, 1892–93; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (deciding that Indian tribes do not have inherent jurisdiction to punish non-Indians), *superseded by statute*, Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)–(d), 104 Stat. 1856, 1892–93; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (concluding that Georgia state laws have “no force” within Indian country); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16–17 (1831) (determining that Indian tribes are not foreign nations but “domestic dependent nations”); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 604–05 (1823) (holding that Indian tribes only have a right to occupy, not a right to own, the American territory they inhabit). Collectively, *McIntosh*, *Cherokee Nation*, and *Worcester* are known as the “Marshall trilogy.” See Pommersheim, *supra* note 27, at 274–76.

51. See, e.g., Indian General Crimes Act, 18 U.S.C. § 1152 (2000) (extending U.S. laws regarding punishment to Indian country); Indian Major Crimes Act, 18 U.S.C. § 1153 (applying U.S. laws and penalties to major offenses committed in Indian country); ICRA, 25 U.S.C. § 1301 (defining “Indian tribe,” “Indian,” “Indian Court,” and “powers of self-government,” and outlining the relationship of the defined entities to the U.S. criminal justice system).

52. See, e.g., *Heath v. Alabama*, 474 U.S. 82, 88 (1985) (“When a defendant in a single act violates the ‘peace and dignity’ of two sovereigns by breaking the laws of each, he has committed two distinct ‘offences.’” (quoting *United States v. Lanza*, 260 U.S. 377, 382 (1922))).

A. *Tribal Sovereignty and Criminal Jurisdiction: A Historical Look*

In order to fully comprehend the implications of the *Lara* decision, a brief discussion of the history of tribal sovereignty is needed. This section provides an overview of tribal sovereignty, including a look at relevant cases and statutes, as well as an examination of the Double Jeopardy Clause and the dual sovereignty exception.

1. *The Constitution and the Marshall Trilogy.* The U.S. Constitution makes limited mention of Indians and Indian tribes.⁵³ Consequently, it provides little guidance as to how the U.S. government and Indian tribes should relate to one another.⁵⁴ For example, Article I excludes Indians from the Constitution's formula for the apportionment of representatives and taxation for each state.⁵⁵ This clause promoted the exclusion of Indians from most of the political processes in this country until 1924.⁵⁶

However, the Framers were aware that they and future generations would interact with the tribes, so they addressed this relationship in the Indian Commerce Clause, granting Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."⁵⁷ This clause recognizes that the tribes had some type of sovereignty independent of the federal government; however, as one commentator has noted, it "merely identifies them as legitimate objects for the exercise of congressional authority."⁵⁸ Thus, these

53. See U.S. CONST. art. I, § 2, cl. 3 (defining the apportionment of representatives to Congress and taxation); U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to regulate commerce with Indian tribes); U.S. CONST. art. II, § 2, cl. 2 (granting, implicitly, the President the authority to regulate the Indians via the treaty power).

54. See Pommersheim, *supra* note 27, at 273 (noting ambiguity regarding Indian tribes in the text of the Constitution, which, perhaps, has led to the confusion over their sovereign status).

55. U.S. CONST. art. I, § 2, cl. 3 ("[E]xcluding Indians not taxed" from the formula determining congressional representation and federal taxation).

56. See Pommersheim, *supra* note 27, at 273 & n.11 (noting U.S. citizenship was not granted to Indians until Congress passed the Citizenship Act of 1924, 8 U.S.C. § 1401(b)).

57. U.S. CONST. art. I, § 8, cl. 3.

58. Pommersheim, *supra* note 27, at 273. Many scholars have theorized that the Indian Commerce Clause is the source of Congress's plenary power over Indian tribes. See, e.g., David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 269-72 (2001) (endorsing the view that Congress's plenary powers flow directly from the Indian Commerce Clause). Others, meanwhile, have asserted that this power is extra-constitutional. See, e.g., Gould, *supra* note 48, at 827-28 (discussing *United States v. Kagama*, 118 U.S. 375 (1886), in which the Court found that "congressional power to regulate the internal affairs of tribes, if not derived expressly from the Constitution, must

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two clauses appear to indicate a troubling proposition—namely that Indians were subject to control by a government in which they had no say. But these two clauses did little to clarify the issue of how the United States and the various tribal governments were to deal with one another.

The issue of tribal sovereignty was first considered by the Supreme Court in three cases decided in the early nineteenth century known as the “Marshall trilogy.”⁵⁹ Written by Chief Justice John Marshall, these three opinions defined the sovereign powers of Indian tribes in a way that the Constitution had not.⁶⁰ The first of these cases, *Johnson v. McIntosh*, determined whether a Native American could properly convey title to land.⁶¹ The Court held that Native Americans could not properly convey title to land because they had mere “title of occupancy”⁶² to the land and did not have “complete ultimate title.”⁶³ *Johnson* thus limited tribal sovereignty by giving Indians only a right to occupy—but not own—their land.⁶⁴

The second case in the trilogy was *Cherokee Nation v. Georgia*.⁶⁵ In this case, Chief Justice Marshall determined that tribes were not foreign nations but were more properly termed “domestic dependent nations,” whose relationship to the United States resembled that of a “ward to his guardian.”⁶⁶

The final case of the trilogy, *Worcester v. Georgia*, held that tribes have no power to make treaties with foreign states.⁶⁷ Additionally, the Court held that state laws were not applicable

nonetheless exist”); Gould, *supra* note 28, at 677 (“At best, [Congress’s plenary power] is a fiduciary responsibility that can be extrapolated from the treaty power and the Indian Commerce Clause. At worst, it is a judicial grant of unbridled power to the Congress to act without constitutional basis or constraint.” (footnotes omitted)); Joseph William Singer, Lone Wolf, *Or How to Take Property by Calling It a “Mere Change in the Form of Investment,”* 38 TULSA L. REV. 37, 37–38 (2002) (arguing that the Court in *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903), ruled that congressional powers over Indians were not subject to the Court’s review).

59. See Pommersheim, *supra* note 27, at 274–76; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

60. See Pommersheim, *supra* note 27, at 274–76 (discussing the role the Marshall trilogy played in defining tribal sovereignty).

61. *Johnson*, 21 U.S. (8 Wheat.) at 563.

62. *Id.* at 592.

63. *Id.* at 603.

64. See Gould, *supra* note 48, at 816 (noting that “the decision made clear that full sovereignty [for Indians] did not exist”); Pommersheim, *supra* note 27, at 275 (concluding that under the “doctrine of discovery,” Indian tribes maintained only a “residual right” to use and occupy the land).

65. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

66. *Id.* at 17.

67. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

within the borders of tribal lands.⁶⁸ Tribes were considered “distinct, independent political communities, retaining their original natural rights.”⁶⁹

Consequently, the Marshall trilogy outlined the doctrine of inherent sovereignty as conceived by the Supreme Court: tribes could occupy their land but could not convey title; tribes and their members were not subject to the laws of the states in which they were located, except to the extent Congress placed limitations on this right; and they could not form treaties with foreign nations.⁷⁰

2. *Eroding Sovereignty.* Following the Marshall trilogy, the issue of tribal sovereignty soon became more and more a part of the American political debate, resulting in a further decline of tribal independence.⁷¹ As the westward expansion of Anglo-American settlers progressed, the reservations became “islands of Indianness.”⁷² The changing topography of Anglo settlement led to changing—and diminishing—concepts of Indian sovereignty. The erosion began in 1817 with the passage of the General Crimes Act, which gave the federal government jurisdiction over crimes involving non-Indians occurring on Indian land.⁷³

Congress again used its plenary power over the tribes and further eroded tribal sovereignty when, in 1885, it passed the Major Crimes Act, which subjects Indians to federal prosecution for several enumerated crimes. This federal jurisdiction over these crimes applies even if the crimes were committed in Indian country, and regardless of whether the victim was Indian or non-Indian.⁷⁴ Examples of the enumerated crimes include murder,

68. *Id.* at 561.

69. *Id.* at 559.

70. See Pommersheim, *supra* note 27, at 276 (“The essential teachings that derive from the Marshall trilogy and form the foundational basis of Indian law are the recognition of tribal sovereignty and self-government, federal exclusivity in dealing with Indian tribes as a basic tenet of an emerging federalism, a unique federal-tribal relationship often identified as the trust relationship, and, as a necessary corollary, the absence of any inherent state authority in Indian affairs.”).

71. See Gould, *supra* note 48, at 819 (discussing a series of congressional acts known as the removal policy designed to remove tribes from east of the Mississippi River); Pommersheim, *supra* note 27, at 276–77 (chronicling the diminishing sovereignty of the tribes as the westward expansion of the white settlers grew).

72. Pommersheim, *supra* note 27, at 276.

73. See Indian General Crimes Act, 18 U.S.C. § 1152 (2000) (extending the general laws of the United States into Indian country, except in “offenses committed by one Indian against the person or property of another Indian” and in cases where an Indian committed an offense against a non-Indian and was punished by the tribe).

74. Indian Major Crimes Act, 18 U.S.C. § 1153; see also Pollman, *supra* note 48, at 907–08 (observing that the Major Crimes Act was one of “the principal federal statutes

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manslaughter, kidnapping, incest, burglary, assault against an individual younger than sixteen years, and assault with intent to commit murder.⁷⁵ The Major Crimes Act was subsequently challenged in *United States v. Kagama*, but the Supreme Court upheld the legislation because Congress's plenary power "has never been denied, and because [Congress] alone can enforce its laws on all the tribes."⁷⁶ *Kagama*, and a subsequent holding in *Lone Wolf v. Hitchcock*,⁷⁷ "fully incorporated tribes into the national system and declared them subject to the 'plenary power' of Congress."⁷⁸

In the latter part of the nineteenth century, states began to play a role in the dwindling criminal sovereignty of Indian tribes.⁷⁹ The Court in *United States v. McBratney* granted states exclusive jurisdiction over crimes in Indian territory that involved a non-Indian against another non-Indian.⁸⁰ Additionally, in 1953, Congress granted five states complete jurisdiction over crimes committed in Indian territory within those states' borders, and gave the remaining states the option of assuming complete or partial jurisdiction over crimes in Indian territory.⁸¹ Congress added to this mix of jurisdictional confusion by passing the Indian Civil Rights Act, which limited tribal punishments to a maximum of one year in prison and \$5000 in fines.⁸² Thus,

governing tribal jurisdiction").

75. 18 U.S.C. § 1153. As originally passed, the Major Crimes Act limited federal jurisdiction to only seven enumerated crimes, but another seven were added upon amendment, bringing the current total to fourteen. Pollman, *supra* note 48, at 907–08.

76. *United States v. Kagama*, 118 U.S. 375, 384–85 (1886) ("The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell.").

77. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (holding that Congress's plenary power over Indian affairs permitted the enactment of statutes allowing non-Indian settlement of Indian lands).

78. Pommersheim, *supra* note 27, at 277.

79. See Pollman, *supra* note 48, at 908–09 (detailing the role the states have played in determining criminal jurisdiction for crimes committed in Indian country).

80. *United States v. McBratney*, 104 U.S. 621, 624 (1881) (holding that the Circuit Court of the United States could not sit in for the district of Colorado, which has exclusive jurisdiction over crimes committed in its territory).

81. Act of Aug. 15, 1953, Pub. L. No. 280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2000) and 28 U.S.C. § 1360 (2000)) (conferring civil and criminal jurisdiction in Indian territory to the states of California, Minnesota, Nebraska, Oregon, and Wisconsin). In 1958, Congress added Alaska to this list and conferred complete civil and criminal jurisdiction over Indian affairs within the territory of the new state. Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545. In addition, nine other states have chosen to assume jurisdiction over crimes in Indian territory within their borders in accordance with Public Law 280, including Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah, and Washington. Pollman, *supra* note 48, at 909 n.130.

82. 25 U.S.C. § 1302(7) (2000).

Congress has limited the tribes' ability to punish offenders over whom they have jurisdiction to what amounts to a misdemeanor in federal court.⁸³

Adding to the patchwork assortment of prosecutorial jurisdictions over tribal lands in the twentieth century are a number of important Supreme Court decisions, the first of which was *Oliphant v. Suquamish Indian Tribe*.⁸⁴ At issue in *Oliphant* was whether a tribe could prosecute a non-Indian for a crime committed while on tribal land.⁸⁵ The Court held that tribes lack inherent criminal jurisdiction over non-Indians because such jurisdiction is "[i]nconsistent with their status" as domestic dependent nations, and consequently, such jurisdiction could only be granted by an express delegation of power by Congress, which had not been done.⁸⁶ As such, *Oliphant* divested tribes of jurisdiction over non-Indians who violate the law while in Indian territory.⁸⁷

83. See 18 U.S.C. § 3559(a)(6)–(9) (defining a crime punishable by imprisonment of one year or less, but more than five days, as a misdemeanor); Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403, 410 n.32 (2004) (noting that federal law categorizes any crime punishable by one year or less of imprisonment as a misdemeanor, and commenting that while tribes may have the jurisdiction to convict murderers, the maximum sentence that can be imposed is one year in prison and \$5000 in fines).

84. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), *superseded by statute*, Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)–(d), 104 Stat. 1856, 1892–93.

85. *Id.* at 195.

86. *Id.* at 208–09 (internal quotation marks omitted) (reasoning that “[u]pon incorporation into the territory of the United States” Indian tribes had given up the authority to exercise their sovereignty in ways that “conflict with the interests of this overriding sovereignty”).

87. *Id.* at 210–11 (noting that “[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress”). However, the *Oliphant* decision has been widely criticized for failing to explain how or when the tribes' authority had been divested. See, e.g., Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 PUB. LAND L. REV. 1, 11–12 (1995) (asserting that the Court in *Oliphant* utilized “unspoken [congressional] assumptions’ to justify” changes in the legal doctrines governing Indian sovereignty); Catherine Baker Stetson, *Decriminalizing Tribal Codes: A Response to Oliphant*, 9 AM. INDIAN L. REV. 51, 53–54 (1981) (criticizing Rehnquist's opinion as “shamefully” decided). The Court relied on unusual evidence in concluding that tribes do not have inherent jurisdiction over non-Indians, including an 1830 treaty between the United States and the Choctaw Tribe in which the Choctaws requested “that Congress *may grant* to the Choctaws” the power to punish non-Indians. *Oliphant*, 435 U.S. at 197. The Court reasoned that since a tribe would not request something which it already possessed, they must not have had the inherent ability to prosecute non-Indians. *Id.* at 197–98. In addition, the Court relied on an opinion from the Western District of Arkansas from 1878 and a biography of the judge who wrote the opinion to support its conclusion. *Id.* at 199–201 (citing *Ex parte Kenyon*, 14 F. Cas. 353, 355 (W.D. Ark. 1878) (No. 7720) and HOMER CROY, HE HANGED THE HIGH: AN AUTHENTIC ACCOUNT OF THE FANATICAL JUDGE WHO HANGED EIGHTY-EIGHT MEN 222 (1952)). One commentator has complained that “the Court turned John

One notable result from the *Oliphant* decision was the inability of Indian tribes to prosecute many persons who violated the laws on their lands.⁸⁸ According to the *Oliphant* Court, at the time it was decided, 33 of the 127 recognized tribes nationwide who exercised criminal jurisdiction extended that jurisdiction to cover non-Indians.⁸⁹ This statistic is further amplified by the fact that as of 1990 on the average reservation, non-Indians made up almost half of the total population,⁹⁰ and “on nine of the most populated reservations, non-Indians vastly outnumbered Indians.”⁹¹ Thus, the *Oliphant* decision left large segments of the population free to break tribal laws without fear of tribal punishment.⁹²

The Court in *United States v. Wheeler* next dealt with the issue of whether tribes had the authority to prosecute tribal members, and if so, where that power originated.⁹³ *Wheeler* involved a member of the Navajo tribe who was convicted in Navajo tribal court of disorderly conduct and contributing to the delinquency of a minor.⁹⁴ One year after his tribal court conviction, federal prosecutors indicted the defendant on a statutory rape charge based on the same set of facts used in the Navajo tribal conviction.⁹⁵ The defendant moved to dismiss the federal charge based on violation of the Double Jeopardy Clause and further claimed that the dual sovereignty exception did not apply because Indian tribes are subject to the plenary power of Congress and thus are not separate sovereigns.⁹⁶

Marshall’s decisions in *McIntosh*, *Cherokee Nation*, and *Worcester* on their heads.” L. Scott Gould, *The Congressional Response to Duro v. Reina: Compromising Sovereignty and the Constitution*, 28 U.C. DAVIS L. REV. 53, 68 (1994).

88. See Amy Radon, Note, *Tribal Jurisdiction and Domestic Violence: The Need for Non-Indian Accountability on the Reservation*, 37 U. MICH. J.L. REFORM 1275, 1292–93 (2004) (commenting that *Oliphant* left tribes nationwide without the power to punish non-Indian law breakers).

89. *Oliphant*, 435 U.S. at 196.

90. See Gould, *supra* note 87, at 126, tbl.2.

91. Gould, *supra* note 28, at 690; see also Radon, *supra* note 88, at 1292–93 (highlighting the plight of some tribes lacking criminal jurisdiction over a non-Indian population that accounts for two-thirds of the total reservation population).

92. It has been observed that “the *Oliphant* Court began the journey to consent-based sovereignty,” a departure from the traditional territorial-based jurisdiction. Gould, *supra* note 48, at 845.

93. *United States v. Wheeler*, 435 U.S. 313, 320–22 (1978) (parsing the nature of sovereign authority in units of a broader nation), *superseded by statute*, Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)–(d), 104 Stat. 1856, 1892–93.

94. *Id.* at 314–15.

95. *Id.* at 315.

96. *Id.* at 316–19. For a more detailed discussion of the Double Jeopardy Clause and the dual sovereignty exception, see *infra* Part III.B.

The Court held that the level of control one government exercises over another is not the proper test for the source of the latter government's authority.⁹⁷ Rather, the proper test is "the ultimate source of the power under which the respective prosecutions were undertaken."⁹⁸ The Court concluded that tribes retain their inherent sovereignty to prosecute member Indians because such authority has not been divested by Congress.⁹⁹ "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."¹⁰⁰ Consequently, the tribal prosecution and the federal prosecution arose from two distinct sovereigns.¹⁰¹ Thus, the Court recognized the inherent authority of tribes to prosecute their own members. Consequently, a tribal member could be convicted of a crime by both the tribal government and the federal government without violation of the Double Jeopardy Clause.¹⁰²

Oliphant and *Wheeler* laid the groundwork for the controversial holding that was to come in *Duro v. Reina*.¹⁰³ While *Oliphant* stood for the proposition that tribes lacked jurisdiction to prosecute non-Indians,¹⁰⁴ and *Wheeler* stated that tribes had the inherent authority to prosecute tribal members,¹⁰⁵ the question remained as to whether tribes could exercise criminal jurisdiction over nonmember Indians.¹⁰⁶ The Court directly dealt with this issue in *Duro*, holding that a tribe could not assert criminal jurisdiction over an Indian unless he was a member of that tribe.¹⁰⁷ The Court used the reasoning from both *Wheeler* and *Oliphant* to reach its conclusion.¹⁰⁸ The Court took from *Wheeler* the proposition that tribal sovereignty is limited to internal

97. *Wheeler*, 435 U.S. at 319–20.

98. *Id.* at 320.

99. *Id.* at 322 (citing FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1942) (observing that powers of Indian tribes are, in general, not delegated powers granted by Congress)).

100. *Id.* at 323.

101. *Id.* at 323–24.

102. See Pollman, *supra* note 48, at 904–06 (examining both the jurisprudential and pragmatic results of the *Wheeler* decision).

103. *Duro v. Reina*, 495 U.S. 676 (1990), *superseded by statute*, Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)–(d), 104 Stat. 1856, 1892–93.

104. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978), *superseded by statute*, Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)–(d), 104 Stat. 1856, 1892–93.

105. *Wheeler*, 435 U.S. at 322.

106. Recall that nonmember Indian is defined as a Native American who is not a member of the prosecuting tribe. See *supra* note 4.

107. *Duro*, 495 U.S. at 688 ("In the area of criminal enforcement, however, tribal power does not extend beyond internal relations among members.").

108. *Id.* at 684–88.

affairs.¹⁰⁹ From *Oliphant*, the Court utilized the principle that “tribes can no longer be described as sovereigns in [the territorial] sense.”¹¹⁰ The *Duro* decision has thus come to stand for the concept that tribal jurisdiction is based on the consent of the governed, and without obtaining such consent, the tribe lacks jurisdiction.¹¹¹ The Court premised tribal criminal jurisdiction on the “voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent.”¹¹² *Duro* resulted in widespread criticism,¹¹³ and in a “jurisdictional void in which neither tribes, nor states, nor the federal government had authority to try nonmember Indians for misdemeanors committed on tribal lands.”¹¹⁴

3. *The “Duro Fix.”* In response to the outcry from tribes and state governments concerning the void in jurisdiction *Duro* left,¹¹⁵ Congress amended ICRA to redefine the inherent sovereign rights of Indian tribes.¹¹⁶ The current section now reads:

109. *Id.* at 685–86.

110. *Id.* at 685.

111. See Pollman, *supra* note 48, at 913 (“The consent theory of jurisdiction introduced in *Wheeler* and *Oliphant* came to full fruition in *Duro*.”).

112. *Duro*, 495 U.S. at 694. The Court also found significant the fact that if it were to hold that nonmember Indians were subject to the jurisdiction of tribes, it could result in “an intrusion on personal liberty” where U.S. citizens would be subject to “legal methods [that] may depend on ‘unspoken practices and norms.’” *Id.* at 693 (quoting COHEN, *supra* note 99, at 334–35).

113. See, e.g., Robert N. Clinton, *Peyote and Judicial Political Activism: Neo-Colonialism and the Supreme Court’s New Indian Law*, 38 FED. B. NEWS & J. 92, 100 (1991) (“[F]ar from being the protector of minorities which the framers envisioned . . . the Court has become a cheerleader for legal oppression of minority Indian interests and the major force in our political system currently bent on curtailing their authority and rights.”); Alex Tallchief Skibine, *Duro v. Reina and the Legislation that Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767, 781 (1993) (“The ultimate fallacy of *Duro* is that it attempts to use the faulty analysis of *Wheeler* to arbitrarily include criminal jurisdiction over nonmember Indians as an exercise of external sovereignty.”).

114. Gould, *supra* note 28, at 686. Recall that (1) the federal government has jurisdiction over major crimes committed in Indian territory, (2) state governments have jurisdiction over crimes committed by non-Indians against non-Indians in Indian territory unless they have enacted Public Law 280, in which case they could prosecute nonmember Indians, and (3) immediately following *Duro*, tribes had jurisdiction over tribal members only and were limited to inflicting misdemeanor-level punishments. Thus, no one had authority to try nonmember Indians for misdemeanors committed on reservations—the *Duro* void. *Id.* at 685–86.

115. See Pollman, *supra* note 48, at 917 (noting that tribes were joined by the Western Governors Association and several other states in requesting that Congress deal with the jurisdictional void left by *Duro*).

116. 25 U.S.C. § 1301(2) (2000).

“[P]owers of self-government” means and includes 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; and means the *inherent* power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over *all* Indians.¹¹⁷

The amendment has been termed the “*Duro* override” or “*Duro* fix” by several commentators¹¹⁸ because, most notably, the amendment unequivocally “recognize[s] and affirm[s]” the “inherent” powers of tribes over “all Indians,” thus giving tribes the ability to prosecute nonmember Indians on tribal lands.¹¹⁹ In addition, the legislative history of the *Duro* fix clearly indicates that the purpose of the legislation was to recognize an inherent right that tribal governments have always had and that was never questioned until *Duro*.¹²⁰ Thus, the *Duro* fix does not delegate authority to the tribes. This is an important distinction because, as will be discussed in the following section, it allows the dual sovereignty exception to the Double Jeopardy Clause to permit both tribal and federal prosecutions of all Indians for the same act.

B. *Double Jeopardy and the Dual Sovereignty Exception*

The Double Jeopardy Clause provides that “[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.”¹²¹ The Double Jeopardy Clause protects individuals from the unnecessary anxiety, expense, and embarrassment of a second trial,¹²² and furthers society’s interest in maintaining the reliability of a court’s determination of a case.¹²³ The protections of the Double Jeopardy Clause are

117. *Id.* (emphasis added).

118. *See* Gould, *supra* note 28, at 688 (noting that the legislation is virtually untouchable by the courts because it “recognizes” rather than “delegates” authority, which means such power is not subject to the Constitution); Pollman, *supra* note 48, at 916 (discussing the implications of the *Duro* override within the contours of due process).

119. 25 U.S.C. § 1301(2).

120. 137 CONG. REC. 10689, 10712 (1991) (statement of Rep. Miller) (“[T]his 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.”).

121. U.S. CONST. amend. V.

122. *See, e.g.*, United States v. Wilson, 420 U.S. 332, 343 (1975) (finding that enduring successive trials puts the defendant through a continuing “state of anxiety and insecurity” (internal quotation marks omitted)).

123. *See, e.g.*, United States v. Scott, 437 U.S. 82, 92 (1978) (“[T]he primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment . . .”).

extended to the states by the Fourteenth Amendment's Due Process Clause.¹²⁴

The dual sovereignty doctrine is an exception to the Double Jeopardy Clause that applies when the same criminal act violates the laws of more than one sovereign, such as a state and the federal government,¹²⁵ two individual states,¹²⁶ or a foreign nation and the federal government.¹²⁷ One requirement for the dual sovereignty exception to apply, thus allowing successive prosecutions for the same crime, is that the two entities must derive their authority to prosecute from separate sources of power.¹²⁸ If the prosecutorial powers of each sovereign do not arise from separate sources, the dual sovereignty doctrine will not apply and the subsequent prosecution will be barred by the Double Jeopardy Clause.¹²⁹

Critics of the dual sovereignty exception claim that allowing successive prosecutions offends the protections the Double Jeopardy Clause sought to employ—namely, to protect defendants from having to live in a state of anxiety for fear of multiple prosecutions, and to protect the integrity of the concept of final judgment.¹³⁰ Furthermore, critics argue that the text of the Fifth Amendment does not provide for any exceptions,¹³¹ and

124. *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

125. *See, e.g., Abbate v. United States*, 359 U.S. 187, 195–96 (1959) (holding that the Double Jeopardy Clause is not a bar to a federal prosecution for conspiracy to destroy an interstate communications facility following a state conviction for conspiracy to destroy property).

126. *See, e.g., Heath v. Alabama*, 474 U.S. 82, 88 (1985) (holding that defendant violated the “peace and dignity” of two separate sovereigns when he hired men to kidnap his wife in Alabama and her body was discovered in Georgia, thus committing two separate crimes).

127. *See, e.g., United States v. Guzman*, 85 F.3d 823, 826–28 (1st Cir. 1996) (holding that a prior conviction in St. Maarten, in the Netherlands Antilles, for possession of cocaine did not bar a second trial by the U.S. government).

128. *See United States v. Lanza*, 260 U.S. 377, 381–84 (1922).

129. *Compare Heath*, 474 U.S. at 88 (holding that successive murder prosecutions by two states for the same act were not barred by the Double Jeopardy Clause), *with Waller v. Florida*, 397 U.S. 387, 394–95 (1970) (holding that political subdivisions of the state of Florida are regarded as instrumentalities of the state, and thus state charges following conviction in municipal court for violation of the same act are barred by the Double Jeopardy Clause).

130. *See supra* notes 122–23 and accompanying text; *see also* Erin M. Cranman, Comment, *The Dual Sovereignty Exception to Double Jeopardy: A Champion of Justice or a Violation of a Fundamental Right?*, 14 EMORY INT'L L. REV. 1641, 1667 (2000) (finding that dual sovereignty is criticized because it offends the defendant's finality interest).

131. *See* Robert Matz, Note, *Dual Sovereignty and the Double Jeopardy Clause: If at First You Don't Convict, Try, Try Again*, 24 FORDHAM URB. L.J. 353, 367–68 (1997) (arguing that the text of the Fifth Amendment does not identify the prosecuting authority to which the amendment applies, and that because the Fourteenth Amendment applies the Double Jeopardy Clause to the states, there is no basis for the argument for dual

that its legislative history demonstrates that the Framers did not intend for there to be an exception.¹³² Nonetheless, the dual sovereignty doctrine is a recognized feature of state and federal Double Jeopardy jurisprudence.¹³³

In the context of Indian law an issue has arisen, most recently in *Lara*, regarding the dual sovereignty exception and whether it applies to a federal prosecution following a completed tribal prosecution on the same facts. As noted previously, the *Lara* Court stated that the authority of tribes to prosecute nonmember Indians is an inherent authority, rather than one delegated from Congress.¹³⁴ In prosecuting member and nonmember Indians, tribes and the federal government draw their prosecutorial authority from different sources, and thus are separate sovereigns. As such, the Double Jeopardy Clause does not bar each from prosecuting an Indian offender for the same

sovereignty).

132. See Ronald J. Allen & John P. Ratnaswamy, *Heath v. Alabama: A Case Study of Doctrine and Rationality in the Supreme Court*, 76 J. CRIM. L. & CRIMINOLOGY 801, 816 (1985) (“The best evidence of the intent of the framers indicates that the double jeopardy clause was intended to apply to prosecutions by different sovereigns, and that there was no exception for separate federal and state prosecutions for the same act, let alone separate state prosecutions.”).

133. See, e.g., *Heath*, 474 U.S. at 88 (holding that defendant’s acts violated laws of two states, and as they are separate sovereigns, each could prosecute the defendant for the murder of his spouse); *Bartkus v. Illinois*, 359 U.S. 121, 138–39 (1959) (holding that the dual sovereignty exception allows successive prosecutions where the first sovereign’s prosecution results in an acquittal); *United States v. Lanza*, 260 U.S. 377, 385 (1922) (applying the dual sovereignty exception for the first time). There are two recognized limitations to the dual sovereignty doctrine: the sham exception, and the U.S. Department of Justice’s own *Petite* policy. See *United States v. Davis*, 906 F.2d 829, 832 (2d Cir. 1990); U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL 9-2.031 (2000) (citing *Petite v. United States*, 361 U.S. 529 (1960), and describing the *Petite* policy). The sham exception provides that in order for dual sovereignty to apply, a second prosecution may only be brought if it serves to vindicate the violation of that sovereign’s own rights, rather than the rights of the first prosecuting sovereign. *Davis*, 906 F.2d at 832. The *Petite* policy operates as an internal constraint on the Department of Justice that requires federal prosecutors to obtain approval from an Assistant Attorney General for successive prosecution, and applies unless the reasons for prosecutions are compelling. See *Rinaldi v. United States*, 434 U.S. 22, 24 n.5 (1977) (citing *Petite*, 361 U.S. at 530–31). In practice the sham exception does not often prove to be a successful argument. See, e.g., *Matz*, *supra* note 131, at 361 n.43 (citing several cases where the sham exception was not applicable). Additionally, the *Petite* policy is an internal constraint rather than a policy that creates substantive rights. See, e.g., *United States v. Peterson*, 233 F.3d 101, 104–05 & n.1 (1st Cir. 2000) (finding that the *Petite* policy does not confer substantive rights on defendants); *United States v. Pungitore*, 910 F.2d 1084, 1120 (3d Cir. 1990) (finding that because the *Petite* policy is an internal rule, it does not allow the defendant to avoid successive prosecutions). Thus, the only two recognized limitations to the dual sovereignty doctrine are seldom helpful to a defendant subject to successive prosecutions, and it is likely that neither was applicable to *Lara*’s federal prosecution.

134. *United States v. Lara*, 124 S. Ct. 1628, 1632–33 (2004).

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offense, irrespective of the offender's tribal membership.¹³⁵ The *Lara* decision represents a complete about-face from earlier opinions declaring that tribes do not have the inherent authority to try nonmember Indians.¹³⁶ The effects of this watershed decision will no doubt be complex and far-reaching.

C. The Road Ahead: Where Does Lara Take Us?

Time, no doubt, will be the best indicator as to what effects the Court's holding in *Lara* will have on federal Indian law. Nonetheless, this section analyzes three anticipated implications of the decision, two that are beneficial for Indian tribes and one that may put the personal liberties of Native Americans at risk.

1. The Gains: Closing the Duro Gap and Making the Move Toward Increased Tribal Sovereignty. The *Lara* Court found that the 1990 ICRA amendments recognized the inherent authority of Indian tribes to prosecute nonmember Indians.¹³⁷ This decision has at least two positive implications. First, the decision validates the ICRA amendments stating that Indian tribes have the authority to prosecute nonmember Indians who commit crimes on tribal land, thus closing the *Duro* gap.¹³⁸ While this is admittedly an obvious consequence of the holding, it is worth discussing here briefly as it is of great importance to tribes nationwide. Secondly, and less obviously, *Lara* marks the beginning of a return to enhanced tribal sovereignty in the Court's jurisprudence.¹³⁹ This section addresses these two implications.

First, the importance of a tribe's prosecutorial authority cannot be overstated. A 1991 survey of 103 tribes conducted by the National Congress of American Indians found that almost 12% of Indians living in reservation communities were not members of the local tribe.¹⁴⁰ In addition, 80% of the tribes

135. *Id.* at 1639.

136. *See Duro v. Reina*, 495 U.S. 676, 679 (1990) (holding that tribes were divested of their inherent power to prosecute nonmember Indians), *superseded by statute*, Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)-(d), 104 Stat. 1856, 1892-93; *United States v. Lara*, 324 F.3d 635, 640 (8th Cir. 2003) (holding that the Double Jeopardy Clause precluded successive tribal and federal prosecutions), *rev'd*, 124 S. Ct. 1628 (2004).

137. *Lara*, 124 S. Ct. at 1632.

138. *Id.*; *see also* Pollman, *supra* note 48, at 936 (noting that the solution in *Lara* "avoid[s] the problems of a jurisdictional void over nonmember Indians").

139. *See* Pollman, *supra* note 48, at 937 (predicting that the *Lara* decision "would slow the advance of consent jurisdiction that the Supreme Court has embraced in the last twenty-five years").

140. S. REP. NO. 102-168, app. E, at 58 (1991).

reported that some tribal members had married nonmember Indians, and 92% of tribes reported that nonmember Indians were employed on their reservations.¹⁴¹ This data shows that the demographics of life on the reservation are anything but homogenous. Furthermore, “[i]t is common for persons enrolled in one tribe to live within the reservation of another, and for family members who live together to be enrolled in different tribes.”¹⁴²

Moreover, statistics show that the crime rate on reservations is between two and three times the national rate.¹⁴³ The most frequent crimes committed on reservations are misdemeanors, including intoxication, assault or battery, and disorderly conduct.¹⁴⁴ Domestic violence also plays a large role in the crimes committed on reservations.¹⁴⁵ One study reports that for every 1000 American Indian females, 23.2 were victims of “intimate violence,” which includes violent crimes committed by a current or former spouse or partner.¹⁴⁶ The same study showed that only 11.2 per every 1000 African-American women, 8.1 per every 1000 Anglo women, and 1.9 per every 1000 Asian-American women were victims of intimate violence.¹⁴⁷

With numbers such as these reflecting the way of life on reservations, it is no surprise that tribes insist they need the authority to police and protect themselves from criminals, both tribal members and nonmembers.¹⁴⁸ Further, they argue that tribes have greater incentive to police their territory than the

141. *Id.*; see also Brief Amici Curiae on Behalf of Eighteen American Indian Tribes at 8 n.5, *Lara*, 124 S. Ct. 1628 (No. 03-107) [hereinafter Brief of Eighteen Tribes] (noting that the Oglala Sioux Reservation in South Dakota has one of the largest nonmember Indian populations where nonmember Indians count for approximately 18% of the total population); Brief for the States of Washington, Arizona, California, Colorado, Michigan, Montana, New Mexico, and Oregon as Amici Curiae Supporting Petitioner at 2, *Lara*, 124 S. Ct. 1628 (No. 03-107) [hereinafter Brief of States] (stating that many reservations are made up of a number of different tribes).

142. Brief of States, *supra* note 141, at 4.

143. Brief of Eighteen Tribes, *supra* note 141, at 9 (citing LAWRENCE A. GREENFELD & STEVEN K. SMITH, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME, NCJ 173386 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/aic.pdf>).

144. See *id.* at 9–10 (citing the 1991 National Congress of American Indians survey).

145. See Radon, *supra* note 88, at 1276 (citing CALLIE RENNISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT ON VIOLENT VICTIMIZATION AND RACE 1993–1998 at 9, NCJ 176354 (2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vvr98.pdf> (noting that American Indian women are more likely to be victims of domestic violence than non-Indian women)).

146. *Id.* at 1280 (citing RENNISON, *supra* note 145, at 9).

147. *Id.* at 1280–81 (citing RENNISON, *supra* note 145, at 9).

148. See Brief of Eighteen Tribes, *supra* note 141, at 16 (arguing that the high crime rate and limited federal resources require that tribes be able to police their lands).

federal government does because “they know the territory and the people, and their presence fosters deterrence and a sense of community pride and responsibility.”¹⁴⁹ Conversely, the federal government does not have as big an incentive to prosecute these types of cases as do the tribes due to a lack of knowledge of the culture and community, and an overburdened docket.¹⁵⁰

In the time between *Duro* and the *Duro* fix, representatives from the Yakima Indian Nation testified before the Senate Select Committee on Indian Affairs that they were forced “to dismiss pending charges against 43 Indians because they were not enrolled members of the Yakima Indian Nation.”¹⁵¹ The Suquamish tribe testified that “tribal police were openly taunted, and tribal law flaunted, by non-member Indians.”¹⁵²

In response to the void left by *Duro*, Congress amended ICRA to define the tribes’ “powers of self-government” to include “the inherent power . . . to exercise criminal jurisdiction over all Indians.”¹⁵³ While the language of the ICRA amendment appears straightforwardly to recognize the tribes’ inherent powers of prosecution necessary to protect their lands, the question remained whether Congress was delegating its own authority to the Indian tribes when it passed this legislation.¹⁵⁴ Accordingly, the Court’s decision in *Lara* settles the dispute, and closes the *Duro* gap for good.¹⁵⁵

The second encouraging result from the *Lara* decision is that it signifies a shift in judicial sentiment by changing the formula used to determine the extent of tribal jurisdiction. For a

149. *Id.* at 12; *see also* United States v. Wheeler, 435 U.S. 313, 331 (1978) (“[Tribes] have a significant interest in maintaining orderly relations among their members and in preserving tribal customs and traditions, apart from the federal interest in law and order on the reservation.”), *superseded by statute*, Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)-(d), 104 Stat. 1856, 1892-93.

150. *Cf.* Brief of Eighteen Tribes, *supra* note 141, at 16-17 (implying that the tribes are in the best situation to govern themselves because of their familiarity with customs and people, something the federal government lacks).

151. *Id.* at 17-18 (citing *Impact of Supreme Court’s Ruling in Duro v. Reina: Hearing Before the S. Select Comm. on Indian Affairs*, 102d Cong., Pt. 2, at 79 (1991) (statement of Harry Smiskin, Tribal Council Member, Yakima Indian Nation)).

152. *Id.* at 19 (quoting *Status of Jurisdictional Authority in Indian Country, an Assessment of Emerging Issues: Hearing Before the S. Select Comm. on Indian Affairs*, 102d Cong. 39 (1991) (prepared statement of Georgia George, Chairperson, Suquamish Indian Tribe)).

153. 25 U.S.C. § 1301(2) (2000).

154. *See supra* note 19 and accompanying text (discussing the circuit split that led the Supreme Court to hear *Lara*).

155. The gap is closed only as to Indian law breakers. *Oliphant’s* holding remains good law after *Lara*, and consequently Indian tribes still lack the authority to prosecute non-Indians who break the law on tribal lands. How Congress or the courts will deal with this jurisdictional void in the future remains an open question.

generation before *Lara*'s confirmation of the ICRA amendments, tribal jurisdiction was based on a theory of consent; the only people the tribe could prosecute were those who had consented to be subject to the jurisdiction of the tribe, namely tribal members.¹⁵⁶ However, tribal jurisdiction was not always based on the consent of those governed.¹⁵⁷ For example, the Marshall trilogy laid the groundwork for the doctrine of inherent sovereignty in which "tribes are domestic dependent nations which may exercise powers free of the strictures of the Constitution unless limited by treaty or by Congress."¹⁵⁸ An unstated principle of the doctrine of inherent sovereignty is that tribes have sovereignty over their lands.¹⁵⁹

With time, however, the territory-based jurisdiction once held by tribes began to dwindle.¹⁶⁰ The Court's opinion in *Oliphant* marked its acceptance of a jurisdictional formula based on consent, rather than territory.¹⁶¹ In *Oliphant*, the Court reasoned that criminal jurisdiction over non-Indians was "inconsistent with their status" as domestic dependent nations, thus divesting tribes of jurisdiction over non-Indians.¹⁶² The Supreme Court reaffirmed the consent doctrine in *Wheeler*, holding that tribes have inherent authority to prosecute tribal members, inferentially suggesting that because *Wheeler* was a tribal member, he had consented to their jurisdiction.¹⁶³

156. See Gould, *supra* note 48, at 837–54 (detailing the emergence of the Court's shift to jurisdiction by consent from 1975 to 1990); *supra* Part III.A.2.

157. See Gould, *supra* note 48, at 815–22 (describing the doctrine of inherent sovereignty found in the Marshall trilogy).

158. *Id.* at 810; see also COHEN, *supra* note 99, at 122 ("Perhaps the most basic principle of all Indian law . . . is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.*").

159. See Gould, *supra* note 48, at 817–18 ("Implicit in the Marshall trilogy is that sovereignty exists over territory.").

160. See Gould, *supra* note 48, at 815–37 (surveying the "drift toward consent" that occurred after the Marshall trilogy until the Court's full acceptance of a consent-based theory in *Oliphant* and *Duro*).

161. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978) (finding that even though Congress had not explicitly divested the tribes of their authority over non-Indians, because of repeated legislation limiting tribal sovereignty, such authority must not exist), *superseded by statute*, Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)–(d), 104 Stat. 1856, 1892–93; see also Pollman, *supra* note 48, at 935 ("[T]he [*Oliphant*] decision has formed the basis for a now long line of cases recognizing consent jurisdiction and not territorial jurisdiction.").

162. *Oliphant*, 435 U.S. at 208 (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976), *rev'd sub nom.* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)).

163. *United States v. Wheeler*, 435 U.S. 313, 328 (1978), *superseded by statute*, Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)–(d), 104 Stat. 1856, 1892–93.

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The *Duro* Court further solidified the doctrine of consent jurisdiction in Indian law jurisprudence when it held that tribes do not have jurisdiction over nonmember Indians.¹⁶⁴ The Court reasoned that the Pima-Maricopa tribe lacked criminal jurisdiction over Duro because he did not have tribal membership rights such as voting, the ability to hold office or serve on a tribal jury; in short, Duro had not consented to Pima-Maricopa tribal jurisdiction.¹⁶⁵

The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members. . . . A tribe's additional authority comes from the consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority.¹⁶⁶

In contrast, the ICRA amendments mark a turn away from consent jurisdiction and a move toward increased territorial sovereignty. ICRA was amended specifically to counteract the Court's decision in *Duro* by recognizing a tribe's inherent criminal jurisdiction over all Indians, not just those who had consented by way of membership.¹⁶⁷ The ICRA amendments therefore signaled a return toward territorial jurisdiction.

Similarly, *Lara* acknowledges that it is dealing with the issue of territorial jurisdiction, "[a]nd the tribes' possession of this additional criminal jurisdiction is consistent with our traditional understanding of the tribes' status as 'domestic dependent nations.'"¹⁶⁸ The Court cites *Cherokee Nation*, indicating that the Court is returning to the tribes the jurisdiction they had in the days of the Marshall trilogy.¹⁶⁹ This is significant because the authority to punish those who violate the laws is an essential element of any sovereign.¹⁷⁰ However, it is

164. *Duro v. Reina*, 495 U.S. 676, 688 (1990), *superseded by statute*, Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)-(d), 104 Stat. 1856, 1892-93. The Court discussed the fact that *Oliphant* marked a turning point in Indian law, going from a territorial jurisdiction to a consent-based jurisdiction. *See id.* at 685 ("*Oliphant* recognized that the tribes can no longer be described as sovereigns in [the territorial] sense.>").

165. *Id.* at 688.

166. *Id.* at 693. Professor Gould notes that Duro did not consent to jurisdiction of the Pima-Maricopa tribe simply by the fact that he is Indian. *See Gould, supra* note 48, at 853.

167. 25 U.S.C. § 1301(2) (2000); *see also supra* note 120 and accompanying text (discussing the purpose of the ICRA amendments).

168. *United States v. Lara*, 124 S. Ct. 1628, 1636 (2004) (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)).

169. *Id.* at 1636.

170. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 418 (1819) ("The good sense of the public has pronounced, without hesitation, that the power of punishment

unclear whether the *Lara* decision will be a momentary turn toward increased tribal sovereignty, or whether it marks the beginning of lasting change.¹⁷¹ It is likely that answers to these questions will come soon, given the changing composition of the Court. With the recent appointment of two new Justices,¹⁷² Indian law cases before the Court will be as unpredictable as they have ever been. In fact, it is debatable whether the outcome in *Lara* would have been the same had it been decided two years later. Both Chief Justice Rehnquist and Justice O'Connor were in *Lara*'s majority, as was Justice Stevens,¹⁷³ who at eighty-six years old is currently the Court's most senior member and has been dubbed "[t]he best friend of tribal sovereignty on the [C]ourt."¹⁷⁴ While some considered Justice O'Connor the Court's Indian law expert,¹⁷⁵ the newly appointed Justices lack her experience; Chief Justice Roberts had minimal exposure to Indian law in his private practice career,¹⁷⁶ and Justice Alito never heard an Indian law case during his more than fifteen years on the Third Circuit

appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.").

171. See Pollman, *supra* note 48, at 936–37 (observing before the *Lara* decision that affirmation of the ICRA amendments would at least result in a slowing of the advancement of consent jurisdiction). Many commentators note that the decision in *Lara* appears to point toward increased tribal sovereignty, but beneath the surface, the decision abhorrently affirms the use of Congress's plenary power over the Indian tribes, which could easily erode what remains of tribal sovereignty. See, e.g., William Bradford, "Another Such Victory and We Are Undone": A Call to an American Indian Declaration of Independence, 40 TULSA L. REV. 71, 72 (2004) (addressing the need for an American Indian Declaration of Independence because "*Lara* simply reaffirms contemporary judicial understandings of the doctrine of plenary power," and consequently, "the sovereignty of Indian tribes, even post-*Lara*, survives at the sufferance of Congress, and history suggests that its future is grim"); Gould, *supra* note 48, at 899 (recognizing that more needs to be done to reform tribal sovereignty than continuing to rely on the doctrines of inherent sovereignty and trust responsibility, as there is no textual constitutional basis for them); Pommersheim, *supra* note 27, at 283 (arguing that without a constitutional amendment, Congress's plenary power could erase tribal sovereignty altogether).

172. See Press Release, Supreme Court of the United States, Justice Alito Sworn In (Jan. 31, 2006), available at http://www.supremecourtus.gov/publicinfo/press/pr_01-31-06.html; Press Release, Supreme Court of the United States, Chief Justice Roberts Sworn In (Sept. 29, 2005), available at http://www.supremecourtus.gov/publicinfo/press/pr_09-29-05.html.

173. *Lara*, 124 S. Ct. at 1630.

174. Editorial, *Turning Point for the Court*, INDIAN COUNTRY TODAY, Sept. 8, 2005, available at <http://www.indiancountry.com/content.cfm?id=1096411529>.

175. Jim Adams, *Judges' Tour in 2001 Helped in Lara Win*, INDIAN COUNTRY TODAY, May 17, 2004, available at <http://www.indiancountry.com/content.cfm?id=1084815404>.

176. Chief Justice Roberts worked on two cases involving federal Indian law as a private practice attorney. The first was *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 522 (1998), and the second was *Rice v. Cayetano*, 528 U.S. 495, 497 (2000).

Court of Appeals.¹⁷⁷ Consequently, as these issues are thrust into the hands of newly appointed Justices who lack experience with the harried past of Indian law, the outcomes remain a mystery.¹⁷⁸

2. *At What Cost? Constitutional Concerns.* Resolution of Lara's case by the Supreme Court did not require an evaluation of whether his equal protection or due process rights had been violated.¹⁷⁹ However, as Justice Kennedy observed, the Court's decision places the constitutional rights of all Indians in danger of being violated.¹⁸⁰ Subjecting nonmember Indians (but not non-Indians) to the powers of tribal governments—governments that do not follow the Constitution and whose civil rights do not include several of those found in the Bill of Rights—without their consent is an infringement on due process and equal protection rights.¹⁸¹ While tribal sovereignty and the tribes' ability to protect themselves may have benefited, the ICRA amendments and their resounding acceptance in *Lara* overlook these individual rights of Indians. This section analyzes the potential equal protection and due process violations that may result from the Court's opinion in *Lara*.

The Fifth and Fourteenth Amendments to the U.S. Constitution guarantee that each person shall be given equal protection under the laws.¹⁸² This protection severely curbs the power of the federal and state governments to make

177. See Peter Harriman, *Johnson One of 1st to Talk with Alito*, ARGUS LEADER (Sioux Falls, S.D.), Nov. 2, 2005, at 1A, available at <http://www.argusleader.com/apps/pbcs.dll/article?AID=/20051102/NEWS/511020315/1001> (reporting that Senator Tim Johnson spoke with Justice Alito shortly after the nomination and stated, "[H]e did share with me his concern with [Indian law] issues and his interest in knowing much more about them").

178. At the time of publication, Indian tribes were zero for one before the Roberts Court. See *Wagnon v. Prairie Band Potawatomi Nation*, 126 S. Ct. 676, 681, 689 (2005) (upholding a Kansas fuel tax that the Prairie Band Potawatomi Nation argued had singled out tribal-owned service stations on reservation land).

179. *United States v. Lara*, 124 S. Ct. 1628, 1638 (2004) ("[W]e need not, and we shall not, consider the merits of Lara's due process claim. . . . Like the due process argument, however, this equal protection argument is simply beside the point, therefore we do not address it.").

180. See *id.* at 1640 (Kennedy, J., concurring in judgment) (arguing that the majority's opinion would subject Lara, a nonmember Indian, to the jurisdiction of a third power—a serious constitutional step).

181. See *Duro v. Reina*, 495 U.S. 676, 693 (1990) ("We hesitate to adopt a view of tribal sovereignty that would single out another group of citizens, nonmember Indians, for trial by political bodies that do not include them."), *superseded by statute*, Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)–(d), 104 Stat. 1856, 1892–93.

182. U.S. CONST. amends. V, XIV. Although the Fifth Amendment does not contain an equal protection clause, the Court has held that the Amendment's Due Process Clause prohibits invidious discrimination that is "so unjustifiable as to be violative of due process." *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954).

classifications based on race.¹⁸³ If either government makes a racial classification, it is subject to strict scrutiny by the courts. That is, in order to be constitutional, the classification must have a compelling governmental interest and be narrowly tailored to meet that interest.¹⁸⁴

Here, the ICRA amendments arguably make the racial classification of “Indian” to identify the class of persons to whom the act applies.¹⁸⁵ ICRA defines “Indian” as “any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18.”¹⁸⁶ Section 1153 of Title 18 covers the jurisdiction of the federal government over crimes committed in Indian country, but does not define the term Indian explicitly.¹⁸⁷ However, the legislative history of the act reveals that “[a] determination of whether the State or the Federal government has jurisdiction to prosecute in a given instance and whether State or Federal substantive law applies, depends upon a number of variables—the offender’s *race*, the victim’s *race*, and the State within which the Indian country is located.”¹⁸⁸ Thus, in terms of statutory construction and legislative history, ICRA’s use of the term Indian is arguably a racial classification. Therefore, it would be subject to strict scrutiny by the courts.

It is doubtful that such a classification would withstand a strict scrutiny analysis, and it would likely be deemed unconstitutional because it violates equal protection. The Court has held that a classification is narrowly tailored only when the

183. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995) (“[B]ecause classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate . . .” (internal quotation marks omitted)); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (plurality opinion) (“Classifications based on race carry a danger of stigmatic harm.”).

184. See *Adarand*, 515 U.S. at 227 (“[A]ll racial classifications . . . must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”); *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (holding that a state violates equal protection by forbidding all persons of a particular race from serving on a grand jury).

185. 25 U.S.C. § 1301(2) (2000) (“[P]owers of self-government’ . . . means the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all *Indians*.” (emphasis added)).

186. *Id.* § 1301(4).

187. 18 U.S.C. § 1153 (2000).

188. H.R. REP. NO. 94-1038, at 2 (1976), as reprinted in 1976 U.S.C.C.A.N. 1125, 1126 (emphasis added); see also H.R. REP. NO. 99-528, at 3 (1986), as reprinted in 1986 U.S.C.C.A.N. 1298, 1300 (“The race of the perpetrator and the offender are thus important in determining whether the Federal government can prosecute a crime occurring in Indian country.”).

government has no other choice in passing the legislation.¹⁸⁹ In addition, racial classifications are “immediately suspect.”¹⁹⁰ Here, Congress enacted the ICRA amendments in order to fill a jurisdictional void left by *Duro*. However, it is doubtful that making only Indians amenable to the act is a narrowly tailored solution. Congress could have addressed the problem by granting Indian tribes misdemeanor jurisdiction over all persons who break the law on their lands, not just Indians. Alternatively, Congress could have increased federal jurisdiction over Indian tribes to include misdemeanor crimes, and provided additional funding to increase the ability of these federal agencies to police the reservations. While these alternatives carry with them difficulties of their own not addressed here,¹⁹¹ they illustrate that Congress had several race-neutral choices available, yet chose to rely on language that violates the equal protection rights of Indians.

There exists a strong argument based on precedent suggesting that Congress’s classification of “Indian” in the ICRA amendments is a political classification, rather than a racial classification, and would therefore only subject the legislation to rational basis review.¹⁹² In the past, the Court has decided in various circumstances that the term “Indian” refers only to those who are members of a federally recognized tribe, and thus Indian is a political classification.¹⁹³ If this argument is persuasive, a court would likely find that the ICRA amendments do not violate the equal protection rights of Indians.

189. See *Adarand*, 515 U.S. at 226, 228, 236 (holding that the legislation must be absolutely necessary and legitimate).

190. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

191. For a brief comparison of other proposals to solve the jurisdictional problem on reservations, see Pommersheim, *supra* note 27, at 285–86 (concluding that a constitutional amendment is the only way to guarantee true tribal sovereignty). See also Gould, *supra* note 48, at 899–902 (indicating that with a dual court system using delegated authority from Congress, “tribes could assert inherent powers over their own members and delegated powers over other Indians and non-Indians”); cf. Brief of Lewis County, Idaho, Mille Lacs County, Minnesota, and Thurston County, Nebraska, *Amici Curiae*, in Support of Respondent in Part at 7–9, *United States v. Lara*, 124 S. Ct. 1628 (2004) (No. 03-107) (arguing that affirmation of the ICRA amendments by *Lara* could result in further legislation that would violate the constitutional rights of all persons).

192. See *Morton v. Mancari*, 417 U.S. 535, 554–55 (1974) (holding that political classifications can withstand equal protection analysis “[a]s long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians”).

193. *Id.* at 552–54; see also *United States v. Antelope*, 430 U.S. 641, 646–47 (1977) (reasoning that the term Indian refers to “a separate people’ with their own political institutions,” and, further, that “[f]ederal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a “racial’ group” (quoting *Mancari*, 417 U.S. at 553 n.24)).

The success of this argument is uncertain, however, because neither ICRA's definition of "Indian" nor the *Lara* Court make membership in a federally recognized tribe a prerequisite to the exercise of tribal jurisdiction.¹⁹⁴ Instead, the *Lara* decision sidesteps the issue of whether ICRA uses a race-based or political classification.¹⁹⁵ Additionally, a number of the cases defining who is subject to federal jurisdiction under 18 U.S.C. § 1153—the statute to which ICRA turns for its definition of "Indian"—have held that membership in a tribe does not determine who is an Indian for purposes of criminal prosecution.¹⁹⁶ While in other circumstances "Indian" has referred to a political body, there is a persuasive argument that in the context of criminal jurisdiction the word "Indian" refers to the race as a whole, and thus, the ICRA amendments and their acceptance in *Lara* would violate equal protection.¹⁹⁷ That argument states that because membership in most tribes has some blood-quantum prerequisite,¹⁹⁸ membership is based, at least in part, on race. Thus, because persons of one race (i.e., Indians) are subject to tribal-court jurisdictions, and persons of every other race are not, Indians are denied equal protection under the law. In fact, Justice Kennedy expressed concern for this issue in his concurrence in *Lara* when he stated, "The individual citizen has an enforceable right to those structural guarantees of liberty, a right which the majority ignores."¹⁹⁹

194. 25 U.S.C. § 1301(4) (2000); *Lara*, 124 S. Ct. at 1631. *But see* Gould, *supra* note 28, at 689 (suggesting that "[t]he Court could summon hoary *Mancari* and its toothless level of review" to find that Indian is a political classification).

195. *Lara*, 124 S. Ct. at 1638 ("[T]his equal protection argument is simply beside the point, therefore we do not address it.").

196. *United States v. Rogers*, 45 U.S. (4 How.) 567, 572–73 (1846) (holding that one need not be a tribal member to be an "Indian" for purposes of criminal prosecution under 18 U.S.C. § 1153); *United States v. Ives*, 504 F.2d 935, 953 (9th Cir. 1974) ("[E]nrollment or lack of enrollment is not determinative of . . . status as an Indian."); *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir. 1938) ("Only Indians are entitled to be enrolled [in tribes] . . . and the fact of enrollment would be evidence that the enrollee is an Indian. But the refusal of the Department of the Interior to enroll a certain Indian as a member of a certain tribe is not necessarily an administrative determination that the person is not an Indian.").

197. *See* Gould, *supra* note 87, at 63 (condemning the ICRA amendments as "inherently racist"); Brief Amicus Curiae of Thomas Lee Morris, Elizabeth S. Morris and Roland J. Morris, Supporting Respondent at 22, *Lara*, 124 S. Ct. 1628 (No. 03-107) ("[T]he ICRA amendments are, and were intended to be, a burden to only one race. As such, they violate equal protection.").

198. David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 803 (1991) ("Virtually all tribal membership qualifications themselves contain two requirements: a political affiliation and a tribal blood quantum. . . . [T]ribal membership is itself based on one suspect and one nonsuspect classification.").

199. *Lara*, 124 S. Ct. at 1641 (Kennedy, J., concurring in judgment).

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To date, only the Ninth Circuit has weighed in on the issue.²⁰⁰ In *Means v. Navajo Nation*, that court affirmed the district court's denial of a habeas appeal by an enrolled member of the Oglala-Sioux Indian Tribe from prosecution by the Navajo tribal court.²⁰¹ In denying the petitioner's equal protection challenge, the court held that "the weight of established law requires us to reject Means's" claim.²⁰² The court left open the question of whether the same reasoning would apply to "a person who was racially Indian, but who was not enrolled or eligible for enrollment in any tribe."²⁰³ This question will likely remain unresolved until the Court faces a tribal prosecution of an Indian who has no tribal affiliation at all.

Additionally, the *Lara* decision arguably violates the due process rights of all Indians. The Fifth Amendment provides that all citizens of the United States shall be afforded "due process of law," which includes all of the protections of the Bill of Rights.²⁰⁴ Indians were officially made citizens of the United States in 1924,²⁰⁵ and they have all of the rights associated with citizenship.²⁰⁶ Nonetheless, the Court has held that, in the absence of congressional authorization, the Bill of Rights' protections do not extend to tribal courts.²⁰⁷ While the 1968 ICRA provides tribal court defendants most of the safeguards of the Bill of Rights, it lacks, most noticeably, the right to appointed counsel.²⁰⁸ The right to appointed counsel is a fundamental right of defendants in a federal or state criminal prosecution.²⁰⁹ While

200. *Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005).

201. *Id.* at 937.

202. *Id.* at 932–34 (citing *Morton v. Mancari*, 417 U.S. 535 (1974), and *United States v. Antelope*, 430 U.S. 641 (1977)).

203. *Id.* at 934–35.

204. U.S. CONST. amend V; see *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276–77 (1856) (confirming that a federal law violates the Fifth Amendment's Due Process Clause if such law is "in conflict with any of [the Constitution's] provisions").

205. See *Duro v. Reina*, 495 U.S. 676, 692 (1990) (citing COHEN, *supra* note 99, at 142–43), *superseded by statute*, Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)–(d), 104 Stat. 1856, 1892–93.

206. See *id.* (quoting *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978), *superseded by statute*, Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)–(d), 104 Stat. 1856, 1892–93).

207. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." (citing *Talton v. Mayes*, 163 U.S. 376, 382, 385 (1896))).

208. 25 U.S.C. § 1302 (2000).

209. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are

it is permissible to deny tribal members the right to appointed counsel based on the fact that they have consented to the jurisdiction of the tribe,²¹⁰ the same argument does not apply to nonmembers. Subjecting a U.S. citizen to a tribal jurisdiction that does not afford him all the constitutional safeguards he is entitled to is a violation of his due process rights.²¹¹

The common reply to this argument is that ICRA provides the convicted defendant in a tribal court proceeding the right to test the validity of his conviction by habeas corpus appeal to federal court.²¹² However, this argument presupposes that the tribal court defendant appearing pro se will know that he is entitled to a federal habeas review, and further, that he will know how to petition a federal court for such relief. The more likely occurrence will be similar to what happened in *Lara*, where the defendant pleads guilty and serves a short tribal court sentence.²¹³ Then, following release, he is charged in federal court based on the same set of facts and only then obtains counsel, because only at this point is it constitutionally guaranteed.²¹⁴ By this time his right to dispute the validity of the tribal court sentence is gone; as the *Lara* Court stated, “we need not, and we shall not, consider the merits of Lara’s due process claim.”²¹⁵ The *Lara* Court suggests that other defendants “remain free to raise that claim should they wish to do so.”²¹⁶ However, it is likely that such a claim will be infrequently brought.²¹⁷ For these reasons, *Lara*’s acceptance of the ICRA amendments presents harmful possibilities for the individual rights of Indians nationwide.

necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.”).

210. See *Duro*, 495 U.S. at 694.

211. *Id.*

212. 25 U.S.C. § 1303 (2000) (demonstrating that, as part of ICRA, any individual convicted in tribal court has the right to obtain habeas corpus review in a U.S. court).

213. *United States v. Lara*, 124 S. Ct. 1628, 1631 (2004).

214. *Id.*

215. *Id.* at 1638.

216. *Id.*

217. See Gould, *supra* note 28, at 691 (“Few litigants will have the wherewithal to launch federal appeals.”).

IV. CONCLUSION

The questions before the *Lara* Court presented no simple solutions. Had the Court held that Congress delegated its authority to the tribes to prosecute nonmember Indians, Billy Jo Lara's federal conviction would have been overturned on double jeopardy grounds, and the decision would have resulted in a large number of crimes punished only by the misdemeanor sentences available to the tribes. However, the Court's holding presents its own set of implications. One of these consequences is that tribes now have greater ability to police themselves against lawbreakers. Additionally, *Lara* signifies a move toward greater tribal sovereignty. And yet it also presents difficult questions concerning the constitutional rights of individual Indians. Whether the decision results in a positive net gain is yet to be determined. More importantly, the questions of whether there are better solutions to the issues of tribal sovereignty, the proper reach of a tribe's criminal jurisdiction, and the individual rights of Native Americans, will undoubtedly be considered by scholars, practitioners, and judges for many years. *Lara* made certain that future cases, perhaps some to be heard by the Roberts Court, will continue to struggle with these evolving constitutional principles.²¹⁸

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218. Resnik, *supra* note 1, at 130–31.