Double Jeopardy and Nonmember Indians in Indian Country

Terrill Pollman

University of Nevada, Las Vegas – William S. Boyd School of Law

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I. INTRODUCTION

It is a small thing: the Indian Civil Rights Act (ICRA) limits the punishment a tribal court can impose to no more than a fine and a
year in jail. 1 Our system gives that much power to municipalities, including every little speed-trap town. Speeding tickets can be costly, and you can go to jail if you don’t pay them. No one asks whether you had the right to participate in making those laws. It’s just the way it is.

It is a great thing: the individual rights guaranteed to citizens under the Constitution or fidelity to promises made long ago, the right of a people to be recognized as sovereign, a moment of respect in a long and continuing history of conquest and colonialism.

The ambivalence of the federal government to the sovereignty of native tribes is ordinarily a quiet fact of life in this country. Now, the federal circuits have disturbed that quiet by rendering opposing rulings on the question whether the Double Jeopardy Clause bars successive tribal/federal prosecution of nonmember Indians2 in Indian Country.3 The Ninth Circuit has held the Double Jeopardy Clause does not present a bar to successive tribal/federal prosecutions.4 In contrast, the Eighth Circuit has held that the Double Jeopardy Clause prohibits subsequent prosecution because the source of the tribe’s jurisdiction, if it has jurisdictional power, is the same as the source of the federal courts’.5 The circuit split has far reaching practical conse-

1. Until 1986, the Indian Civil Rights Act (ICRA) limited the penalty that tribal courts could impose to no more than 6 months in jail plus a $500 fine. 25 U.S.C. § 1302(7) (1986). Currently, the limits under ICRA are $5,000 and one year in jail. Id.

2. The courts use the term “nonmember Indians” to refer to those individuals on tribal land who meet the legal definition of “Indian” in at least one context, but are not registered as members of the tribe where the individual is being prosecuted. See infra note 14 and accompanying text. The term distinguishes these Indians from both Indians who are members, and from non-Indians generally.

3. “Indian Country” is the term used to demarcate the physical borders of jurisdiction. The term is statutorily defined in 18 U.S.C. § 1151 as,

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights of way running through the same.


quences, and the United States Supreme Court granted certiorari on the issue.

Beyond practical consequences, however, are the doctrinal and theoretical effects. Indian law scholar Frank Pommersheim has called this circuit split "the (little or not so little) constitutional crisis." Like so many Indian law cases, one case becomes a microcosm for the Indian law universe by raising the fundamental questions: What are the limits of tribal sovereignty? Where is the source of tribal sovereignty? Who decides the answers to those questions?

Analyzing the sovereignty question requires a multifaceted inquiry into several complex bodies of law. The Double Jeopardy Clause of the United States Constitution forbids multiple prosecutions based on the same facts. The dual sovereignty exception to the Double Jeopardy Clause allows successive prosecutions by separate sovereigns, or more precisely, sovereigns that derive power from separate sources. Thus, the Court must determine whether tribes have inherent sovereignty over nonmember Indians or have sovereignty only as derived from a delegation by the federal government. If it is an inherent power, retained by the tribe from the days before the United States existed, the dual sovereignty exception will apply, allowing multiple prosecutions. If it is a power delegated by the federal government, the federal court and the tribal court derive their power from the same

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6. The Reply Brief for the Petitioner on Petition for Writ of Certiorari notes that although only two circuits have addressed the question that those two circuits contain more than 80% of the recognized tribes in the United States. Reply Brief for Petitioner, United States v. Lara, 324 F.3d 635 (8th Cir. 2003), available at http://www.usdoj.gov/osg/briefs/2003/2pet/7pet/2003-0107.pet.rep.html (citing "information provided to this Office by the Bureau of Indian Affairs" which states that "of the 562 recognized Tribes in the United States (see 67 Fed. Reg. 46,328 (2002)), 455 are located in the Eighth and Ninth Circuits).

7. United States v. Lara, 124 S. Ct. 982 (2003). The petition for cert frames the issue as: "Whether Section 1301, as amended, validly restores the Tribes' sovereign power to prosecute members of other Tribes (rather than delegates federal prosecutorial power to the Tribes), such that a federal prosecution following a tribal prosecution for an offense with the same elements is valid under the Double Jeopardy Clause of the Fifth Amendment." Pet. for Cert. at I, United States v. Lara, 124 S. Ct. 982 (2003), available at 2003 WL 22428587 (Appellate Filing) Petition for a Writ of Certiorari (Jul. 22, 2003).


9. "This case sits at the intersection of two complicated bodies of law: the dual sovereignty exception to double jeopardy, and the sovereign power of Indian tribes." Enas, 255 F.3d at 664. The issue also raises separation of powers questions.

10. The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V.


source, and Double Jeopardy bars successive prosecution by the two courts.

Deciding the source of tribal court criminal jurisdiction in a given situation is a complicated task, however, because tribal jurisdiction is not one-dimensional. Instead, a tribe's jurisdiction over a crime committed on the reservation often depends upon the nature of the crime, the identity of the parties, and treaties and statutes specifically ceding jurisdiction over certain matters or peoples to other sovereigns. The complexity of tribal jurisdiction derives, in part, from the demographics of the reservation. Three categories of residents make their home in Indian Country: (1) members of the tribe, (2) non-Indians, and (3) Indians who are not enrolled members of the tribe on whose reservation they reside, who are considered nonmember Indians.13 Rules governing jurisdiction can differ for each category. The way courts have used these labels and practical questions raised by wide demographic variety in Indian Country play an important role in deciding tribal jurisdictional questions. The Court must consider this variety when analyzing double jeopardy issues in Indian Country.14

13. This group would include Indians enrolled in other tribes, and Indians who are not enrolled at all. See supra note 2 and accompanying text.

14. Demographic categories also raise questions of equal protection. This Article will follow the lead of the circuit courts, and will not address equal protection issues. Moreover, other authors have studied and analyzed the equal protection issues in depth. Many find that equal protection concerns should not interfere with tribal sovereignty. See, e.g., David C. Williams, The Borders of the Equal Protection Clause: Indians as Peoples, 38 UCLA L. REV. 759 (1991). Williams concludes that Indians are different and that they are a separate people with a right to develop in their own way, and that the authors of the Fifth and Fourteen Amendments did not intend Indians to fall within their purview. Id. at 835. Nell Jessup Newton argues tribes should be able to make the same distinctions in their criminal scheme as the federal government has made in its scheme. Further, she notes wryly that it is the decision of the Supreme Court in limiting criminal jurisdiction that has eliminated the opportunity for tribes to treat defendents the same regardless of race Nell Jessup Newton, Commentary,Permanent Legislation to Correct Duro v. Reina, 17 AM. INDIAN L. REV. 109, 119-124 (1992). Alex Tallchief Skibine maintains that the classification of Indians is “at least partially based on race” and strict scrutiny applies “unless Congress’ action can be tied rationally to the fulfillment of its unique obligation toward Indians.” Alex Tallchief Skibine, Duro v. Reina and the Legislation that Overturned it: A Power Play of Constitutional Dimensions, 66 S. CAL. L. REV. 767, 784-791 (1993). Robert N. Clinton argues that individual Indians derive their identities from the tribe, and to limit tribal sovereignty discriminates against Indians on the basis of race. Robert H. Clinton, Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government, 33 STAN. L. REV. 979, 1053 (1981). Others find equal protection concerns will eventually bar everything except member jurisdiction, or will subject tribes to strict scrutiny when actions involve nonmembers. Stuart Minor Benjamin, Equal Protection and the Special Relationship: The Case of Native Hawaiians, 106 YALE L. J. 537, 611 (1996); L. Scott Gould, The Consent Paradigm: Tribal Sovereignty at the Millennium, 96 COLUM. L. REV. 809, 843-44 (1996). Gould also suggests tribes address equal pro-
Double jeopardy analysis is further complicated by the lack of clarity concerning whether tribal courts have jurisdiction over nonmember Indians at all. In Duro v. Reina, the United States Supreme Court held that tribal courts cannot exert criminal jurisdiction over nonmember Indians. Six months later, Congress responded in what has become known as "the Duro override" or "the Duro fix." Congress amended the Indian Civil Rights Act (ICRA) to "recognize" the "inherent" power of the tribes. The Duro override raises what scholars Philip S. Deloria and Nell Jessup Newton have called "complex and subtle issues of constitutional law." Separation of powers questions remain concerning which law will govern: Duro, or the Duro override? If the Supreme Court decided Duro on a constitutional basis, then Congress may not have the authority to override Duro, and the Duro decision stands. But if Duro was decided as a matter of federal common law, without a constitutional basis, then Congress can overrule the Court. Thus, to decide the source of tribal jurisdiction, which will decide the double jeopardy question, one must carefully analyze Duro v. Reina.

Two opinions served as the primary building blocks for the Duro rationale: United States v. Wheeler and Oliphant v. Suquamish Indian Tribe. These cases, decided within the same year, presented different outcomes on questions of Indian sovereignty. Wheeler held that the dual sovereignty exception to the Double Jeopardy Clause allowed successive tribal/federal prosecutions for tribal members because tribal sovereignty over members was inherent and not

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18. The Court stated in Cooper v. Aaron, 358 U.S. 1, 18 (1958), that "the federal judiciary is supreme in the exposition of the law of the Constitution . . . ." Scholars continue to debate, however, whether Congress lacks authority to correct the Court when the basis of the Court's decision is the Constitution. See, e.g., Larry D. Kramer, The Supreme Court 2000 Term Forward: We the Court, 115 HARV. L. REV. 4 (2001).
19. The Ninth Circuit analyzes the issue in this way. Enas, 255 F.3d at 673-74. Federal common law is generally accepted as "court-made law that is neither constitutional or statutory." Id. at 674-75 (citing ERWIN CHEMERINSKY, FEDERAL JURISDICTION 349 (3 ed. 1999)). In National Farmers Union Insurance Companies v. Crow Tribe of Indians, 471 U.S. 845 (1985), the Court held that Indian law precedent, as federal common law, gave plaintiffs a basis for federal district court jurisdiction after they had exhausted tribal court remedies.
delegated from the federal government. In contrast, *Oliphant* held that tribal courts could not exercise criminal jurisdiction over non-Indians because the tribes cannot exercise their sovereignty in ways that "conflict with the interests of [the] overriding [federal] sovereignty." In *Duro* the Court attempted to reconcile the recognition of inherent sovereignty over a tribal member in *Wheeler*, with the rejection of sovereignty over non-Indians in *Oliphant*. In the process, traditional concepts of geographically-based jurisdiction gave way to what commentator L. Scott Gould calls the inception of a new paradigm of Indian sovereignty, one based only on membership, or consent jurisdiction. Scholar Philip Frickey, on the other hand, has written that the consent jurisdiction theory fails because it attempts "to impose an artificial coherence upon the field." This new theory poses yet another question that runs through the multi-layered analysis concerning criminal jurisdiction, double jeopardy and nonmember Indians in Indian Country. When the United States Supreme Court addresses the issue, will it continue on the path of members-only jurisdiction for the tribes or will it leave open the older paths of deference to Congress' explicit intent in matters of tribal jurisdiction?

This Article attempts to answer this and other questions posed here. The Article gathers and analyzes various strands of law that contribute to the analysis of double jeopardy and nonmember Indians in Indian Country and the choices the Court faces when it decides double jeopardy issues. Part One briefly investigates the demographics of Indian Country, because the demographic diversity of the tribes plays a part in understanding the difficulty the Court will face when addressing this issue. Part Two reviews double jeopardy doctrines and the *Wheeler* decision, the first decision to address how the Double Jeopardy Clause applies to successive tribal/federal prosecutions. Part Three summarizes the complex rules governing criminal

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24. "Confronted with this history, the *Oliphant* Court began the journey to consent-based sovereignty." L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 845 (1996). "In reaching its decision, the *Wheeler* Court described the central principle of the consent paradigm." Id. at 849.
25. "Consent based jurisdiction" as Scott Gould uses the term, means that the tribe has jurisdiction only over members who have consented to jurisdiction by becoming members. This kind of jurisdiction contrasts with "territorial jurisdiction," or jurisdiction over those who enter a sovereign's territory. See generally Gould, supra note 25. This Article uses the term "consent based jurisdiction" and "members-only jurisdiction" interchangeably.
jurisdiction in tribal courts and examines Oliphant, Duro, and the Duro override. Part Four presents highlights from the split opinions, setting out the reasoning of the Eighth and Ninth Circuits. Part Five analyzes the choices that the Court will face if the issue comes before them. Finally, the Article concludes by recommending that the Court defer to Congress’ power to determine the limits of tribal sovereignty, and that both Congress and the Court defer to the duty of the tribe to protect its members by allowing tribal prosecution of nonmembers.

II. BACKGROUND

A. Demographics in Indian Country

The Court’s decision about criminal jurisdiction and double jeopardy on the reservation will have lasting effects on law enforcement in Indian Country. To make wise choices, decision makers must have a realistic view of the demographic realities of life on the reservation. What it means to be a tribe, the membership rules of individual tribes, and the ratios of tribal members to nonmembers or non-Indians on a given reservation are all tribal features that vary widely, making it difficult to generalize. Nevertheless, it is clear that many reservations are home to a mix of members, nonmembers, and non-Indians.

Duro, and the cases on which Duro relies, devote considerable discussion on the individual’s ability to participate in government and the individual rights of nonmembers and non-Indians.27 Discussion of individual rights in most Indian law cases is rare because much of the federal law concerning Native Americans deals with tribes, and not individuals.28 Traditionally, it was the tribes, not individuals, that negotiated treaties with the United States; therefore, the benefits and burdens derived from those treaties often accrued to the tribe and not the individual tribal members.29 As a result, tribal membership generally determined individual members’ rights. If the Supreme Court finds a constitutional basis for Duro, the resulting limit on tribal jurisdiction to tribal members would render membership rules even more important than in the past. Over twenty years ago, Indian law scholar Robert Clinton wrote about the problems that the inquiry into membership might create.

The Court’s focus on political membership of tribal Indians has had another awkward consequence—the fragmentation of governance on Indian reservations. Indian communities often include many individuals, sometimes full-blooded Indians, who through marriage or as a result of having parents of different tribal backgrounds, are ineligible for formal enrollment as members of the tribe on whose reservation they reside. Yet Indians and non-Indians alike usually consider such persons to be socially, economically, and culturally

27. Duro, 495 U.S. at 691-92.
29. Id.
part of the Indian community. The Court's blind and rigid focus on tribal affiliation is beginning to oust Indian tribes from power to govern these nonmember Indians and to enlarge the sphere of state authority over these Indian residents who are not members of the governing tribe even if they are enrolled members of a different tribe. This recent development of focusing on membership is inconsistent with prior law and is profoundly disturbing to the integrity of the reservation Indian community.30

As Clinton notes, membership rules, the question of who is an "Indian," and who may enroll in a particular tribe, are complex and context-dependent.31 In some situations, individuals must be recognized as an enrolled member of a federally recognized tribe to reap certain legal benefits, while in others, ethnicity alone is sufficient.32 In the absence of federal legislation dictating otherwise, each tribe has the authority to determine its own membership criteria.33

The wide variance in membership rules results in many reservations becoming home to a significant population of nonmember Indians.34 Some tribal constitutions automatically provide membership for every child born to a member of the tribe, while others require application, a certain blood quantum, residency, or that father, mother or both parents be enrolled members.35 Some tribes recognize a loss of membership if the member leaves the reservation.36 Some tribes allow membership for Indians of other tribes who reside on the reser-

32. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 24 (1945). Some federal statutes include multiple definitions of "Indian," which may not reference membership in an Indian tribe at all.
33. Id. at 20; see also Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364 (10th Cir. 1966) cert. denied 385 U.S. 831 (1966). Generally speaking, the two most common requirements to claim Indian status are some measure of Indian blood and recognition by the tribal community as Indian. Cohen, supra note 33 at ___.
34. Membership rules may exclude individuals that other laws may recognize as Indians. A typical example of membership rules thwarting enrollment of full blooded Indians posits a child born to an Indian father whose tribe enrolls only children of female members. The same child's mother is a member of a different tribe who only enrolls children of male members. Thus, the child is 100% Indian, but unable to enroll with either tribe.
36. Id.
vation, while others do not.37 Some Indians may choose not to enroll for political or other reasons.38

Although we lack much important data, we do know that the demographic context varies from tribe to tribe.39 The array of federal and tribal rules that make defining tribes and Indians such a complex task, combined with federal policies that have encouraged a diverse population on reservations, are likely causes of these wide demographic variations.

Not only are membership rules complex, but the task of defining what constitutes a tribe under federal law is not always simple.40 Moreover, federal government policies have sometimes grouped members of more than one tribe together, ignoring age-old ethnological divisions, to create “consolidated” or “confederated” tribes.41 These artificial groupings create populations that include a diverse group of Indians and, along with other federal policies, have resulted in a reservation population that is far from homogenous. Foremost among those federal policies resulting in a mixed reservation population is the Allotment Act, a program that privatized tribal land in an effort to assimilate Indians.42 The Allotment Act has long been best recognized for its devastation of many tribes because those tribes lost much of their land during the Allotment Period.43 Allotment, as an assimi-

37. Id.
38. Deloria and Newton, supra note 18, at 73. Newton writes that Indians may choose not to enroll as an act of protest against the Indian Reorganization Act, or for other causes.
40. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 3-4 (3d ed. 1998) (Stating: “[T]here is no all-purpose definition of an Indian tribe. A group of Indians may qualify as a tribe for the purpose of one statute or federal program, but fail to qualify for others.”).
41. Id. at 5; Clinton, supra note 15, at 987-88; see also Oliphant, 435 U.S. at 192 (explaining that “[w]ho hundred years ago, the area bordering Puget Sound consisted of a large number of politically autonomous Indian villages . . . [that] were aggregated into a series of Indian tribes . . . .”). Robert Clinton writes, “The United States negotiators forced tribes, which were organized on a basis of group consent to select ‘chiefs’ or leaders who could speak for the tribe in dealings with the Americans. At other times the negotiators simply acted as if there were a tribal leader who could speak for the tribe, when in fact there was not.” Robert N. Clinton, Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government, 33 Stan. L. Rev. 979, 987-88 (1981). Other examples of confederated tribes include the Confederated Tribes and Bands of Yakima Indians, or the Confederated Tribe of the Colville Indians.
42. The General Allotment Act of 1887, 25 U.S.C. § 331 (2000) was also known as the Dawes Act. Under the Allotment Act, the United States took title of reservation lands away from the tribes and gave it to individual Indians in an effort to instill in Indians the dominant culture’s belief in the value of private property.
43. Implementation of the Act diminished tribal land holdings dramatically; tribes lost a total of nearly 90 million acres or eighty percent of tribal holdings. Steven
lationist policy, was ultimately a failure, but during that period a great deal of tribal land was transferred to non-Indians. When land passed out of the hands of tribal members and into the hands of non-Indians or nonmember Indians, the reservations became "check-erboards" of tribal and non-tribal land. Similarly, educational policies, adoption policies, and the establishment of Bureau of Indian Affairs employment preferences have resulted in many individuals living on reservations where they are not members. Under these federal policies, reservation populations have come to include non-Indians, members of the tribe, Indians who are members of another tribe, and Indians who are not enrolled members of any tribe.

Finally, the population mix of members, nonmember Indians and non-Indians can vary enormously from one reservation to another, making it hard for general rules to apply equally well in diverse situations. On some reservations, like the Suquamish Reservation involved in Oelphant, non-Indians far outnumber members and nonmember Indians. The opposite is true, however, for the majority of tribes. Scott Gould writes that "among the 124 tribal courts operating in 1990, ninety-three were in fact located on reservations in which Indians comprised the majority of reservation population. Moreover, among these, forty-five courts were located on reservations in which Indians comprised 90% or more of the total population."

Those figures, however, leave thirty-one tribal courts operating on reservations where Indians are not the majority.


Angie Debo, A History of the Indians of the United States 332 (1970). Debo notes that after the states had succeeded in taking nearly everything they could want from the tribes, "it began to dawn on some of the good people who had urged the allotment policy that perhaps the Indians were not exactly prospering under it." Id.

Wetherington, supra note 36 at 1058-59. Wetherington cites the Vocational Training Program, 25 U.S.C. § 309 (2002), the Indian Child Welfare Act, 25 U.S.C. § 1901 (2002) and employment practices of the Bureau of Indian Affairs (BIA) as contributing to Indians leaving their own reservations to move to either "urban areas which became 'melting pots' for Indians of different tribal ancestry," or to move to other reservations. Id. at 1059. Indian children were removed from the reservation for educational programs. The Indian Child Welfare Act sometimes places a child from one tribe with a family on the reservation of another. 25 U.S.C. § 1915 (a)(3) (2000). BIA employment preferences for Indians sometimes mean that the best available job for an Indian is working on a reservation of another tribe. Id. at 1059.

Deloria and Newton, supra note 18, at 71 (Newton claims significant numbers of all three categories.)

In Oelphant, the Court notes that approximately 50 members of the Suquamish Tribe reside on the reservation, while 2,928 non-Indians live there. Oelphant, 435 U.S. at 193 n.1.

Beyond general knowledge, however, currently no comprehensive studies provide definitive demographic data on the populations in Indian Country. Some authors have addressed the lack of data by using information from the United States Census, but the time between census data collection and publication is problematic, and data collection on the reservation may not be complete. Thus, while the question of defining tribal membership is central to the resolution of many issues, including the double jeopardy question addressed here, any analysis must acknowledge the limitations inherent in the lack of coherent and complete data on tribal membership.

B. Double Jeopardy and the Dual Sovereignty Doctrine in Indian Country

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that citizens will not “be subject for the same offense to be twice put in jeopardy of life or limb.” The notion that the individual should be spared the anxiety of defending against the might of the state more than once for the same offense has been called “the oldest of all the Bill of Rights guarantees,” having its origins in many cultures. The policies that Double Jeopardy furthers include relieving citizens from the anxiety and expense of successive prosecutions and the fundamental unfairness that would result from the increased likelihood of prosecutorial success in multiple trials.

The Court addressed many of the core issues concerning double jeopardy in Indian Country when it decided United States v. Wheeler by applying the Dual Sovereignty Doctrine. The Dual Sovereignty Doctrine, complex and the object of much criticism, was integral to the Wheeler holding. This Article turns now to that doctrine and the Wheeler decision.

1. The Dual Sovereignty Doctrine

Although the Court had addressed the issue of serial prosecution in dicta earlier, the primary exception to the Double Jeopardy

49. Deloria and Newton, supra note 18 at 75.
51. U.S. CONST. amend. V.
53. Early in the nineteenth century the Court noted its disapproval of successive prosecution in two cases. United States v. Furlong, 18 U.S. (5 Wheat.) 184 (1820); Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820). Later, the Court responded to arguments that the power to criminalize conduct was the province of the states and the federal government could not constitutionally legislate in those areas. Michael A. Dawson, Popular Sovereignty, Double Jeopardy, and the Dual
Clause, the Dual Sovereignty Doctrine, was first applied in 1922 in United States v. Lanza. The Court based the doctrine on the common law notion that a criminal offense is more than a crime against certain individuals; it is a crime against the sovereignty of the government. The Court adopted the rationale elaborated in Moore v. Illinois, in language often quoted in later opinions, including Wheeler, and by scholars:

Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both . . . Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable.

The doctrine applies not only to state-federal successive prosecutions, but also to state-state successive prosecutions.

The Dual Sovereignty Doctrine is not without limits; it does not apply when prosecution by the second sovereign is merely a sham or a tool to allow a second attempt at prosecution. Further, when both jurisdictions derive power from the same source, such as a state and a subdivision of the state, they are not separate sovereigns, and the doctrine does not apply. Thus, cities are not separate sovereigns from

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Sovereignty Doctrine, 102 Yale L.J. 281, 290 (1992). Thus, the Court changed direction in Fox v. Ohio, 46 U.S. (5 How.) 470 (1847), in Fox v. Illinois, 55 U.S. (14 How.) 13 (1852), and expressed the view that dual prosecutions by separate sovereigns would not violate the Double Jeopardy Clause.

54. 260 U.S. 377 (1922).
56. 55 U.S. (14 How.) 13 (1852).
59. Heath v. Alabama, 474 U.S. 82 (1985). In Heath, the Court allowed Alabama to try the defendant and impose the death penalty after Georgia had successfully convicted him and sentenced him to life imprisonment.
60. See Bartkus, 359 U.S. at 123-24. Although the majority in Bartkus found no sham prosecution, Justice Brennan dissented, saying

What happened here was simply that the federal effort which failed in the federal courthouse was renewed a second time in the state courthouse across the street. Not content with the federal jury's resolution of conflicting testimony in Bartkus' favor, the federal officers engineered this second prosecution and on the second try obtained the desired conviction. It is exactly this kind of successive prosecution by federal officers that the Fifth Amendment was intended to prohibit.

Id. at 169 (Brennan, J., dissenting).
states, and United States territories are not separate sovereigns from the federal government.

Also, certain federal agency policies and parallel state provisions provide further limits on the doctrine. The Petite Policy is a Department of Justice policy that forbids federal prosecution if the alleged criminality was an ingredient of a previous state prosecution, unless the prosecution will serve “compelling interests of federal law enforcement.” Commentators disagree on how often the Petite Policy bars successive state-federal prosecution. Regardless of whether federal prosecutors use the doctrine rarely or routinely, however, the Petite Policy leaves the determination whether federal interests are compelling to the discretion of federal prosecutors. Moreover, several states have limited the Dual Sovereignty Doctrine by adopting either constitutional or legislative prohibitions on its applicability to state prosecutions. The effectiveness of these prohibitions has also been questioned.

Proponents of the Dual Sovereignty Doctrine in the context of state-federal successive prosecutions or state-state successive prosecutions have praised it primarily for its practical effects on law enforcement. Use of the doctrine has the further positive effects of avoiding a “race to the courthouse” that could result in hasty, mistaken prosecutions and minimizing the impact of “imperfect coordination” be-

65. “Successive prosecutions, however, are not the norm.” Robert Matz, Dual Sovereignty and the Double Jeopardy Clause: If at First You Don't Convict, Try, Try Again, 24 FORDHAM URM. L. J. 353, 362 (1997) (citing United States v. Davis, 906 F.2d 829, 833 (2d Cir. 1990)). “Furthermore, while the policy limits the instances of federal prosecutions following state prosecutions, such prosecutions are brought routinely.” Dawson, supra note 54, at 294. See, e.g., United States v. Simpkins, 953 F.2d 443 (8th Cir. 1992); United States v. Paiz, 905 F.2d 1014 (7th Cir. 1990); United States v. Bartlett, 856 F.2d 1071 (8th Cir. 1988); United States v. Bernhardt, 831 F.2d 181 (9th Cir. 1987); United States v. Aboumoussalem, 726 F.2d 906 (2d Cir. 1984).
66. The Supreme Court of New Hampshire holds that the state constitution's double jeopardy provision allows no exception for separate sovereigns. See, e.g., State v. Hogg, 385 A.2d 844, 847 (N.H. 1978) (holding that the state constitution's double jeopardy provision allows no exception for separate sovereigns). States have limited the Dual Sovereignty Doctrine to varying degrees. See Dawson, supra note 54 at nn. 94-97.
67. Id.
tween state and federal prosecutors. Many are critical of the doctrine, however. Some scholars have questioned its constitutionality, and others have found no basis for the doctrine in the common law. Other observers have suggested that the policies supporting the doctrine are less compelling because the doctrine was decided before there was much federal criminal law, and before technology allowed greater cooperation between federal and state law enforcement agencies. Further, critics have found the foundational theory of the doctrine defective, arguing sovereignty in our system resides in the people, and not in either the state or the federal government.

Though "commentators have virtually uniformly argued against the dual sovereignty theory the Court has forged, advocating its abolition, or at least limitation," the Court has shown no sign of abandoning the doctrine. The Court clearly delineated and reaffirmed its use in Wheeler, the case that first examined double jeopardy issues in Indian Country. In Wheeler, the Court was called upon to decide whether the Dual Sovereignty doctrine applied to tribes: sovereigns who have been defined as "domestic dependent nations."

2. United States v. Wheeler

The United States Supreme Court first addressed the issue of double jeopardy in Indian Country in 1978 in United States v. Wheeler. Without distinguishing between member and non-member Indians, the Court framed the issue in Wheeler as "whether the Double Jeopardy Clause of the Fifth Amendment bars the prosecution of an Indian in a federal district court under the Major Crimes Act, . . . when he has previously been convicted in a tribal court of a lesser included offense arising out of the same incident." The Court's use of the more general term "Indian," and not "member" to frame the

70. Id.
71. See, e.g., Amar and Marcus, supra note 59 at 4-5; Dawson, supra note 54 at 299-302; Walter T. Fisher, Double Jeopardy, Two Sovereignties and the Intruding Constitution, 28 U. Chi. L. Rev. 591 (1961);
73. Matz, supra note 66, at 367.
74. Id.
75. See, e.g., Susan N. Herman, Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU, 41 UCLA L. Rev. 609, 618 (1993).
76. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16-17 (1831). Part of the "Marshall Trilogy," Cherokee Nation established that the tribes were not foreign sovereigns, but rather "domestic dependent nations," and that the federal-tribe relationship was that of guardian and ward.
77. 345 U.S. 313 (1978).
78. Id. at 314.
question does not settle the question for all Indians, however, because
the defendant in Wheeler was a member of the Navajo tribe who was
convicted in Navajo tribal court of disorderly conduct and contributing
to the delinquency of a minor.79 Thus, Wheeler leaves open the issue
of double jeopardy as it pertains to nonmembers Indians.

In Wheeler, over a year after the tribal convictions, a federal grand
jury returned an indictment against the same Navajo member. The
charge was statutory rape, and it was based on the same facts the
Navajo court had decided a year earlier.80 The respondent moved to
dismiss the indictment based on the Double Jeopardy Clause. Fur-
ther, the respondent argued that the Dual Sovereignty Doctrine did
not apply to the Navajo because the tribe was subject to the plenary
power of Congress and thus was not a separate sovereign.81 The
Court, however, ruled that the Navajo tribe’s inherent sovereignty,
which included the power to punish tribal offenders, had not been lost
by treaty, statute, or its status as a “domestic dependent nation.”82
Thus, the Dual Sovereignty Doctrine applied, and the Double Jeop-
dardy Clause did not preclude the federal prosecution following a trial
arising out of the same facts in tribal court.

In Wheeler, Justice Stewart, writing for the majority, outlined the
limits of the Dual Sovereignty Doctrine, noting that territories of the
United States are not separate sovereigns,83 nor are a state and a mu-
nicipality within that state separate sovereigns.84 The Court ex-
plained the doctrine’s applicability by stating that it is not the degree
of control that one sovereign exercised over another, “but rather the
ultimate source of the power under which the respective prosecutions
were undertaken.”85

The opinion elaborates on the nature of the relationship between
states and the national government as a relationship of independent
“political communities,” with each community “[e]xercising its own
sovereignty, not that of the other[,]” despite the fact that the
Supremacy Clause of the United States Constitution gives the federal
government the power to enact laws that supersede the laws of any
individual state.86 Thus, rejecting “control” as the touchstone for sepa-
rate sovereigns, the Court also rejects the argument that the ulti-

79. Id. at 315-16
80. Id.
81. Id. at 319.
82. Id.
83. Id. at 318 (citing Grafton v. United States, 206 U.S. 333 (1907)).
84. Id. (citing Waller v. Florida, 397 U.S. 387 (1970)).
85. Id. at 319-20.
(1922) which held that the state’s power to legislate concerning prohibition was
part of its inherent sovereignty, and was not derived from the Eighteenth
Amendment’s grant of concurrent jurisdiction to Congress).
mate control, plenary power, that Congress exercises over the tribes, prevents tribes from exercising a sovereignty that is separate from the federal government.

The Wheeler opinion contains language about the tribes’ sovereignty that would, at first glance, give much hope to those who support sovereignty for the tribes. The Court cited Felix Cohen’s Handbook of Federal Indian Law for the proposition that tribal powers are “inherent powers of a limited sovereignty which has never been extinguished.” The Court asserted that “[o]ur cases recognize that the Indian tribes have not given up their full sovereignty[,]” and “[a]re] a good deal more than ‘private, voluntary organizations.’ “In sum, 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.”

Despite the Court’s recognition of the tribe’s inherent sovereignty, there is much in Wheeler that can be seen as suggesting limits to tribal authority. The Court distinguished between tribal sovereignty over internal relations and tribal sovereignty over external relations. For example, the Court states, “[i]mplicit in these treaty terms . . . was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.” The Court implies by this that “external” matters involving the tribes would be left to the federal government. Further, the opinion contains language which would severely limit the tribe’s sovereignty, when read literally, as it later would be in Duro v. Reina. The Wheeler Court opened itself up to such limitations when it stated, for example, that “areas in which such implicit

87. A long line of cases have recognized the plenary power of Congress. See, e.g., Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903); United States v. Kagama, 118 U.S. 375, 384-85 (1886). The doctrine is usually regarded as outside the text of the Constitution; the Court rejected the argument that the Major Crimes act regulated “commerce” with the tribe under the Indian Commerce clause. Id. at 378-79. Later, the Eighth Circuit found that the Court more often bases the power in the Indian Commerce Clause.


89. Id. at 322 (citing F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 122 (1942)).

90. Id. at 323 (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)).

91. Id.

92. Wheeler, 435 U.S. at 324.

93. Id. (citing Williams v. Lee, 358 U.S. 217, 221-222 (1959)). It is interesting that the quote the Court chose from Williams uses the term “Indian” and not “member.”

94. In Duro v. Reina, the Court quoted Wheeler’s statement that “[t]ribes cannot try nonmembers in tribal courts,” 495 U.S. at 685 (quoting Wheeler, 435 U.S. at 326), and remarked that “literal application of that statement to these facts would bring this case to an end.” Id. Justice Brennan, in his dissent, chides the majority for “transmuting this dictum into law.” Id. at 700 n.1 (Brennan, J., dissenting).
divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.95 And the problems with the Court's imprecision in Wheeler do not end here.

Although the Court frequently refers to jurisdiction over "members," it often uses the general term "Indian" and does not distinguish between "Indian" and "member."96 One commentator analyzed the Court's use of the two terms in Wheeler, and concluded:

Nothing about the facts in Wheeler indicates that the Court gave attention to the distinction between members and nonmember Indians with significant contacts to the reservation. Just as easily, one can conclude that by "nonmember" the Court meant "non-Indian," or alternatively nonmember Indian without significant contacts with the reservation. Evidence of the continuing ambiguity is also found in the Court's plainly imprecise use of the terms "nonmember" and "non-Indian" in subsequent opinions.97

Unless one recognizes the Court's indiscriminate and interchangeable use of the terms "Indians" and "members," and "non-Indian" and "non-member," the language in Wheeler would be daunting to anyone constructing an argument for tribal jurisdiction over nonmember Indians.

In examining whether the Double Jeopardy Clause precludes successive prosecution of nonmember Indians in tribal and federal forums, one more aspect of Wheeler requires comment. After addressing the purely legal question of sovereignty, the Wheeler Court focused on the practical reasons for holding that the Dual Sovereignty Doctrine applied.98 The Court observed that the same policies that supported use of the Dual Sovereignty Doctrine in other cases, such as Abbate where the Court praised the pragmatic benefits of the doctrine regarding law enforcement, supported its application in Indian Country.99 Further, the strict limitations on punishment in tribal courts could serve to entice offenders to appear first in tribal court to bar federal prosecution and its more serious penalties.100 Although the Wheeler

95. Wheeler, 435 U.S. at 326.
96. The Ninth Circuit reasoned that the court should give "little weight" to use of the terms "members" and "nonmembers" in Wheeler because the use was "indiscriminate." Duro v. Reina, 851 F.2d 1136, 1140-41 (1988); see also Wetherington, supra note 36 at 1076-77.
98. Wheeler, 435 U.S. at 330. The Court devotes the last section of the opinion to practical concerns.
99. Wheeler, 435 U.S. at 330-32 ("Moreover, the same sort of 'undesirable consequences' identified in Abbate could occur if successive tribal and federal prosecutions were barred despite the fact that tribal and federal courts are arms of separate sovereigns.").
100. Id. at 330-331.
Court suggested that Congress could solve that problem by depriving tribes of criminal jurisdiction altogether, the Court concluded that the tribal courts are "important mechanisms for protecting significant tribal interests" and that they filled the important role of protecting customs and traditions that "can differ greatly from our own."101

Thus, Wheeler is a pragmatic decision that firmly recognizes the inherent power of the tribe in matters of criminal jurisdiction over members of the tribe. Only six months prior to Wheeler, the Court had decided a landmark case concerning tribal court criminal jurisdiction, Oliphant v. Suquamish Indian Tribe,102 which held that the tribes had no jurisdiction over non-Indians residents on reservations.103 Understanding the history of criminal jurisdiction that led up to the Oliphant decision is critical to understanding the choices the Court will face in resolving the question of double jeopardy and nonmember Indians in Indian Country.

C. Criminal Jurisdiction in Indian Country

The rules governing criminal jurisdiction in Indian Country have been called a "conflicting morass,"104 and a "convoluted knot,"105 causing one scholar to wonder "whether there is anything more substantial than a judicial gut instinct at work in these cases."106 Some have noted parallel and conflicting decisions from the Supreme Court on questions of tribal jurisdiction over criminal conduct.107 Changing times have contributed to the muddle, as evidenced by the pendulum swing from policies of assimilation to recognition of tribal sovereignty,108 decisionmakers’ failure to honor treaties,109 and many years of decision-makers failing to distinguish between members and nonmembers generally, or between members and nonmember Indians of a particular tribe, but distinguishing instead between Indians and non-Indians.110

101. Id. at 331. Indeed, the Court observed that these policy interests of protecting the role of tribal courts may be just as "undesirable as the federal pre-emption of state criminal jurisdiction that would have avoided conflict in Bartkus and Abate." Id.
103. Id. at 195.
107. See, e.g., Clinton, supra note 105, at 985-88.
110. See Wetherington, supra note 36 at 1075-1079.
1. Criminal Jurisdiction in Indian Country

Historically, tribes had jurisdiction over anyone within their borders. But soon after nationhood, Congressional consideration of tribal jurisdiction began to distinguish situations involving non-Indians from those involving exclusively Indians. In the late 1700's, Congress provided federal courts with jurisdiction over non-Indians who committed crimes against Indians, even in geographic areas under tribal control. By 1817, the General Crimes Act, one of the three most important federal statutes governing criminal jurisdiction in Indian Country, extended federal jurisdiction to crimes committed in Indian Country against non-Indians. The only exception to federal jurisdiction was for crimes committed by Indians against Indians, which Congress left to the jurisdiction of tribes, regardless of membership.

The Supreme Court expressed its faith in tribal jurisdiction over Indians in Ex parte Crow Dog, holding that the General Crimes Act did not extend to any Indian-on-Indian crimes. Congress responded to Crow Dog by passing the Major Crimes Act, mandating federal jurisdiction over serious crimes, without regard to whether victims were Indian or non-Indian. The Major Crimes Act, another of the principal federal statutes governing tribal jurisdiction, originally limited federal court jurisdiction to seven crimes, but Congress has expanded the Act to include seven more offenses, conferring federal

111. See Canby, supra note 41, at 123-24.
112. See id. at 124 (citing 1 Stat. 138 (1790)). From 1776 to 1871, the Senate exercised primary power over relations with the tribes through the treaty power; but in 1871 the House of Representatives used their power to appropriate funds to provide in the Indian Appropriations Act that tribes were no longer to be regarded as independent nations capable of negotiating treaties with the United States. Clinton, supra note 105, at 957-58.
113. The General Crimes Act, also known as the Indian Crimes Act or the Federal Enclaves Act, is now codified under 18 U.S.C. § 1152. Currently, although the General Crimes Act provides for prosecution of crimes where either the perpetrator or the victim is non-Indian, the Act primarily fills the need for a way to punish non-Indians in Indian Country. The Act contains a provision that has the effect of making most of state criminal law applicable to areas under federal jurisdiction. Further, the Act expressly excludes federal jurisdiction if a tribal court has first heard the case. Canby, supra note 41, at 124, 147-58.
115. Canby, supra note 41, at 124 (citing 3 Stat. 383 (1817)).
117. Id.
118. Clinton, supra note 105, at 963-64 (citing 23 Stat. 385 (1885)).
120. Currently, 18 U.S.C. § 1153 (2000) provides that:
   (a) Any Indian who commits against the person or property of another
   Indian or other person any of the following offenses, namely murder,
jurisdiction over a total of fourteen serious felonies. In 1948, Congress supplemented the Major Crimes Act with a provision that ensures that Indians in federal court receive all the procedural protections accorded other defendants.121

States also play a part in the criminal jurisdiction puzzle, despite the “foundational” early decisions of the United States Supreme Court known as the Marshall Trilogy,122 which effectively removed states from considerations of tribal sovereignty and federal exclusivity.123 States began to exercise jurisdiction in Indian Country in 1881 when the United States Supreme Court held that states have exclusive jurisdiction over crimes committed by non-Indians against non-Indians in Indian Country.124 Then, in 1953, during a period when assimilation policies held ascendancy,125 Congress responded to fears that law

manslaughter, kidnaping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

121. 18 U.S.C. § 3242 (2000) provides that an Indian “shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States.” Further, Federal Sentencing Guidelines apply. See 18 U.S.C. § 3551 (2000). Note this is not a provision that governs procedural protections in tribal court, but rather in federal courts.

122. The Marshall Trilogy, all written by Chief Justice John Marshall, includes John- son v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823) (holding that under the doctrine of discovery, tribes could not transfer title to land), Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (holding that the tribes’ status is that of “domestic dependent nations” and not foreign nations), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 562-63 (1832) (holding that the state of Georgia could not prosecute Worcester for preaching without a license in Indian Country).

123. Frank Pommersheim writes that:

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.

Pommersheim, supra note 9, at 276.


enforcement was lax in Indian Country by passing Public Law 280,\textsuperscript{126} which returned states to the jurisdictional puzzle involving Indian defendants and victims.

Public Law 280, noteworthy because the Supreme Court later offered it as a solution to a jurisdictional void created in \textit{Duro}, conferred both criminal and civil jurisdiction in Indian Country on six states.\textsuperscript{127} It explicitly stated that the General Crimes Act and the Major Crimes Act no longer applied in those original six states.\textsuperscript{128} In addition to the six mandatory states, the statute gave other states the opportunity to assume complete jurisdiction or partial jurisdiction if they chose to do so.\textsuperscript{129} Nine states have opted into jurisdiction.\textsuperscript{130} Later, as the assimilationist policies of the termination era gave way to the self-determination policies of the 1960’s, Congress amended Public Law 280 in 1968 to require that states secure the consent of the tribe before assuming jurisdiction.\textsuperscript{131} Only one tribe has consented to a state assuming jurisdiction, and then only after the state agreed that it would return jurisdiction to the tribe if the majority of the tribe voted in favor of retrocession.\textsuperscript{132}

To summarize, jurisdiction in Indian Country varies according to the nature of the crime, those involved in the crime, and whether the state where the tribe is located falls within special jurisdictional provisions of the United States Code. States have jurisdiction over crimes committed in Indian Country involving non-Indian parties and, in some cases, have express statutory authority to exert general criminal jurisdiction. Absent such statutory grants to states, federal jurisdiction is exclusive over crimes committed by non-Indians against Indians, concurrent with the tribe if the defendant is Indian and the victim is non-Indian and for certain serious crimes regardless of the

\begin{footnotes}

\item 127. § 2, 67 Stat. At 588-89. The six states expressly authorized in the statute were California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska, which was added in 1958.

\item 128. \textit{Id.} at 589.

\item 129. \textit{Id.} at § 7, 590.

\item 130. The nine states that have assumed some authority under Public Law 280 include Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah, and Washington. \textit{Canby}, \textit{supra} note 41, at 234-35. “In some cases, the assuming state required consent of the tribes, but Public Law 280 did not require it.” \textit{Id.} at 235.


\end{footnotes}
identity of defendant or victim. In cases of Indian on Indian offenses, the tribes are left with the power of concurrent jurisdiction under the General Crimes Act. The tribe may exert jurisdiction over offenses in the Major Crimes Act, but rarely do so because the Indian Civil Rights Act limits tribes to imposing sentences not to exceed one year imprisonment and a $5000 fine or both.\footnote{133}

2. \textit{Olipphant v. Suquamish Indian Tribes}

\textit{Olipphant v. Suquamish Indian Tribes},\footnote{134} a landmark case in which the Supreme Court narrowed tribal criminal jurisdiction in cases involving non-Indians, presented themes that reappear in the question of double jeopardy and nonmember Indians. Thus, a solid understanding of the \textit{Olipphant} Court's reasoning is necessary to understand later analysis of nonmember double jeopardy. The Court implicitly acknowledged that the demographic results of the Allotment Act\footnote{135} played a role in the decision, by taking pains to state that at the time of the decision the Suquamish made up less than 2 percent of the population of the residents on the Port Madison reservation.\footnote{136} Olipphant, a non-Indian resident of the reservation, was charged with assaulting a tribal officer and resisting arrest. He argued that the tribal court lacked jurisdiction to hear the case. Both the federal district court and the Ninth Circuit held that the case was properly before the tribal court.\footnote{137} Justice Rehnquist, writing for the majority, reversed.\footnote{138}

In \textit{Olipphant}, the Court relied on a historical approach, rather than relying on precedent or a legislative enactment. The opinion began with a long discussion of the history of tribal court jurisdiction over non-Indians, and apparently relied in large part on this historical review to support its conclusion.\footnote{139} Although the Court used this history to justify its decision, at least two scholars have questioned the accuracy of this historical review.\footnote{140} The \textit{Olipphant} Court rarely cited Supreme Court precedent or federal statutory law, but made asser-

\begin{itemize}
\item \footnote{133}{25 U.S.C. § 1302(7) (2000).}
\item \footnote{134}{\textit{Olipphant}, 435 U.S. at 212.}
\item \footnote{135}{See discussion on demographics \textit{infra} Section II.A. Professor Scott Gould credits Congressional policy of allotments as the reason for the \textit{Olipphant} decision. Gould, \textit{supra} note 15, at 844.}
\item \footnote{136}{\textit{Olipphant}, 435 U.S. at 212. In 1978, at the time the Court heard the case, the tribe held 63\% of the reservation land in fee simple, but out of approximately 2978 residents, only about 50 were members of the tribe. Gould, \textit{supra} note 15, at 844 n.1.}
\item \footnote{137}{Olipphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976).}
\item \footnote{138}{\textit{Olipphant}, 435 U.S. at 194-95.}
\item \footnote{139}{Id. at 195-206.}
\item \footnote{140}{See generally Russel Lawrence Barsh & James Youngblood Henderson, \textit{The Betrayal: Olipphant v. Suquamish Indian Tribe and the Hunting of the Snark}, 63 MINN. L. REV. 609 (1979).}
\end{itemize}
tions without citation to authority and cited to the legislative history of unenacted bills. Other unusual authority included citing a federal district court’s decision from 1878, and then, oddly, the biography of the judge who wrote that opinion.

In addition to this historical approach, the Court went on to examine whether Congress had exercised its plenary power to grant or deny criminal jurisdiction over non-Indians to the tribes and concluded that Congress had not. This deference to Congress’ plenary power becomes noteworthy when analyzing the double jeopardy and non-member Indian question. In that analysis, the question whether the Court has based its decisions concerning criminal jurisdiction and double jeopardy on constitutional grounds or has created federal common law in the absence of Congressional action will become a central question.

Finally, the Olyphant Court held that beyond historical treaties and Congressional action, it was the status of the tribes as dependent nations that determined the extent of their sovereignty. In other words, the Court based its decision on the tribes’ role as a conquered nation, dependent on its conqueror, rather than the tribe’s role as a sovereign power. Justice Rehnquist wrote that the tribes were “prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers ‘inconsistent with their status’.” The Court went on to hold that “[u]pon incorporation into the territory of the United States” the tribes lost the power to exercise their sovereignty in ways that “conflict with the interests of this overriding sovereignty.” The “conflicting interest” of the “overriding” sovereign that gave rise to this implicit divestiture, in the context of criminal jurisdiction, was the federal government’s interest in

141. For example, the Court stated: “The effort by Indian tribal courts to exercise criminal jurisdiction over non-Indians, however, is a relatively new phenomenon. And where the effort has been made in the past, it has been held that the jurisdiction did not exist.” Olyphant, 435 U.S. at 196-97.


143. Id. at 199-200. The Court cites to Ex parte Kenyon, 14 F. Cas. 353 (W.D. Ark. 1878). In a footnote, the Court cited to the biography of Judge Issac C. Parker, the judge who wrote the Kenyon opinion. Olyphant, 435 U.S. at 200 n.10 (citing H. CROY, HE HANGED THEM HIGH 222 (1952)). The Court also cited J. GREGORY & R. STRICKLAND EDs., HELL ON THE BORDER (1971).

144. Olyphant, 435 U.S. at 203 (“Congress’ concern over criminal jurisdiction in this proposed Indian Territory contrasts markedly with its total failure to address criminal jurisdiction over non-Indians on other reservations, which frequently bordered non-Indian settlements.”).

145. Id. at 208.

146. Id. (alteration in original).

147. Id. at 209.
ensuring the protection of Bill of Rights to non-Indian defendants.\footnote{David H. Getches, \textit{Beyond Indian Law}: The Rhenquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values, 86 Minn. L. Rev. 267, 332 (2001) ("The Court presumed that the tribes' inherent sovereignty must be limited because the ability to deprive non-Indians of personal liberties would be "inconsistent with their status.") (quoting \textit{Oliphant}, 435 U.S. at 208).} 

Despite the concern with Bill of Rights protections for defendants, the Court did not mention another safeguard available to protect non-Indians whose civil liberties are in jeopardy: the right of defendants to appeal to a federal court through a habeas petition.\footnote{Justice Brennan later points this out in his dissent in \textit{Duro}, 495 U.S. at 709.} The Court's concern about civil liberties, however, led at least one commentator to mark the beginning of consent-based jurisdiction, as opposed to territorial-based jurisdiction, to \textit{Oliphant} and \textit{Wheeler}.\footnote{See supra notes 25-27 and accompanying text.} Later cases have characterized the \textit{Oliphant} analysis as involving an "implicit divestiture of sovereignty."\footnote{\textit{Duro v. Reina}, 495 U.S. 676, 686 (1990) (quoting \textit{Oliphant}, 435 U.S. at 326).}

Many criticize \textit{Oliphant}'s interpretation of the relationship of the tribes to the federal government as inconsistent with the foundational precedents of Indian law, such as the Marshall Trilogy, as well as a departure from the prevailing Congressional view in more recent decades recognizing tribal sovereignty.\footnote{E.g., Frickey, supra note 107, at 38 ("In short, the Marshall Court considered tribes subservient to clear assertions of authority deemed necessary for the colonizing government to conduct the colonial process efficiently. \textit{Oliphant} involved no conflict of this sort."); Gould, supra note 49, at 68 ("[T]he Court turned John Marshall's decisions in \textit{McIntosh}, \textit{Cherokee Nation}, and \textit{Worcester} on their heads.").} "Incorporation" was precisely what the Marshall Trilogy avoided.\footnote{Milner S. Ball, \textit{Constitution, Court, Indian Tribes}, 1987 Am. B. Found. Res. J. 1, 36-43. Ball finds the "incorporation" justified by selective use of authority and "ethnocentrism" as evidence of the "incapacity for talking openly and honestly about the injury in our origin." \textit{Id.} at 42-43.} Other commentators accuse the \textit{Oliphant} Court of ethnocentric racism.\footnote{See id. at 42; Robert A. Williams, Jr., \textit{Documents of Barbarism}: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law, 31 Ariz. L. Rev. 237, 263-65 (1989).} Nonetheless, twelve years later, the Court would use \textit{Oliphant}, a shaky foundation of scant and questionable authority, to build its decision in \textit{Duro v. Reina}.\footnote{495 U.S. 676 (1990).}

3. \textit{Duro v. Reina}

\textit{Duro v. Reina} presented the question whether a tribe's criminal jurisdiction extends to non-member Indians.\footnote{Id. at 679.} The case involved Albert Duro, an enrolled member of the Torres-Martinez Band of Chauilla Mission. Duro allegedly shot and killed a fourteen year-old...
member of the Gila River Indian Tribe within the boundaries of the Salt River Reservation, home of the Salt River Pima-Maricopa Tribe.\footnote{Id.} After the U.S. Attorney brought a federal indictment that the federal district court dismissed without prejudice, the defendant was brought before the Pima-Maricopa Tribal Court on charges of illegal firing of a weapon on the reservation. Duro filed a petition for a writ of habeas corpus on the grounds that equal protection principles precluded the tribe’s assertion of jurisdiction over a nonmember Indian. Although the District Court for the District of Arizona granted the motion, the Ninth Circuit reversed.\footnote{Id. at 682.} The United States Supreme Court reversed the Ninth Circuit, holding that tribes do not have jurisdiction over nonmember Indians.\footnote{Id. at 689.}

The Duro Court, with Justice Kennedy writing for the majority, based its decision on principles announced in both Wheeler and Oliphant,\footnote{See, e.g., Skibine, supra note 15, at 781. Professor Skibine concludes: “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.” Id.} and this attempt to reconcile the two cases has led to criticism.\footnote{Duro, 495 U.S. at 686. When addressing Wheeler, the Court emphasized that the sovereignty recognized by the Wheeler Court was limited to “internal self-governance.” If the prosecution involved “external relations between the Tribe and outsiders, such power would have been inconsistent with the Tribe’s dependent status.” The Court characterized the Oliphant ruling as a recognition that “tribes can no longer be described as sovereigns in [the territorial] sense.”} The Court characterized the Oliphant ruling as a recognition that “tribes can no longer be described as sovereigns in [the territorial] sense.”\footnote{Id. at 685.} The consent theory of jurisdiction introduced in Wheeler and Oliphant came to full fruition in Duro. The Court found that the tribes’ exercise of criminal jurisdiction governed only internal affairs, and was justified only by the “voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent.”\footnote{Id. at 694.} As in Oliphant, the Court focused on the “more direct intrusion on personal liberties” in the criminal jurisdiction context. The Court distinguished cases involving civil jurisdiction\footnote{Id. at 687-88.} and noted that, as a nonmember, the defendant was
not eligible to vote, hold office or serve on a jury in the tribal court, which put him in the same position as a non-Indian. 167

But in contrast to Oliphant, in which historical arguments formed the basis of the opinion, the Duro majority rejected the historical arguments which the tribes and amici offered in support of jurisdiction. The tribes offered examples of the broad use of the word “Indian” in the United States Code and Supreme Court precedent, but the Duro Court rejected the examples as “somewhat less illuminating than in Oliphant,” and tending to support the opposite conclusion. 168 Further, the Court rejected the tribes’ argument that denying the tribes jurisdiction over nonmembers would leave a jurisdictional void when nonmembers committed minor crimes in Indian Country by making reference to the fact that tribes could agree to states assuming jurisdiction through Pub. L. 280. 169

In reaching its own conclusion, the Court cited to opinions of the Solicitor of the Department of Interior during the period in which assimilation, not tribal sovereignty, was the federal policy, 170 as well as cases from the allotment era. 171 The Court also stated that the tendency of the government to treat Indians as one large class, without distinguishing between members and nonmember Indians, was not dispositive in a case examining tribal, and not federal, power. 172 Finally, the Court repeated that protection of personal liberties trumped the historical record, stating, “[w]hatever might be said of the historical record, we must view it in light of petitioner’s status as a citizen of the United States.” 173

In dissent, Justice Brennan, joined by Justice Marshall, carefully answered the arguments of the majority, emphasizing Congress’ role in determining jurisdiction. First, Brennan characterized the majority’s view of tribes “implicitly surrender[ing]” jurisdiction as a “parsimonious” view of tribal sovereignty. 174 Brennan rejected the majority’s position that Oliphant limited the tribe to consent-based ju-

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167. Id. Note, however, that the same situation would be true if a citizen of Nevada were prosecuted in a California court. The Nevada citizen would not be eligible to vote in California, hold office in California or serve on a California jury. The lack of participation on the part of the Nevada citizen in the California government does not preclude California courts from exercising jurisdiction.

168. Id. at 688-89.
169. Id. at 697; see also infra notes 186-190, and accompanying text.
170. Id. at 691-92 (citing opinions of the Solicitor for the Department of the Interior in the 1930’s).
172. Duro, 495 U.S. at 689-90.
173. Id. at 692.
174. Id. at 698 (Brennan, J., dissenting).
risdiction, finding instead that the holding in *Oliphant* was based on examining "Congress' actions with respect to non-Indians." Brennan presented a different view of history, noting that Congress often distinguished between Indians and non-Indians, but rarely distinguished between member and nonmember Indians.

As the Court addresses the question of double jeopardy and nonmember Indians, one of the questions it will face is whether the decision is founded on the Constitution or on federal common law. The *Duro* Court cited neither a constitutional provision nor a federal statute as the legal authority for its holding. However, the opinion concludes with a statement of deference to Congress' plenary power and a reiteration of the Court's focus on the equal treatment of citizens. Although most scholars agree that *Duro* was not constitutionally based, some see the possibility of re-interpreting the opinion to find a constitutional basis. Others admit that it is a difficult prediction to make.

As *Oliphant* before it had created a firestorm of criticism, scholars responded to *Duro* with dismay, finding unprincipled judicial activism based on insubstantial authority. Even more significant,

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175. *Id.* at 700-01.

176. *Id.* at 702-04. The dissent also carefully examined the majority's use of authority. In addition to noting the ways in which the majority misread *Oliphant*, Brennan pointed out that *Wheeler* involved an enrolled member before his own tribal court and thus, the majority relied on dicta - statements from *Wheeler* concerning what the court would do if a nonmember Indian were before it. *Id.* at 700 n.1.

177. The final paragraph of the majority opinion gives support to both theories when it states:

> If the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs. We cannot, however, accept these arguments of policy as a basis for finding tribal jurisdiction that is inconsistent with precedent, history, and the equal treatment of Native American citizens. The judgment of the Court of Appeals is hereby reversed.

*Id.* at 698. Thus, one could read the opinion as anticipating deference to Congress ("which has the ultimate authority over Indian affairs") or as based on individual rights ("inconsistent with . . . equal treatment of Native American citizens").

178. See, e.g., Pommersheim, *supra* note 9, at 279; Newton, *supra* note 15, at 113. But see, Skibine, *supra* note 15, at 784 ("Because a strong possibility exists that the Court will view its decision as having been made on constitutional grounds, at least in a structural or organic sense . . . .").

179. Deloria and Newton, *supra* note 18, at 74. Professor Newton notes that the opinion is greatly influenced by constitutional values,” and speculates that the Court could decide that the tribes are merely a subsidiary of the federal government, and “are therefore bound to the same constitutional limitations . . . as are agencies of government.” *Id.*

180. Frickey, *supra* note 107, at 41-42.

however, were the practical concerns, most prominently the jurisdictional void left by Duro, raised by scholars, tribes and politicians. Congress responded to the outcry and a year later amended the Indian Civil Rights Act to resolve the issue of jurisdiction over nonmember Indians in what has become known as “the Duro override,” or “the Duro fix.”

D. Separation of Powers and the Duro Override

The outcry about the Duro decision was considerable. One particular criticism was the jurisdictional void it created over lesser crimes committed by nonmember Indians in Indian Country. Unless the state had Public Law 280 jurisdiction, the state could not prosecute nonmember Indians. Tribes could not prosecute nonmember Indians or non-Indians. The federal government had jurisdiction over all Indians in the fourteen crimes of the Major Crimes Act, but not over lesser crimes. Thus, if tribes were without jurisdiction over nonmember Indians for the lesser crimes under Duro, no one had jurisdiction to prosecute.

Professor Nell Jessup Newton, an active participant in drafting the Duro override and lobbying in its favor, has described the legislative

182. David H. Getches, Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law, 84 Calif. L. Rev. 1573, 1634 (1996). Getches notes that the opinion “indulged in a search for historical indicators as to how Indian sovereignty should be treated, rather than a search for Congressional limitations.” Id.

185. Public Law 280 gave specific states criminal jurisdiction in Indian Country. When Congress required tribal consent for a state to assume jurisdiction, almost no states have been added to the list of fifteen states with Public Law 280 jurisdiction. See supra notes 131-32 and accompanying text.
186. See supra notes 121-23 and accompanying text.
187. The tribes made this argument in the Duro brief, and the Court dismissed it by suggesting that tribes could negotiate reciprocal jurisdictional agreements with other tribes, and by reference to Public Law 280, discussed supra at note 127 and accompanying text. The Court stated,

Our decision today does not imply endorsement of the theory of a jurisdictional void presented by respondents and the court below. States may, with the consent of the tribes, assist in maintaining order on the reservation by punishing minor crime. Congress has provided a mechanism by which the States now without jurisdiction in Indian country may assume criminal jurisdiction through Pub. L. 280. Our decision here also does not address the ability of neighboring tribal governments that share law enforcement concerns to enter into reciprocal agreements giving each jurisdiction over the other's members. As to federal jurisdiction under § 1152, both academic commentators and the dissenting judge below have suggested that the statute could be construed to cover the conduct here.

Duro, 495 U.S. at 697 (citation omitted).
process in detail. 188 Not only did the tribes denounce the decision, but
the Western Governors Association, and the states of Arizona, Mont-
tana, Nevada, North Dakota, and South Dakota passed resolutions
asking Congress to address the problem. 189 Not all agreed that Con-
gress should give tribes jurisdiction over nonmember Indians; for ex-
ample the Western Attorneys General urged Congress to grant the
states jurisdiction. 190

Congress addressed the problem by adding a rider to an appropria-
tion bill that temporarily amended the definitions section of the In-
dian Civil Rights Act. 191 The amendment concerning the power of the
tribe currently reads:

"[P]owers of self-government" means and includes all governmental powers
possessed by an Indian tribe, executive, legislative, and judicial, and all of-
ices, bodies, and tribunals by and through which they are executed, including
courts of Indian offenses; and means the inherent power of Indian tribe,
hereby recognized and affirmed, to exercise criminal jurisdiction over all
Indians. 192

Significantly, the language of the amendment "recognizes" the "inher-
ent" tribal power. It purports to acknowledge jurisdiction, rather than
grant or delegate jurisdiction. Whether Congress has recognized or
delegated jurisdiction will become a key question in the double jeop-
ardy for nonmembers analysis.

It was necessary for Congress to define "Indian" for the purposes of
the override, and Congress did that by referring to how courts have
interpreted the Major Crimes Act: "Indian' means any person who
would be subject to the jurisdiction of the United States as an Indian
under section 1153, title 18, if that person were to commit an offense
listed in that section in Indian country to which that section ap-
lies." 193 Section 1153 refers to the Major Crimes Act, which does not

188. See generally Newton, supra note 15.
189. Id. at 110. Newton reports elsewhere that the Western Governors' Association
expressed concern that states may not be able to fill the jurisdictional gap cre-
ated by Duro, and asked Congress to hold hearings in the west on the impact of
the case." Deloria and Newton, supra note 16, at 73 (citing West. Govs. Ass'n
Res. 90-014 (July 17, 1990)).
191. Id. at 111. Deloria and Newton write that Congress has used appropriations rid-
ers to make Indian policy before. Deloria and Newton, supra note 18, at 51. Fur-
ther, the choice to amend the Indian Civil Rights Act was a deliberate effort to
avoid the appearance of Congress delegating jurisdiction, rather than recognizing
jurisdiction derived from inherent sovereignty. "Congress thus chose to correct
the Court's misreading of congressional intent, and, in a sense, overturn Duro."
Newton, supra note 15, at 111-12.
define “Indian,” leaving definition to the courts.\textsuperscript{194} In 1991, Congress made the \textit{Duro} override a permanent solution.\textsuperscript{195}

The \textit{Duro} override raises serious constitutional questions involving separation of powers.\textsuperscript{196} Before deciding whether the tribes’ source of jurisdiction is that of a separate sovereign for purposes of the Dual Sovereignty exception to the Double Jeopardy Clause, the Court will need to decide whether the tribes have jurisdiction at all. The constitutional question is which branch of government has the power to decide whether the tribe has jurisdiction. There is no provision in the Constitution addressing jurisdiction of Indian tribes. The treaty power is given in part to Congress,\textsuperscript{197} and the Court has recognized that Congress has plenary power over the tribes.\textsuperscript{198} Hence, generally speaking, when federal courts determine the limits of tribal jurisdiction, if they make that determination in the absence of legislative enactment, they do so as a matter of federal common law.\textsuperscript{199}

Professor Martha Field, a noted scholar on the question of federal common law suggests that no definition of federal common law is “inherently correct,” but for practical purposes she has defined it broadly as “any rule of federal law, created by a court. . . \textit{when the substance of that rule is not clearly suggested by federal enactments}—constitutional or congressional.”\textsuperscript{200} Thus, in \textit{Oliphat} and \textit{Duro}, when the Court searched fruitlessly for Congress’ pronouncement on the issues, and was left to interpret congressional intent, the Court was deciding the issue as a matter of federal common law. And if the decision was a matter of federal common law, Congress was perfectly within its authority when it decided to correct the Court, and to “override” or to “fix” \textit{Duro}.\textsuperscript{201} For the Court to resist Congress’ power to modify the decision would be for the Court to usurp the legislative function, because common law can be replaced by statutes. The Court

\textsuperscript{194} The Major Crimes Act gives federal jurisdiction over 14 felonies if committed in Indian Country. \textit{See supra} notes 121-23 and accompanying text.

\textsuperscript{195} Professor Newton gives an informative account of the complex political negotiations necessary to secure passage of the permanent legislation. Newton, \textit{supra} note 15, at 114-117.

\textsuperscript{196} The issue also raises questions of equal protection. \textit{See supra} note 15.

\textsuperscript{197} U.S. \textsc{Const.} art. II, §2, cl. 2.

\textsuperscript{198} \textit{See supra} note 88.

\textsuperscript{199} \textit{See National Farmers Union}, 471 U.S. at 857.

\textsuperscript{200} Martha A. Field, \textit{Sources of Law: The Scope of Federal Common Law}, 99 \textit{Harv. L. Rev.} 881, 890 (1986) (footnote omitted). Professor Field states that “the area cannot be delimited by any clear-cut line” and “includes much we think of as interpretation.” \textit{Id.} at 893-94.

\textsuperscript{201} Professor Field discusses federal common law in the context of Federal Indian Law, looking back to the Marshall trilogy. She concludes that in this area the opinions “stress that the adoption of preexisting common law is subject to modification by Congress.” \textit{Id.} at 949.
cannot usurp the legislative function without offending separation of powers principles.

If, on the other hand, the Supreme Court based its decision in Duro on constitutional grounds, then it was properly exercising its power of constitutional judicial review. In that case, Congress might not have the power to interfere, override, or fix Duro in any way. Consequently, tribal courts would have no criminal jurisdiction over nonmember Indians and the Double Jeopardy question would not arise.

Duro allows for either possibility, although most scholars find that it is not constitutionally based. As discussed supra, it cites no Constitutional provision but rather seeks evidence of Congressional intent. The Court's rationale in Duro raises constitutional questions, however, because it focuses on the defendant's inability to participate in the system, and the absence of the full Bill of Rights protection in the proceeding. It is a difficult question, and one that has divided the Circuit Courts of Appeals.

III. THE CIRCUIT SPLITS

The Eighth and Ninth Circuits are divided on the issue of tribal court jurisdiction over nonmember Indians. The Eighth Circuit has addressed the question twice. In United States v. Weaselhead, the court, sitting en banc, split evenly on the question. More recently, in United States v. Lara, a majority emerged to hold that the Double Jeopardy Clause precluded successive tribal/federal prosecution. In the interim, however, the Ninth Circuit held in United States v. Enas that multiple prosecutions are permissible under the dual sovereignty exception to the Double Jeopardy Clause.

203. See supra notes 177-80 and accompanying text.
204. United States v. Weaselhead, 165 F.3d 1209 (1999) (per curiam) (en banc). In United States v. Weaselhead, 156 F.3d 818 (8th Cir. 1998), the 8th Circuit reversed a district court's decision to deny defendant's motion and held that the dual sovereignty limitation could not prevent the application of the Double Jeopardy Clause in preventing the government from prosecuting the defendant. Id. at 824. The 8th Circuit, in United States v. Weaselhead, 1998 U.S. App. LEXIS 30874, vacated its opinion and granted a rehearing on the issue. The per curiam opinion follows the vacated opinion and affirmed the original district court's ruling that defendants motion to dismiss the criminal charge based on the Double Jeopardy Clause should be denied. The discussion that follows infra refers to the 156 F.3d 818 opinion that upheld the defendant's motion and denied prosecution based on the Double Jeopardy Clause.
205. 324 F.3d 635, 640 (8th Cir. 2003).
206. 255 F.3d 662, 675 (9th Cir. 2001).
A. Weaselhead and Lara

The circumstances before the Eighth Circuit in Weaselhead and Lara were similar. In both cases an Indian enrolled in one tribe was prosecuted in the tribal court of another tribe. In Weaselhead an enrolled member of the Blackfeet Indian Tribe of Montana agreed to plead no contest in Winnebago tribal court to one count of sexual assault.207 On the same day that he entered his plea, Weaselhead was indicted in federal court on a charge of engaging in a sexual act with an Indian juvenile. Weaselhead moved to dismiss based on double jeopardy grounds.208

Similarly, in United States v. Lara, a nonmember Indian was convicted in the Spirit Lake Nation Reservation tribal court of assaulting a police officer.209 Subsequently, Lara was charged with assaulting a federal officer and moved to dismiss the indictment on double jeopardy grounds.210

The reasoning in both opinions followed the same pattern. The opinions first examined the Dual Sovereignty Doctrine and observed that the application "turns on whether the two entities draw their authority to punish the offender from distinct sources of power,"211 which would preclude applying the Dual Sovereignty Doctrine.

Next, the opinions discussed the recent cases concerning criminal jurisdiction, double jeopardy and the nature of tribal sovereignty, using Oliphant, Wheeler, and Duro to trace the emergence of the principle that in criminal matters, the tribe's sovereignty extends only to those who have consented to jurisdiction by enrolling as members.212 The opinions recounted Congress' response to Duro, noting that Congress attempted to "recognize[] and affirm[]" the tribes' "inherent power" rather than to delegate criminal jurisdiction over nonmember Indians.213 The Lara majority opinion went on to observe that the Supreme Court had not yet addressed the Duro override, but that the Court had decided several post-Duro and post-Duro override cases that had reaffirmed limiting tribes to consent jurisdiction. Lara relied on Montana v. United States,214 as well as three later cases that built

207. Weaselhead, 156 F.3d at 819. Weaselhead, nineteen years old, entered into a sexual relationship with a fourteen year-old Winnebago girl. Id.
208. Id.
209. Lara, 324 F.3d at 636.
210. Id.
211. Id. at 637 (quoting Heath v. Alabama, 474 U.S. 82, 88 (1985)); Weaselhead, 156 F.3d at 820.
212. Weaselhead, 156 F.3d at 821-23; Lara, 324 F.3d. at 637-38.
213. Lara, 324 F.3d at 638; Weaselhead, 156 F.3d at 823.
on the Montana rationale, Atkinson Trading Co. v. Shirley,215 Nevada v. Hicks216, and Dakota v. Bourland.217 In Montana, written around the time of Oliphant and Wheeler, the Court rejected tribal claims of treaty rights and inherent sovereignty to hold that the tribe did not retain sovereignty to regulate hunting and fishing by nonmembers on land owned in fee by nonmembers.218 Scott Gould characterizes Montana as "a more fundamental change in federal Indian law than the changes worked in Oliphant," because under Oliphant tribes retained power until divested, but under Montana "tribes had sovereign powers only over consenting members unless greater powers were conferred by Congress."219 The Montana general rule that the inherent sovereignty of tribes does not extend to nonmembers admitted two exceptions.220 First, if nonmembers enter a consensual relationship with the tribe, the tribe may regulate their activities. Second, a tribe may regulate "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."221 The language concerning a direct effect on the tribe's political integrity, economic security, or health or welfare gave some who support the tribe cause to hope, but the later cases of Nevada, Bourland, and Atkinson have interpreted that language narrowly.

Bourland, Atkinson, and Nevada, all cases decided after the Duro override and cited by the Eighth Circuit in Lara, apply the Montana test to determine regulatory or civil jurisdiction. Bourland addressed the question of tribal regulation of hunting and fishing rights on Cheyenne River reservation land that Congress had appropriated for flood control purposes, holding that if Congress abrogates a treaty that gave the tribe control for any reason, the tribe loses the power to regulate nonmembers.222 Most recently, Atkinson held the Navajo tribe could not impose a hotel occupancy tax on a hotel owned in fee by nonmembers on non-Indian fee land within the reservation.223 It is noteworthy, however, that even in the more recent cases, the Court sometimes uses the term "members" and "nonmembers," but other times seems to use "nonmember" and "non-Indian" indiscriminately.224

218. 450 U.S. at 564-65.
220. 450 U.S. at 565-66.
221. Id.
222. 508 U.S. at 695.
223. 532 U.S. at 659.
224. For example, within one paragraph of its discussion of Bourland, the Court first uses the term "members." The Court states: "Although Indian tribes retain in-
less, these regulatory cases are important, because if the Court has
reaffirmed its commitment to the principle of tribal members-only ju-
risdiction in the civil context, it is much more likely to reaffirm that
principle in the criminal context where the stakes are higher for indi-
vidual rights.

Although *Nevada v. Hicks* also was a civil suit, it had implications
in the criminal law context. *Hicks* addressed whether a tribal court
had jurisdiction over civil suits against state officials who executed
search warrants on Indian-owned land against an Indian defend-
ant.\(^{225}\) In part the Court applied the *Montana* test to conclude that
“tribal authority to regulate state officers in executing process related
to the violation, off reservation, of state laws is not essential to tribal
self-government or internal relations—to ‘the right to make laws and
be ruled by them.’”\(^{226}\) The Court’s opinion gave little deference to the
fact that the incidents in the case occurred on Indian owned and In-
dian controlled land. There were several concurrences filed. In one,
Justice O’Connor rejected the idea of a “*per se* rule of tribal jurisdic-
tion that fails to consider adequately the Tribes’ inherent sovereign
interests in activities on their land,” and she expressed worry that the
decision “would give nonmembers freedom to act with impunity on tri-
bal land based solely on their status as state law enforcement offi-
cials.”\(^{227}\) Allowing state law enforcement officials to act with
impunity on reservation land takes tribal sovereignty a long way from
the *Marshall* trilogy. The Eighth Circuit, perhaps correctly, read the
recent cases as continuing support for non-geographic members-only
jurisdiction. To the Eighth Circuit these cases underscored the point
that the *Duro* override had not led the Court to abandon its view of
nonmember jurisdiction.

In regard to the central question of whether *Duro* is a constitu-
tional law decision, the *Lara* court made clear that it considers the
decision concerning sovereignty to be “of constitutional magnitude,”\(^{228}\)
and not a matter of federal common law. The court stated, “[W]e con-
clude that the distinction between a tribe’s inherent and delegated
powers is of constitutional magnitude and therefore is a matter ul-
timately entrusted to the Supreme Court.”\(^{229}\) The court reasoned that

\(^{226}\) Id. at 364.
\(^{227}\) Id. at 401 (O’Connor, J., concurring).
\(^{228}\) 324 F.3d 635, 639 (8th Cir. 2003).
\(^{229}\) Id.
references to Congress' plenary power, based in the government's trust in responsibility for the tribes, were waning, while references to the Indian Commerce Clause were increasing.\textsuperscript{230} Nevertheless, according to \textit{Lara}, the fact that \textit{Duro} was constitutionally based did not serve to void the ICRA amendments that Congress passed as the \textit{Duro} override.\textsuperscript{231} Instead, the constitutional basis of \textit{Duro} provided the rationale for finding that Congress could delegate jurisdictional authority to the tribe after \textit{Duro}, but it could not recognize a pre-existing power. The \textit{Weaselhead} panel reasoned that "ascertainment of first principles regarding the position of Indian tribes within our constitutional structure of government is a matter ultimately entrusted to the Court and thus beyond the scope of Congress's authority to alter retroactively by legislative fiat."\textsuperscript{232} As the Eighth Circuit explained in \textit{Weaselhead}, criminal jurisdiction that existed prior to \textit{Duro} was surrendered to the "overriding sovereignty of the United States" when the Court spoke.\textsuperscript{233} Congress had the power to restore the jurisdiction, but the restoration, at that point, was a delegation. Therefore, the majority found that tribal courts and federal courts share the same source of sovereignty, and the dual sovereignty exception did not apply.\textsuperscript{234}

Judge Morris Shepard Arnold wrote the dissenting opinion in both \textit{Weaselhead} and \textit{Lara}. Judge Arnold's disdain for the idea that only the Court can determine what sovereign powers the tribes inherently possess is palpable. In \textit{Weaselhead}, Judge Arnold wrote, "I cannot locate any such legal principle in the relevant cases or in the Constitution."\textsuperscript{235} He further wrote, "The Constitution is simply silent on the matter" and "the question of what powers Indian tribes inherently possess . . . has always been a matter of federal common law."\textsuperscript{236} Thus, the dissent found the power to "expand and contract the inherent sovereignty that Indian tribes possess" belonged to Congress, and because the tribe was exercising inherent sovereignty, the Dual Sovereignty Doctrine allowed successive tribal/federal prosecution.\textsuperscript{237}

In \textit{Lara}, Judge Arnold elaborated on his reasoning from \textit{Weaselhead}. He rejected the notion that basing Congress' plenary power in the Indian Commerce Clause limits congressional authority, analogizing to the fact that Congress retains the power to reverse the
court's decision invalidating a state law based on the Dormant Commerce Clause.238 And the dissent distinguished the post-Duro override cases of Bourland and Hicks by observing that they did not involve amendments similar to the ICRA amendments that Congress passed to correct Duro.239 Judge Arnold concluded that with respect to whether Congress could recognize the tribes’ inherent sovereignty, "the only possible answer to that question is that Congress can do what it quite plainly sought to do here."240 The Ninth Circuit, sitting en banc, agreed with Judge Arnold.

B. United States v. Enas

Enas involved an enrolled member of the San Carlos Apache Tribe, who stabbed an enrolled member of the White Mountain Apache Tribe, while on the White Mountain Apache Reservation.241 Enas was convicted of assault with a deadly weapon and sentenced to 180 days in jail and a fine of $1180. Nearly a year later, based on the same facts, a federal grand jury indicted Enas again with assault with a dangerous weapon and assault resulting in serious bodily injury. Enas responded with a motion to dismiss based on double jeopardy grounds. The trial court granted the Enas motion and dismissed the case.242 A three-judge panel reversed the trial court, and the Ninth Circuit agreed to hear the issue en banc. The circuit court found that double jeopardy did not bar the claim.243

The court applied the test for the dual sovereignty exception, analyzing Duro and the Duro override to decide whether the source of power for the tribal court was separate from the source of power for the federal court.244 The majority opinion made several points in addition to the lack of constitutional language245 on which Judge Arnold had focused in the Weaselhead panel dissent246 and the Lara dissent.247 First, the Enas court noticed that in Duro, the Supreme Court "used terms with a temporal component" throughout the Duro opinion, which led the Ninth Circuit to emphasize the historical na-

238. 324 F.3d at 645 (Arnold, J., dissenting).
239. Id.
240. Id. at 646.
242. Id.
243. Id. at 675.
244. Id. at 688-71.
245. The majority opinion clearly agreed with Judge Arnold when it stated: “To hold, as did the Weaselhead panel majority, that this is a constitutional issue ignores the glaring omission of constitutional discourse from Duro, Oliphant, and Wheeler. It would be extraordinary indeed if those were constitutional decisions that simply neglected to mention the Constitution.” Id. at 674.
246. 156 F.3d at 824-25 (Arnold, J., dissenting).
247. 324 F.3d at 641-46 (Arnold, J., dissenting).
ture of the Supreme Court's analysis. Regarding the historical approach in *Duro*, the circuit court noted that the Supreme Court in *Duro* was at times "equivocal," and "even acknowledged that the historical record was not crystal clear." Then the Ninth Circuit turned to the *Duro* override, and made two points about the override. First, the Ninth Circuit found that Congress clearly intended that tribes would have jurisdiction over all Indians, whether members or not. Second, the court found that Congress explicitly intended to replace the history set out in *Duro*, with a different history that would recognize a power that always existed. Then, on the basis of the conflict between *Duro* and the *Duro* override, the Ninth Circuit went on to a separation of powers analysis.

The majority opinion began its separation of powers analysis by reviewing definitions of federal common law, admitting that "history falls outside of the usual litany of authorities controlled by designated branches of government." But the majority concluded that *Duro* was indeed federal common law, and "within the realm of federal common law—and the federal common law of tribes—Congress is supreme. Consequently, Congress had the power to do exactly what it intended when it enacted the 1990 amendments to the ICRA." The court warned however, of a "major limitation" on the *Enas* decision—that Congress cannot "override a constitutional decision by rewriting the history upon which it is based."

248. 255 F.3d at 668 ("In reaching this conclusion, the Court undertook the historical approach previously employed in *Wheeler*, examining whether this was a form of power that was 'necessarily divested' at the time of the tribe's 'incorporation within the territory of the United States.'" (quoting United States v. Wheeler, 435 U.S. 313 (1978))).
249. *Id.* at 669.
250. *Id.* at 669.
251. *Id.*
252. The majority opinion also used a section of the opinion to address other cases dealing with the relationship between *Duro* and the *Duro* override. This discussion included an earlier case from the Ninth Circuit, *Means v. Northern Cheyenne Tribal Court*, 154 F.3d 941 (9th Cir. 1998) (overruled by *Enas*, 255 F.3d 662). *Means* considered the issue of whether the ICRA amendments (the *Duro* override) applied retroactively. In *Means*, the Ninth Circuit decided that Congress could not "legislatively overrule" *Duro* because Congress could not "somehow erase" *Duro*. *Id.* at 946. In *Enas*, however, the Ninth Circuit comes to the opposite conclusion, and notes that "Means is overruled to the extent that it held that Congress did not have such power. We do not disturb, however, the holding of *Means* regarding retroactivity and the Ex Post Facto Clause." *Enas*, 255 F.3d at 675 n.8 (citations omitted).
253. *Enas*, 255 F.3d at 674. Further, the court states that "[i]t would be disingenuous to suggest that this questions [of what constitutes federal common law] presents a simple answer." *Id.*
254. *Id.* at 675 (citation omitted).
255. *Id.* (emphasis omitted).
Unlike the Eighth Circuit where the court was deeply divided, the Ninth Circuit unanimously agreed that the Double Jeopardy Clause did not bar the claim. The judges did not agree, however, on the rationale supporting the outcome; seven were in the majority, and four judges filed a concurrence. The concurring opinion took the position that no separation of powers analysis was necessary because Duro was a "snapshot" of tribal authority at the time the Court decided it. As a snapshot it was not inconsistent with the Duro override, but simply waiting for Congress to exercise its plenary power. The concurrence supported this view by pointing out that if the tribe prosecuted first, and double jeopardy principles barred successive prosecutions, the maximum sentence a defendant could face would be severely limited under ICRA—a result Congress did not likely intend. Further, Judge Pregerson, who wrote for the concurring judges, found the position that there was no conflict between Duro and the Duro override "consistent with the general structure of federal criminal law as it relates to Indians," including other federal statutes and the Courts of Indian Offenses.

Thus, the judges of the Eighth and Ninth Circuits, as well as Indian law scholars, have come to differing conclusions about how the question of successive prosecutions after Duro should be decided, and how to support that decision. The circuits are split on a question that involves the criminal law, Indian law, and the Double Jeopardy Clause. The United States Supreme Court has granted certiorari. This Article turns now to setting out the choices that will face the Court.

IV. THE CHOICES BEFORE THE COURT

The choices before the Court concerning the issues involved in Weaselhead, Lara, and Enas are complicated. Easy solutions that follow familiar patterns are few. Scholars have long sought a cohesive theory to explain American Indian Law and to serve as a framework for making Indian law decisions, but for the most part the search has been in vain. Moreover, Indian law issues habitually test the dura-

256. Id. at 664, 676.
257. Id. at 679 (Pregerson, J., concurring).
258. Id. at 681.
259. Id.
260. Nathan Margold, author of the introduction to Cohen's Indian Law Handbook remarks that without a historical perspective, Indian law is "a mystifying collection of inconsistencies and anachronisms." Nathan R. Margold, Introduction to Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW xxvii (1942); see also Philip Frickey, Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law, 110 Harv. L. Rev. 1754, 1754 (1997) ("If the 'life of the law' for legal formalists is logic and for legal pragmatists is experience, then federal Indian law is for neither."); Laurie Reynolds, Adjudication in Indian Country: The Confusing
bility of traditional theories of judicial philosophy because remaining true to one philosophy will often lead a decision-maker to hard-to-live-with outcomes.\textsuperscript{261} Jurists of all persuasions, whether usually labeled conservative or liberal, can face this problem. Many who are ordinarly textualists would like to limit the power of the tribes, but find little or no text upon which to base a decision. Originalists are stuck with a history that would show greater deference to the tribe than most would like to give in a modern world. And those usually labeled liberal would like outcomes that honor promises made to respect the sovereignty of the tribes, but may be deeply disturbed at ignoring individual rights and liberties in favor of group identity. The decision the Supreme Court must make to resolve the circuit split on the question of nonmember Indians, criminal jurisdiction, and the Double Jeopardy Clause illustrates this dilemma. This section will analyze the choices before the Court.

One option that would settle the questions of double jeopardy would be to discard the Dual Sovereignty Doctrine altogether, and thus to decide that any successive prosecution would violate the Double Jeopardy Clause. Supreme Court precedent binds lower courts to the doctrine, but if the question comes before the Supreme Court, the Court is bound only by \textit{stare decisis}, and it could decide that the doctrine should no longer apply. The doctrine is inconsistent with the plain language of the Double Jeopardy Clause. Many have criticized it as contrary to the common law at the time the Constitution was drafted and thus contrary to the intent of the Founders.\textsuperscript{262} Thus, jurists who prize fidelity to the plain meaning of the text or to the intent of the Founders would find discarding the doctrine consistent with that judicial philosophy. But discarding the doctrine would have implications far beyond Indian Country. Because the doctrine is so well established, and because discarding the doctrine would have far reaching consequences in other contexts such as federal and state law enforcement, it is unlikely that the Court will decide to discard the doctrine. Therefore, for purposes of this discussion, it will be assumed the Court will continue to apply the Dual Sovereignty Doctrine and focus on the Indian Law choices the Court faces.

As outlined above, one of the central questions before the Court is to clarify the role of the Supreme Court and Congress in deciding the

\textsuperscript{261} Parameters of State, Federal, and Tribal Jurisdiction, 38 Wm. & Mary L. Rev. 539, 578 (1997) ("(C)onsistencies, symmetry, and uniformity have never been highly valued in the constantly changing field of Indian law.").

source of jurisdictional power, or in other words, to determine how to interpret Duro and the Duro override.

A. The Court Could Decide that Duro is Constitutionally Based

The Court may find that Duro is constitutionally based, as the Eighth Circuit did in Lara. There is significant support in the language of Duro for finding a constitutional basis for the opinion. For example, the Duro Court stated, “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. As full citizens, Indians share in the territorial and political sovereignty of the United States.” Other language supporting a constitutional grounding for Duro is this statement from the Court: “Our cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right.” Additionally, the Eighth Circuit in Lara found Duro was constitutionally based because “[t]he Supreme Court has suggested that we must be guided in part by structural principles that are both implicit and explicit in the Constitution.”

There are many problems, however, with finding a constitutional basis for the decision. The Eighth Circuit must rely on “implicit structural principles,” of course, because nowhere does the Constitution make explicit statements concerning the sovereignty of Indian tribes. While structural approaches are common enough in Indian law cases, some jurists may find little comfort there. If a jurist seeks guidance from the plain meaning of the text, or from the intent of the Founders, “implicit structural principles” may sound as boundless as the “penumbras” and “interstices” in which the Supreme Court has found the right to privacy.

In essence, this double jeopardy issue presents to the Court the same questions that faced Justice Marshall in the first Indian law cases—the nature of the sovereignty of the conquered tribes, the rela-

263. 324 F.3d 635, 639 (2003).
265. Id. Here, the Court cites to Reid v. Covert, 354 U.S. 1 (1957), in which a plurality held that military tribunals had no jurisdiction over civilian dependents of military personnel stationed overseas where no jury trial was available. Id. at 23. Philip Frickey observes that the citation to Reid “suggests the extent to which the Court in Duro viewed tribal prosecution of nonmembers as bizarre.” Frickey, supra note 107, at 40. Frickey goes on to analyze the Court’s comparison of the tribal courts, subject to habeas corpus review and where ICRA imposes most of the protections of the Bill of Rights (except for right to counsel) to military tribunals where few of those safeguards are in place. Id.
266. 324 F.3d at 640.
tionship between the conquerors and the vanquished, and where to situate the power of deciding what role the tribes would play in the nation. Other than the Indian Commerce Clause, the Constitution is silent about the tribes. Without the anchor of constitutional principles, the source of power was a difficult question for the Court in Johnson v. McIntosh. Justice Marshall grounded the case in the “Doctrine of Discovery,” a doctrine not derived from constitutional principles, but instead based in European medieval history. Justice Rehnquist grounded Oliphant, one of the building blocks of Duro, in history as well. The problem with using history as authority for Supreme Court decisions is that it may be even more malleable and more subject to changing interpretation than text-based interpretation. One example of the malleability of history is Oliphant’s departure from the view of history presented in the Marshall Trilogy. More recently though in a different context, the Court changed its view of historical support for anti-sodomy laws within a relatively short period of seventeen years when it overturned Bowers v. Hardwick in Lawrence v. Texas.

Moreover, finding a constitutional basis for Duro would not only implicitly reject the Marshall Trilogy and other Supreme Court precedent that acknowledges tribal sovereignty, but it would make it difficult for the Court to avoid explicitly overruling Talton v. Mayes and to avoid seriously limiting the Plenary Power Doctrine. The Court was cited by the Duro Court for the proposition that the Bill of Rights does not apply to the tribes. In Duro, the Court makes a distinction between how the federal government may treat nonmembers In—

267. Frank Pommersheim notes that the constitutional status of tribes has been “elusive from the very beginning,” yet “[d]espite this acknowledgment, the Court proceeded then, and has ever since, to routinely decide cases about the nature of tribal sovereignty and its interaction with the federal and state sovereigns with almost no reference to any constitutional benchmarks or limitations.” Pommersheim, supra note 9, at 271.

268. U.S. Const. art. I, § 8, cl. 3. The Clause also excludes Indians from the count when apportioning taxes.

269. 21 U.S. (8 Wheat.) 543 (1823).

270. Id. at 573-74.

271. See generally Robert A. Williams, Jr., The American Indian in Western Legal Thought: The Discourses of Conquest (1990).


274. 163 U.S. 376 (1896).

275. The Court has long deferred to Congressional power through the Plenary Power Doctrine. See, e.g., United States v. Kagama, 118 U.S. 375 (1886). Judge Canby states, “Although there may be argument over the extent to which the courts may properly limit tribal sovereignty, there has never been any doubt that Congress is legally free to do so.” Canby, supra note 41, at 85.

276. Duro, 495 U.S. at 693 ("It is significant that the Bill of Rights does not apply to Indian tribal governments." (citing Talton, 163 U.S. 376)).
rians, and how tribes may treat nonmember Indians. \footnote{277}{495 U.S. at 689-90. In regard to historical evidence that federal statutes did not distinguish between member and nonmember Indians, the Court states: "Congressional and administrative provisions such as those cited above reflect the Government's treatment of Indians as a single large class with respect to federal jurisdiction and programs. Those references are not dispositive of a question of tribal power to treat Indians by the same broad classification." \textit{Id}.} It is unclear whether, without \textit{Talton}, that distinction would still exist. Some current systems, like the Courts of Indian Offenses, might not survive if the Bill of Rights applied to all Indians regardless of tribal membership. \footnote{278}{Also known as CFR courts, the Courts of Indian Offenses were established pursuant to 25 C.F.R. §§ 11.1-11.32c (1991) to provide enforcement for tribes whose own systems have "broken down," and federal or state enforcement was not available. One must wonder if even the Bureau of Indian Affairs might be suspect under equal protection principles.} The consequences would be far reaching and would revolutionize the position of tribes in the United States.

Also revolutionary would be the power that the Supreme Court would claim, if it were to follow this route. The Plenary Power doctrine is anchored in the brief text of the Indian Commerce Clause, which announces Congress' power to regulate trade with the tribes. \footnote{279}{Frickey, \textit{supra} note 107, at 73-4.} Outside of interpreting the Indian Commerce Clause, the Court's exercise of power does not have even that scant authorization over tribal sovereignty. Prominent Indian law scholars have denounced the extension of the Court's power, begun in \textit{Wheeler}, and \textit{Oliphant} and extended in \textit{Duro}, calling it "judicial missionary work," \footnote{280}{"judicial plenary power", \textit{supra} note 182, at 218. Clinton states, "Judicial Indian plenary power apparently contains few limitations on judicial activism and creativity, just as it failed to limit Congressional excesses during the height of American colonialism in Indian country." \textit{Id}.} "subjectivist path" where "legal traditions are being almost totally disregarded," \footnote{281}{Pommersheim, \textit{supra} note 9, at 284. Pommersheim also calls it "a rogue doctrine used to curb tribal sovereignty." \textit{Id}. Robert Clinton also calls it "judicial plenary power." Clinton, \textit{supra} note 182, at 218. Clinton states, "Judicial Indian plenary power apparently contains few limitations on judicial activism and creativity, just as it failed to limit Congressional excesses during the height of American colonialism in Indian country." \textit{Id}.} "a power play," \footnote{282}{Skibine, \textit{supra} note 15, at 783-84 ("Thus interpreted, the Court in \textit{Oliphant} and \textit{Duro} accomplished a power play of constitutional dimension: a power play aimed at wresting from Congress its traditional role of determining the relations between Indian tribes and the United States.").} and "a house of cards ultimately built on a flawed constitutional thesis." \footnote{283}{Clinton, \textit{supra} note 182, at 117. Clinton states the following: [I]n the late-twentieth century, the Supreme Court has arrogated to itself the plenary power it previously rationalized for Congress and has begun defining federal Indian law in an exercise of judicial plenary power, similarly without any lawful justification. While internally consistent with one another, none of these cases can be reconciled with basic}
this path to consent jurisdiction, or members-only jurisdiction, was begun in *Oliphant*, a Supreme Court decision holding that *Duro* is based on constitutional principles would make it difficult to deny the activism of this Court. The Court has always deferred to Congressional power over the tribes, as well as other areas. Although *Duro* announced that Congressional power is not without limits, the Court assuming for itself the power to limit sovereignty would be a blatant example of judicial activism.

There is evidence that at least one justice, Justice Anton Scalia, recognized that *Duro* represented a departure from his usual judicial philosophy. Indian law scholar David Getches found a memorandum from Justice Scalia to Justice Brennan among the papers of Justice Thurgood Marshall, in which Scalia, usually devoted to the plain meaning of texts, explains his thinking in *Duro*. Getches describes the memo,

A majority of the Court voted in conference after the oral argument [in *Duro*] to reverse a Court of Appeals decision upholding tribal jurisdiction. Justice Scalia originally voted to affirm. Justice Brennan, as senior dissenting Justice, assigned him the task of writing the dissent. Scalia later changed his mind, telling Brennan "I am sorry to desert." In the course of his "efforts to craft an opinion," he had gleaned from some recent decisions an approach that enabled the Court to readjust tribal jurisdiction and sovereignty based on a snapshot of current conditions and the expectations of non-members. Although he "would not have taken that approach as an original matter," he became convinced that this approach was now "too deeply imbedded in our jurisprudence to be changed." Hence he joined in Justice Kennedy's majority opinion, which extended the Court's denial of tribal criminal jurisdiction over non-Indians in *Oliphant v. Suquamish Indian Tribe* to the more difficult question of jurisdiction over non-member Indians.

Philip Frickey reflects on the incident, giving credit to Justice Scalia for recognizing the inconsistency of this position when compared with those for which he is famous, but worrying that the "inescapable" reason for the different approach is that Scalia finds "federal Indian law is not worth the bother."

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American constitutional principles, the constitutional history of the Indian Commerce Clause or the principles of the Anglo-American legal system. It is a house of cards ultimately built upon a constitutionally-flawed thesis.

*Id.*

285. The Court also commonly defers to Congress in areas such as military matters. *See, e.g., Loving v. United States*, 517 U.S. 748 (1996) (stating that the court must give highest deference to military judgment).


There are other arguments against following the path of members-only jurisdiction. The consent jurisdiction rationale emphasizes the lack of defendants' ability to participate in making the laws that govern them. But, as Justice Brennan noted in the Duro dissent, requiring the possibility of participation in exchange for jurisdiction imposes a requirement on the tribal government that we do not impose on other sovereigns. As Brennan explains, to do so would be to hold that "a State could not prosecute nonresidents, and this country could not prosecute aliens who violate our laws. The commission of a crime on the reservation is all the 'consent' that is necessary to allow the tribe to exercise criminal jurisdiction over the nonmember Indian." Treating tribal courts differently than state courts and other sovereign courts suggests to some commentators that the true basis for consent jurisdiction is distrust of tribal courts—and that the distrust is a vestige of the racism that has darkened the relationship of the tribes and the dominant American society. Robert Clinton notes that ironically, this line of consent jurisdiction cases transforms the issue into one of reverse discrimination:

In short, the exercise of federal judicial Indian plenary power is all about protecting nonmembers, primarily whites, from Indian governance! Obviously, in a post-Brown v. Board of Education world, some non-racial explanation of this effort was necessary in order to mask the overt racism and colonialism involved in the Court's most recent foray into the world of Indian wardship, dependency and plenary power. Duro v. Reina supplied that rationale.

Thus, the consent jurisdiction path is fraught with difficulties. Justice Marshall, in Johnson v. McIntosh, recognized that regardless of the justice of the claim, the "Courts of the conqueror" could not deny the conqueror title. Although the Supreme Court does not seem to see the irony of the "courts of the conqueror" requiring consent from Indians, it has not escaped others. Philip Frickey has said, "The Court has transformed itself from the court of the conqueror into the court as the conqueror."

Even if the Court finds a constitutional basis for Duro, there are still two possible outcomes to the criminal jurisdiction and double

289. Duro, 495 U.S. at 678.
290. Id. at 707 (Brennan, J., dissenting) ("Nor have we ever held that participation in the political process is a prerequisite to the exercise of criminal jurisdiction by a sovereign."
291. Id.
293. Clinton, supra note 182, at 223.
294. 21 U.S. (8 Wheat.) at 588.
295. Frickey, supra note 107, at 73 (emphasis added).
jeopardy issues. First, the Court may find, as the Eighth Circuit did, that although the decision is based on constitutional principles, the effect is not to void the *Duro* override, but instead to limit Congress’ possible reactions to *Duro* to delegating sovereignty, instead of recognizing inherent sovereignty. If tribal sovereignty is delegated from the federal government, then both federal courts and tribal courts share the same source of power, and the Dual Sovereignty Doctrine does not apply. The Double Jeopardy Clause would bar successive prosecution. Because this position still recognizes the *Duro* override as granting tribal courts jurisdiction over nonmember Indians, nonmember Indians who are prosecuted first by tribal courts, where punishment is severely limited, would not face prosecution by federal courts where more conventional punishment is available. The tribal court has concurrent jurisdiction under the Major Crimes Act, and thus, if the tribe prosecutes a defendant before the federal government does, those who commit serious crimes may escape with light punishment. Moreover, if the Court chooses this path, although the tribal court will have jurisdiction over both members and nonmember Indians, nonmember Indians will not be subject to successive prosecutions by tribal courts, but, under *Wheeler*, member Indians will.

The second outcome possible if the Court finds *Duro* to be constitutionally-based is to find that the constitutional basis trumps any authority Congress has to override the decision. Thus, the *Duro* override would be void. This choice would solve double jeopardy problems because lacking jurisdiction over nonmembers, no tribal prosecution would exist to interfere with federal prosecutions. But this solution presents other practical problems—the same problems that Congress responded to in the *Duro* override. If tribal courts lack jurisdiction, it leaves a jurisdictional void on the reservation and tribes would be unable to protect themselves. The Supreme Court in *Duro* suggested that states and tribes could fill the void by means of Public Law 280 or inter-tribal reciprocal agreements. This suggestion seems likely to


297. See Clinton, supra note 291 and accompanying text.

298. See supra notes 185-90 and accompanying text. The tribes had argued, “there may not be any lawful authority to punish the nonmember Indian.” *Duro*, 495 U.S. at 697. State authorities may lack the power, resources, or inclination to deal with reservation crime. Arizona for example, specifically disclaims jurisdiction over Indian country crimes. *Ariz. Const.* art. 20 ¶ 4. Further, federal authority over minor crimes, otherwise provided by the Indian Country Crimes Act, 18 U.S.C. § 1152, may be lacking altogether in the case of crime committed by a nonmember Indian against another Indian since § 1152 states that general federal jurisdiction over Indian country crime “shall not extend to offenses committed by one Indian against the person or property of another Indian.” *Duro*, 495 U.S. at 697.

299. 495 U.S. at 697. The Court states:
be unattractive, if not insulting, to the tribes, given that when granted authority to accept or reject State jurisdiction under Public Law 280, tribes have nearly unanimously rejected it.\textsuperscript{300} The demographic information that is currently available on the reservation population,\textsuperscript{301} and the outcry that met the \textit{Duro} decision, suggest that the jurisdictional void created by finding Congress had no authority to override \textit{Duro} will present a significant law enforcement problem for states and tribes.\textsuperscript{302}

In summary, if the Court finds \textit{Duro} has a constitutional basis it faces problematic choices that lead to unsettling consequences: creating a constitutional basis without a text as an anchor; overruling long established precedent and requiring change in established systems; creating situations where serious crimes may be punished with no more than a fine and a year in jail; or creating jurisdictional voids that once before led to an outcry by States and tribes concerning law enforcement. If the United States Supreme Court finds the decision was constitutionally based, it opens itself to charges of judicial activism and of exercising unauthorized power. Given the numerous negative consequences of finding that \textit{Duro} is based on the Constitution, perhaps finding that \textit{Duro} was decided as a matter of federal common law is a better choice.

B. The Court Could Conclude that \textit{Duro} was Decided as a Matter of Federal Common Law

Alternatively, the Court may find that \textit{Duro} is a matter of federal common law as the Ninth Circuit did in \textit{Enas}.\textsuperscript{303} First, and most important, there is the lack of any reference in \textit{Duro} to the United States Constitution. Second, although much in the \textit{Duro} opinion supported finding a constitutional basis for the decision, there is also substantial language in \textit{Duro} that supports finding the Court intended deference to Congress and therefore, that the Court made their decision as a matter of federal common law. For example, the \textit{Duro} Court clearly states near the end of the opinion that Congress has the final

\begin{flushright}
\textit{Id.}
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\textsuperscript{300} See supra notes 127-133 and accompanying text.
\textsuperscript{301} See supra Part I.
\textsuperscript{302} See supra notes 125-133 and accompanying text.
\textsuperscript{303} United States v. \textit{Enas}, 255 F.3d 662, 674 (9th Cir. 2001) ("If there is a constitutional dimension to those decisions, we cannot divine it from the language of the opinions.").
authority to address the jurisdictional scheme: "If the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs."

Even when the Court is speaking about the nonmember Indians’ right to the Nation’s protection of their individual rights, the Court defers to Congress by stating that "[i]n the absence of such [federal] legislation, however, Indians, like other citizens are embraced within our Nation’s ‘great solicitude that its citizens be protected . . . from unwarranted intrusion on their personal liberty.’" Furthermore, most Indian law scholars agree that Duro is federal common law and not constitutionally based.

Just as finding a constitutional basis for Duro would entail turning away from the Marshall Trilogy, Talton, and other well-established precedent, similarly deciding that Duro was decided as a matter of federal common law would also entail diverging from precedent—in this case, the modern trend to consent jurisdiction. Although Oliphant has been repeatedly criticized for relying on weak or mistaken authority, the decision has formed the basis for a now long line of cases recognizing consent jurisdiction and not territorial jurisdiction. And for jurists, usually labeled “liberal,” who often privilege the rights of the individual over group rights or the power of governmental entities, a decision away from the consent jurisdiction path may be difficult. Those jurists who see the courts’ role as protecting the liberty of the individual must ask how it can be that within the United States, the courts are unable to protect the civil rights of its own citizens. Some scholars see this trend toward the consent par-

304. 495 U.S. at 698.
305. 495 U.S. at 692 (emphasis added) (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978)).
306. This was the conclusion of the Ninth Circuit in Enas, 255 F.3d at 674.
307. See Barsh and Henderson, supra note 141.
308. See generally Gould, supra note 15, at 899 (“It may be that little recourse is now available to Indians and tribes. But continuing resort to the doctrines of inherent sovereignty and trust responsibility will not remedy the problem. These doctrines will forever fail the tribes because they lack a textual basis in the Constitution. If the paradigm holds true, tribes will lose virtually every time they attempt to assert inherent rights against nonmembers.”).
309. Philip Frickey writes:

It is obvious that the Court has found it increasingly incongruous that tribes, as entities within the borders of the United States subject to ultimate congressional control, may use the coercive power of government against nonmembers without being subject to all of the basic constitutional limitations and remedies. This incongruity has been heightened because in most of the cases the tribe has struggled to regulate such persons in circumstances in which Congress long ago destroyed the tribe’s ability to exclude nonmembers and in which the region in question may have, to Anglo judicial eyes, lost its “Indian character.”
adigm to be unstoppable.\textsuperscript{310} Although it is true that finding \textit{Duro} was a matter of federal common law and not constitutionally based will not stop the trend, it would slow it down. And slowing it down may be a too painful choice for those jurists who see their role as protectors of individual rights.

Even if the Court finds that \textit{Duro} is a matter of federal common law, however, the Court must still apply the test for dual sovereignty and decide whether the \textit{Duro} override recognized the tribe's inherent power, or whether the \textit{Duro} override was a delegation of jurisdictional power. The Court may decide that Congress had the power to trump the \textit{Duro} decision, but that during the short period of time that \textit{Duro} was in force, the federal government, through the arm of the Court, had removed inherent jurisdiction from the tribe. Once removed by the federal government, regardless of the language or intent of Congress, any restoration of jurisdiction must be a delegation. This was the conclusion the Ninth Circuit originally reached in \textit{Means},\textsuperscript{311} and later overturned in \textit{Enas}.\textsuperscript{312}

If the Court decides that Congress had only the power to delegate jurisdiction to the tribe, the tribal court and the federal courts will share the same source of sovereignty, and the dual sovereignty exception will not apply. As discussed above, double jeopardy principles will require that only one prosecution take place, and, if the tribal court acts before the federal court, some defendants may receive light punishment for serious crimes.\textsuperscript{313} Member Indians and nonmember Indians will be subject to different double jeopardy outcomes.

If, on the other hand, Congress has not only the right to decide whether the tribe has jurisdiction over nonmember Indians, but also has the right to recognize inherent jurisdiction, then the Dual Sovereignty Doctrine applies and both member and nonmember Indians are subject to successive tribal-federal jurisdiction. This practical solution would also avoid the problems of a jurisdictional void over nonmember Indians, and allow the tribes to fulfill their duties to protect their own members. It would be a striking reaffirmation of Congress' plenary

\textsuperscript{310} Frickey, \textit{supra} note 107, at 65. David Williams makes a parallel point: "[W]e need to believe in the possibility of a nation that can encompass and welcome all. The reason that Indian law may stir so much anxiety may be that it tends to place limits on the promise. And so it is an understandable impulse to claim that the Constitution applies to Indians in the same way as it does to every other group." Williams, \textit{supra} note 15, at 869.

\textsuperscript{311} \textit{Means} v. N. Cheyenne Tribal Court, 154 F.2d 941, 947 (9th Cir. 1998), \textit{overruled by Enas}, 255 F.3d 662 ("The 1990 amendments must be treated as an affirmative delegation of power . . .").

\textsuperscript{312} 255 F.3d at 675 n.8.

\textsuperscript{313} See \textit{supra} note 2.
power, but would slow the advance of consent jurisdiction that the Supreme Court has embraced in the last twenty-five years.

In sum, this issue will present the Justices with difficult choices that will test their fidelity to their jurisprudential philosophies, and their decisions will have important consequences for individual Indians and for the tribes. The following section concludes this Article by predicting how the Supreme Court will resolve the issue, as well as suggesting the direction the Court should take.

V. CONCLUSION

Currently, under Enas, a nonmember Indian tried by a Navajo Tribal Court may face a subsequent federal prosecution based on the same facts. Simultaneously, under Lara, a nonmember Indian tried by the Winnebago Tribal Court is protected from that threat by the Double Jeopardy Clause. Given this situation, the United States Supreme Court has agreed to decide the issue. There will be a strong temptation to reaffirm the trend to members jurisdiction, most likely by deciding that Duro was constitutionally based and that Congress had no power to override Duro.

The Court will likely be induced to take this approach for several reasons. First, finding Congress could not override Duro’s denial of jurisdiction is a practical response to the double jeopardy issue. This decision would avoid the double jeopardy problem for federal prosecutors, because without tribal court jurisdiction over nonmembers, there will be no tribal prosecutions to interfere with federal proceedings.

Second, the outcome would comport with results this Court has found acceptable before. The Court has shown in Duro that it considers the jurisdictional void created by tribal courts lacking jurisdiction over nonmember Indians to be a solvable problem, because the tribe can accept the State’s protection under Public Law 280.314

Third, it would avoid the rationale that worried the Eighth Circuit in Lara and Weaselhead, and the Ninth Circuit in Means: that giving Congress the power to “recognize” sovereignty instead of delegating it is the same thing as giving Congress the power to revise history. This ability to “recognize” a power that Congress had not noted previously in Indian law suggests that Congress could perhaps do the same in other areas. The Ninth Circuit in Enas admits a major limitation to its holding: “It cannot be the case that Congress may override a constitutional decision by simply rewriting the history upon which it is based.”315 The court goes on to distinguish Enas from that situation because Enas is not a matter of constitutional history.316

314. See supra notes 125-131.
315. 255 F.3d at 675.
316. Id.
Finally, and perhaps most important, a decision that Duro was constitutionally based will continue the modern trend to members-only jurisdiction. It will focus, as the Court has before, on whether nonmember Indians enjoy the full protection of the Bill of Rights in tribal court, and whether they are eligible to participate in the government that holds them accountable for their actions in Indian Country. Members of the Court are comfortable focusing on individual rights, and uncomfortable with recognizing the group rights that tribal governments represent. The Court has confirmed this principle of consent jurisdiction repeatedly in the last thirty years. It is unlikely to abandon it now, especially in the criminal context where the interest in protecting civil rights is high.

A decision that Duro is constitutionally based would be mistaken, however, for the reasons that this Article sets out above: no constitutional text supports the decision; it would disturb longstanding principles of Indian law, it would be seen by many as explicitly assuming judicial plenary power over the tribes, and it would leave States and tribes with a jurisdictional void. But there are more reasons why the Court should reject such a decision.

First, in the criminal context the stakes are higher, not just for the defendant, but for the tribe as well. The Court must understand that it is the duty of the tribe, as sovereign, to protect its own members. The Court is not contemplating another small limitation on tribes; this denial of jurisdiction strikes at the heart of sovereignty. If members cannot place their trust in their government to maintain peace and order, sovereignty is a sham. It is not simply that order must be maintained by someone, but rather that it is the tribe that must maintain it. More than the right of the tribe, it is the obligation and the purpose, of the tribe. In Heath, the landmark double jeopardy case, Justice O'Connor writing for the majority, explained:

> Foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code. To deny a State its power to enforce its criminal laws because another State has won the race to the courthouse “would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace within their confines.

> A State’s interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another State’s enforcement of its own laws. Just as the Federal Government has the right to decide that a state prosecution has not vindicated a violation of the “peace and dignity” of the Federal Government, a State must be entitled to decide that a prosecution by another State has not satisfied its legitimate sovereign interest.

317. See supra notes 214-225 and accompanying text.
318. 474 U.S. 82, 93 (1985) (citation omitted).
Thus, the Court’s solution of tribes accepting state jurisdiction under Public Law 280 is completely misses the point. The tribe, as a sovereign, has “a right to decide” whether a prosecution has vindicated or satisfied its sovereign interest. And if that right to decide is to mean anything, the tribe must have the right to subsequent prosecution. The fact that the tribe long ago lost the power to vindicate its interests in the case of non-Indians does not justify further eroding this basic right.

If the Court is concerned about the individual rights of nonmember Indians, there are other steps Congress could take to protect those rights. The Indian Civil Rights Act could be amended to include all of the Bill of Rights protections. The right to appeal to the federal courts through a habeas petition is already an established protection.

In the criminal law context, the Court routinely balances the protection of individual rights with the right of the state to fulfill its duty to protect all of the people. If a citizen of New York commits a crime in Philadelphia, the Court acknowledges the right of Pennsylvania to protect its citizens by asserting jurisdiction over the New Yorker, regardless of the differences in New York and Pennsylvania law and regardless of the lack of opportunity for the defendant to participate in making those laws. The tribes’ right and duty to protect its members is no different.

If members cannot rely on the tribe for that protection, membership becomes trivial. In Duro, Justice Kennedy repeats the often quoted language from United States v. Mazurie, “The tribes are, to be sure, ‘a good deal more than “private voluntary organizations” . . .’” but Duro goes on in the next sentence to limit tribal sovereignty in what Heath calls a “shocking and untoward deprivation.”

A Supreme Court decision to limit criminal jurisdiction to members-only is also wrong because it is impractical. Like the Allotment Act that attempted to change the Indian culture by imposing individual land ownership on the tribes, the plan to limit tribal court jurisdiction attempts to impose constitutional values on tribal courts. It is an assimilationist policy, and as the failure of the Allotment Act demonstrated, assimilation is a failed policy. Congress has learned that assimilation will not work, and the Court may expect to learn the

319. See supra notes 125-131 and accompanying text.
320. As noted earlier, the Wheeler Court recognized that “[t]ribal laws and procedures are often influenced by tribal custom and can differ greatly from our own.” United States v. Wheeler, 435 U.S. 313, 331-32 (1978).
321. 495 U.S. at 688 (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)).
322. 474 U.S. at 93.
323. See supra notes 43-45.
same lesson.324 Despite the devastation of the Allotment Period, tribes have not only survived, some have begun to thrive, which leads to the last point arguing against a decision to limit jurisdiction over nonmember Indians.

A decision that erodes the power of Congress at a time when Indians are finally in a position to influence the political process would undermine the democratic participation that the Court focused on in *Duro*. In addition to the incongruity of the “courts of the conqueror” requiring consent for jurisdiction, another irony becomes apparent if the Court finds that Congress did not have the power to recognize the tribe’s inherent jurisdiction in the *Duro* override. For many years, the Court has upheld the plenary power of Congress to define the limits of tribal authority.325 During those years, tribal members were among the poorest people in the nation, and the tribes were without means to contribute to political campaigns or to pay lobbyists to represent tribal interests. Now, with many tribes developing economic prosperity through gaming compacts and other development projects, these tribes are finally in a position to take advantage of the political influence that prosperity can bring.326 It would be wrong for the Court to

324. The author has been told by Native American friends that despite all efforts to encourage assimilation, the tribes intend to survive. Frank Pommersheim has commented on the hardiness of the tribes.

The central paradox—and certainly one a trickster figure navigating between two worlds could appreciate—of contemporary Indian law is the strength and elan of tribal efforts in the face of the negative jurisprudence of the Supreme Court. Despite the inimical ethos that permeates much of contemporary Supreme Court Indian law jurisprudence, the efforts of tribes to achieve meaningful self-determination proceed apace. Tribes seemingly grow ever more confident with their accomplishments in developing increasingly competent and sophisticated tribal governing institutions to better serve individuals and communities on the reservation.


325. *See supra* note 86 and accompanying text.

326. Reports of increased political clout for the tribes come from across the nation and from both political parties. *See, e.g.*, *Casino Royale Politics*, WALL St. J., May 30, 2002, at A14, which states the following:

Indian tribes with casinos argue that gambling is the yellow brick road to Native American economic development. The jury is still out on that and not everyone in Indian country is so sanguine. But one thing is undisputed: The political clout of casino tribes is sharply on the rise, and it is beginning to purchase favors that affect other Americans.

We suspect it’s no coincidence that a torrent of casino money has also been pouring through California’s politicians. The money comes from 61 tribes that have signed gambling compacts with the state and the big-money interests that back them. According to campaign finance reports, gambling tribes have lavished more than $40 million on state politicians since 1995, and another $80 million on casino propositions before California voters. Governor Gray Davis has received more than $1 million
deny the tribes access to power, now when they actually have the ability to influence the system.327

In sum, the Court should decline the opportunity to advance the theory of members-only jurisdiction or to limit the power of Congress or the tribes. The Court must fashion a decision, much like it did Wheeler, that leaves open the viability of the traditional line of precedent, anchored in the Marshall Trilogy that recognized the retained sovereignty of the tribes. Further, as the tribes gain political power, it is important that the Court reject an activist role by deferring to congressional power to recognize the inherent sovereignty of tribes. The best choice for the Court is a rationale that acknowledges that the source of tribal sovereignty is separate from the source of federal authority; it is the inherent sovereignty that the tribes retain from pre-colonial days.

ADDENDUM328

"Wheeler, Oliphant, and Duro, then, are not determinative because Congress has enacted a new statute, relaxing restrictions on the bounds of the inherent tribal authority that the United States recognizes. And that fact makes all the difference."329 So spoke the majority in United States v. Lara, holding that the source of tribal jurisdiction is an inherent sovereignty, recognized—not delegated—by Congress, and thus under the dual sovereignty doctrine successive tribal/federal prosecutions do not violate the Double Jeopardy Clause of the United States Constitution.330 In so holding the Court secured the benefits mentioned in the Article above: protecting the viability of the line of cases that recognize both the sovereignty of Indian tribes from gambling tribes. Virtually overnight, casino-owning Indian tribes have become one of California’s most powerful political lobbies. See, e.g., Threat to Sovereignty Sends Tribes to Capitol, WASH. POST, Sept 10, 1998, at A-03 (“Tribes never have had a stronger presence in Washington than they do now. They made a record $2 million in campaign contributions, mostly to Democrats, in the 1996 election and more recently have marshaled lobbyists and public relations specialists to defend the constitutionally protected Indian sovereignty.”); R. G. Ratcliffe, Firms Fund DeLay Bid to Capture House Seats, HOUSTON CHRON., June 21, 2003 (“In 1995, at the request of the Mississippi Indians, DeLay helped kill a proposed tax on Indian gambling. Since then the tribes have become major Republican donors.”).}

327. In addition to the political process, other systems of influence may bring more power to the tribes. Philip Frickey suggests that a “broader approach” to dispute resolution, those that offer “a greater degree of conciliation” such as negotiation or mediation, may “bring Indians into Indian law far better than does adjudication.” Frickey, supra note 27, at 1782-83.

328. The Court decided United States v. Lara, ___U.S.____; 124 S. Ct. 1628 (2004), on April 19, 2004, as this Article was going to press. This addendum will briefly describe the opinion.

329. ___U. S. at ___; 124 S. Ct. at 1637.

330. ___U.S. at ___; 124 S. Ct. at 1639.
and Congress' plenary power over the tribes, thereby acknowledging that tribes retain some inherent tribal sovereignty that exceeds tribal membership, and rejecting the judicial activism regarding the tribes that scholars have denounced.\textsuperscript{331}

In \textit{Lara}, the Court first reviewed the history of cases addressing Double Jeopardy and Indian tribes, arriving at the question of whether \textit{Duro} was constitutionally based and thus a decision that Congress could not override, or whether it was federal common law which Congress could override. The Court found that \textit{Duro} was not constitutionally based, and noted \textit{Duro, Bourland}, and \textit{Nevada} were not controlling because those cases rest on "extant treaties and statutes... sources as they existed at the time the Court issued its decisions."\textsuperscript{332} Further, although the Court conceded that \textit{Duro} anticipated congressional delegation of jurisdiction, the \textit{Lara} majority found that when Congress overrode \textit{Duro}, it did not delegate, but rather it "adjusted" the status of the tribes by "relaxing the restrictions recognized in \textit{Duro}."\textsuperscript{333}

In explaining the basis for its decision, the Court went beyond endorsing tribal sovereignty in the double jeopardy setting to explicating and reaffirming the \textit{constitutional basis} for the congressional plenary power over the tribes. The Court identified the traditional constitutional sources: the Indian Commerce Clause and, by implication, the treaty power. Additionally, Justice Breyer noted that Congress' plenary power has long enjoyed the Court's approval,\textsuperscript{334} and that Congress had routinely modified the autonomy of dependent entities in other contexts.\textsuperscript{335} Further, the Court reasoned that no explicit language in the Constitution prohibited Congress acting to relax restrictions, and the action required no "radical changes in tribal status."\textsuperscript{336} The Court also, in a move reminiscent of the first Justice Marshall's wry reference to the "courts of the conqueror,"\textsuperscript{337} stated that Congress' power rests on "preconstitutional powers necessarily inherent in any Federal Government, namely power the Court has described as 'necessary concomitants of nationality.'"\textsuperscript{338} This allusion to the power of the dominant nation is not the only way in which the decision echoes the Marshall trilogy.

\textsuperscript{331} \textit{Supra} notes 266-68, 283-85, and accompanying text.
\textsuperscript{332} \textit{Id.} at 1635; 124 S. Ct. at 1636-37.
\textsuperscript{333} The Court listed other instances when Congress could "relax restrictions," most notably when Congress terminated and then later recognized a tribe. \textit{Id.} at 1635 (\textit{citing Menominee Tribe v. United States}, 391 U.S. 404 (1968)).
\textsuperscript{334} \textit{Id.} at 1635; 124 S. Ct. at 1634
\textsuperscript{335} \textit{Id.} at 1635.
\textsuperscript{336} \textit{Id.} at 1636.
\textsuperscript{337} \textit{See supra} note 188 and accompanying text.
\textsuperscript{338} \textit{Id.} at 1634; 124 S. Ct at 1634.
Just as the cases of the Marshall trilogy simultaneously gave hope to the tribes by recognizing Indian sovereignty apart from the states but also undermined that sovereignty by establishing “domestic dependent nation” status, the Lara Court reserved a question that may undermine much of the victory that tribes can find in Lara. The Court carefully explained, step-by-step, why Lara’s double jeopardy claim did not allow the Court to address the equal protection and due process claims that a nonmember Indian might normally bring after prosecution in tribal court. Clearly, the Court left open the possibility that the sovereignty it recognized in the double jeopardy context may evaporate in the face of other constitutional claims.

Justice Stevens, Justice Kennedy and Justice Thomas all wrote separate concurrences. Justice Stevens, concurred in both the judgment and the rationale. He found “nothing exceptional” in recognizing the inherent sovereignty of the Indian tribes that had been previously limited because the Court had similarly acted with the states, and furthermore the tribes were originally independent sovereigns, unlike most states.

Justice Kennedy, on the other hand, concurred in the outcome, but found the majority went too far when it found a constitutional basis for Congress’ actions. Kennedy would simply “take Congress at its word,” no more. As the Article above speculated it might, it troubled Justice Kennedy to stray far from the consent theory that supports the notion of members-only jurisdiction. According to Kennedy, under Wheeler it is the historic power over the tribe that justifies limited tribal sovereignty. He found it “most doubtful” to extend the “unique and limited character” of that historical limited jurisdic-

339. ___ U.S. at ___; 124 S. Ct. at 1637-39. The Court explained that the due process or equal protection claim, if valid, would invalidate all tribal prosecutions of nonmember Indians, including Lara’s. But invalidating the prosecution is not the same as showing a violation of the Double Jeopardy Clause, which would require showing a delegation of federal power. Thus, the Court stated, “we need not and shall not consider the merits” of the due process or equal protection claim. Id. at 1638. Further, the Court found that when Lara cited Duro to raise the lack of constitutional safeguards, he was merely re-making the due process and equal protection claims. Id. at 1639.

340. Id. (J. Stevens, dissenting). Justice Stevens cites Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 437-438 (1946) as an example. In that case the Court wrote that for a party to contend that “Congress’ adoption of South Carolina’s statute was an unconstitutional delegation of Congress’ legislative power to the states obviously confuses Congress’ power to legislate with its power to consent to state legislation. They are not identical, though exercised in the same formal manner.” Id. at n.51.

341. ___ U.S. ____; 124 S. Ct. 1639 (J. Kennedy, dissenting).

342. Id.

343. Id. at 1640.

344. Id.
Moreover, Kennedy noted that reserving the questions of due process and equal protection, or using the "euphemistic formulation" of "relaxing restrictions" "obscures what is actually at stake . . . de-
mean[ing] the constitutional structure and the consent upon which it rests . . . ."346

Justice Thomas also concurred in the outcome, but not the reasoning of the Court.347 Thomas confronted the confusing jurisprudence on tribal jurisdiction by calling for the Court to "re-examine the pre-

mises and logic of our tribal sovereignty cases."348 Thomas identified the source of that confusion as the tensions within Wheeler, specifically the tension between Congress' plenary power and the Indian tribes' inherent sovereignty.349 For example, Justice Thomas ob-

served that if the dual sovereignty doctrine applied because the same offense may violate the 'peace and dignity' of each separate sovereign, then the tribe should have sovereignty to hear all claims that violate the 'peace and dignity' of the tribe including those committed by member or nonmember or non-Indian.350 Unlike the dissent, Thomas finds no constitutional basis for Duro or Oliphant.351

In contrast, the dissent, authored by Justice Souter and joined by Justice Scalia, found a constitutional basis for Duro, because Duro was a "question of how far a prosecuting entity's inherent jurisdiction extends" which required an analysis that the dissent vaguely characterizes as "a constitutional analysis based on legal categories of constitutional dimension."352 The dissent cited Duro and Bourland for the proposition that tribes retain only the jurisdiction "necessary for self government and internal tribal affairs" and that subsequent to these cases, jurisdiction must come from delegation.353 Souter reasoned that tribal authority could be restored only by granting the tribe independence or by rejecting the doctrine of dependent sovereignty. He feared that the majority's opinion represented that rejection of dependent status and a move toward independence. Souter observed that stare decisis principles are "particularly compelling in the law of tribal

345. Id.
346. Id.
347. ___U.S. at ___; 124 S. Ct. at 1642.
348. Id. Thomas is not the first to find the area confusing, of course. See supra notes 105-07 and accompanying text.
349. ___U.S. at ___; 124 S. Ct. at 1642.
350. Id.
351. Id. at 1645.
352. ___U.S. at ___; 124 S. Ct at 1650 (J. Souter, dissenting). "What should also be clear, and what I would hold today, is that our previous understanding of the jurisdictional implications of dependent sovereignty was constitutional in nature, certainly so far as its significance under the Double Jeopardy Clause is concerned." Id.
353. ___U.S. at ___; 124 S. Ct. at 1649.
jurisdiction, an area peculiarly susceptible to confusion."354 And he fears that confusion "will be the legacy of today's decision." But the dissent seemed less worried about principles of stare decisis regarding Cherokee Nation v. Georgia,355 and United States v. Kagama,356 which it found was "not much help."357

And so, does Lara supply the answers to the questions posed at the beginning of this Article: What are the limits of tribal sovereignty? Where is the source of tribal sovereignty? Who decides the answers to those questions? It is not surprising that only some answers are clear.

First, it is clear that in the double jeopardy context the source of tribal jurisdiction is the inherent sovereignty of the tribe.358 The limits of that sovereignty now include the majority's endorsement of the Duro override—tribes have jurisdiction over nonmember Indians, at least the tribe has jurisdiction in the same instances that they have jurisdiction over members.359 And who decides? For the Lara majority it is quite clear that Congress decides. Plenary power is back; indeed it is back with a vengeance and a renewed analysis of its constitutional basis.360 Congress' plenary power over the tribes has often been decried as an odious doctrine by both tribes and Indian law scholars.361 But as mentioned earlier, Congress' plenary power may be a more positive alternative than the Court's activism through members-only jurisprudence in an era when some tribes are gaining financial and political power.362

Although the decision is undoubtedly positive for the tribes, it leaves open possibilities of severe limitation in the future. The decision may be limited to the double jeopardy context in the future, and it is unclear whether Justices Kennedy and Thomas would support deference to inherent tribal sovereignty beyond that context. Even the majority clearly reserves the question of a due process or equal protection claim brought by nonmembers tried in tribal court on criminal charges. And Justice Souter and Justice Scalia, without textual basis but nevertheless affirming the constitutional basis of earlier decisions

354. ___ U.S. at __; 124 S. Ct. at 1650.
355. 5 Pet. 1, 8 L. Ed. 25 (1831).
356. 118 U.S. 375 (1886).
357. ___ U.S. at __; 124 S. Ct. at 1649 (J. Souter, dissenting). In contrast, the majority cites to one of the Marshall Trilogy, Cherokee Nation v. Georgia, 5 Pet. 1, 17, 8 L. ed. 25 (1831) (cited by Lara, 124 S. Ct. at 1636).
358. ___ U.S. at __; 124 S. Ct. at 1639.
359. ___ U.S. at __; 124 S. Ct. at 1636.
360. ___ U.S. at __; 124 S. Ct. at 1639.
362. See supra note 327 and accompanying text.
limiting tribal jurisdiction, remain firmly on the path of members-only Indian law jurisprudence.

Yet, the Court has stated that the *Duro* override "enlarges the tribe's own 'powers of self-government,"363 and that the basis of the tribes jurisdiction is inherent sovereignty. The tribes are unlikely to call this any less than a victory.

363. ___U.S. at ___; 124 S. Ct. at 1632 (emphasis in original).