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The Criminal Jurisdiction of Tribal Courts Over Nonmember Indians

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The Criminal Jurisdiction of Tribal Courts over
An examination of the basic framework of inherent tribal

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Throughout most of the history of federal Indian law, the United States Supreme Court has expressed extraordinary deference to Congress as the principal policymaker in Indian affairs, while often filling in gaps with imaginative characterizations of congressional intent or relying implicitly on its own power to create federal common law. Judicially articulated doctrines such as that of inherent tribal sovereignty have rightly been identified as providing the legal framework which has given conceptual stability to Indian law and influenced Congress to enact some of its more humane Indian legislation. But in more recent years the balance has switched; it is now the Congress that is the protector of tribal interests against the onslaughts of a Supreme Court bent on making its own Indian policy to please its western members.

In *Duro v. Reina*,[1] the Supreme Court broke with history and tradition in Indian law and held that Indian tribes' retained criminal jurisdiction does not extend to Indians who are not members of the particular tribe. The case arose when shots fired during an altercation on the Salt River Pima Maricopa reservation in Arizona killed a fourteen-year-old member of the nearby Gila River Indian tribe who was two blocks away. The federal prosecutor indicted Duro, a California Mission Indian, for murder, one of the federal Major Crimes under 18 U.S.C. § 1153, and then dropped the charges. Although tribal courts may have concurrent jurisdiction over Major Crimes,[2] federal law limits the punishments that tribal courts can impose to not more than one year in jail and not more than $5,000 in fines.[3] As a result, tribes often choose to charge miscreants with lesser offenses, as did the Salt River tribe by charging Duro with unlawful discharging of a firearm. The defendant unsuccessfully moved to dismiss on the grounds that the tribe lacked jurisdiction over him because he was not a member of the Salt River Pima-Maricopa Tribe, and sought a writ of habeas corpus in federal court under the 1968 Civil Rights Act. The Supreme Court reversed the Ninth Circuit's denial of the writ. In so doing, the Court ignored 200 years of congressional policy recognizing tribal court criminal jurisdiction over non-member Indians. The result is a void in jurisdiction—states cannot exercise jurisdiction over any Indians on the reservation, members or non-members; federal law exempts non-members from federal jurisdiction if they commit a crime against another Indian in Indian country.[4] Tribes, forced to open their jails and free non-member prisoners, and faced with an influx of non-members during the summer celebrations, reacted with outrage. In *Duro*'s aftermath many proposals were made to Congress not just to rectify the decision, but also to begin reasserting its primary role in setting Indian policy for the nation.

Congress responded by means of a rider to the Defense Appropriations Act amending the definition sections of the Indian Civil Rights Act (ICRA)[5] to correct the Court's misreading of congressional intent and thus, in a sense, to overturn *Duro*.[6] To the present definition of "powers of self-government," the amendment adds: "means the inherent power of Indian Tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."[7] The amendment also adds a definition of the term "Indian":

> Indian means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, United States Code if that person were to commit an offense listed in that section in Indian country to which that section applies.[8]

A final provision restricts the temporal effect of the amendment:

> The effects of subsections (b) and (c) as those subsections affect the criminal misdemeanor jurisdiction of tribal courts over non-member Indians shall have no effect after September 30, 1991.[9]

This unique law, designed to clarify congressional policy on the inherent powers of Indian tribes, the events leading up to its passage, and its appropriateness both as a matter of Indian policy and constitutional policy, are the subjects of this article.

We will first sketch the basic framework of tribal sovereignty and specifically criminal jurisdiction in Indian Country before and after *Duro*. Then, after reviewing the Court's recent activism in setting judicial limits on tribal sovereignty, we will turn to an analysis of the recent amendments and recommendations for the future.

Tribal Inherent Sovereignty

Indian tribes predate the Constitution; their place in our constitutional system is by virtue of their relationship with the federal government as defined by the plenary power of Congress on the subject of Indian affairs. While not juridical entities for purposes of international law,[10] neither are Indian tribes arms of the federal or of the state governments. They exercise their own inherent

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Non-Member Indians
sovereignty before and after Duro v. Reina.

sovereign powers, subject to the overriding sovereignty of the national government. Relying on its powers under the Indian Commerce clause, the treaty clauses, and the war powers, Congress has exercised authority over Indian tribes and continues to be the branch of government charged with making Indian policy under the Constitution.

Congress has exercised this power to limit the reach of tribal sovereignty in two respects that are particularly important to understanding the background of the *Duro* case. First, since the constitutional limitations on governmental power of the Bill of Rights do not apply to Indian tribes, Congress enacted the Indian Civil Rights Act in 1968 to apply most of the guarantees of the Bill of Rights as statutory obligations binding Indian tribes.[11] Second, Congress has granted criminal jurisdiction to some states over all crimes (except fish and game laws) occurring on Indian reservations in Public Law 280[12] and other statutes specific to various states.[13]

Criminal Jurisdiction in Indian Country

1. The Statutory Scheme

Where the state has not been given criminal jurisdiction on the reservations[14] statutorily, the federal courts have jurisdiction over most felonies involving Indians.[15] If an Indian defendant is charged with one of the thirteen crimes listed in the federal Major Crimes Act,[16] the federal courts have jurisdiction. If either the victim or the defendant is an Indian and the crime is other than one of the Major Crimes, federal courts have jurisdiction under the General Crimes Act,[17] although they may be instructed to apply state law if federal law does not define the offense.[18] Federal jurisdiction under these two statutes preempts state jurisdiction over these crimes.[19]

This scheme, while abrogating tribal sovereignty to some extent, leaves tribes with a great deal of power to punish those offending against the peace and order on the reservation. Tribes have concurrent jurisdiction over both "major" and "general" crimes.[20] In addition, the General Crimes Act recognizes that tribes have exclusive jurisdiction over general crimes committed by one Indian against another.[21] These "Indian against Indian" crimes have thus been left to the jurisdiction of the most interested forum, the tribal court.

2. Common Law Exceptions

In 1978, the Supreme Court removed non-Indians from tribal criminal jurisdiction on the theory that exercising such jurisdiction was inconsistent with Indian tribes' dependent status. *Oliphant v. Suquamish Indian Tribe*[22] represented a novel departure from the basic tenet of Indian law discussed above—that Indian tribes retain inherent sovereignty over internal affairs absent express abrogation by Congress. According to the classic formulation before *Oliphant*: "What is not expressly limited remains within the domain of tribal sovereignty."[23] Acknowledging that there was no federal statute denying tribes this jurisdiction, the Court reasoned that a statute was unnecessary. In the absence of any clear congressional guidance, the Court relied on unenacted bills, lower court opinions, and other somewhat dubious expressions of the shared presumptions of the executive, legislative, and judicial branches that tribes lacked such power.

Although rendering a federal common law opinion, the Court seemed influenced by two factors: first, a concern that non-Indians were barred from participating in tribal political life, and second, a concern that non-Indians would suffer racial discrimination in a system dominated by Indians.

Duro took this principle one step further by extending it to Indian non-members of the tribe. Although the Court admitted that the historical record regarding tribal court criminal jurisdiction over non-member Indians was "somewhat less illuminating than *Oliphant*,"[24] it nevertheless concluded that the record "tends to support the conclusion we reason."[25] The opinion can be criticized on many grounds,[26] some of which will be explored below. Initially, however, it is important to note that the opinion's distinction between enrolled members and all other Indians reveals a serious ignorance of the realities of Indian country, as those realities affect and involve Indian non-members.[27]

Demographics in Indian Country

In particular, the Court demonstrated no awareness of the real circumstances of Indian communities. In fact, there are three classes of Indian people, all of them significant in size. The first includes tribal members living on their own reservations and therefore subject both to tribal and federal jurisdiction. The second includes Indian people who are enrolled in a tribe, but who live on another reservation, and who are, after *Duro*, not subject to tribal jurisdiction, but otherwise "Indians" for all federal purposes. This group includes many Bureau of Indian Affairs (BIA) and Indian Health Service (IHS) employees, Indians who have married a member of the tribe and their offspring, and those working on the reservation, as well as the increasing numbers of Indians who reside on or near reservations of other tribes, preferring to live or work near other Indians but not on their own reservation.[28] The third, and most problematic, category is comprised of the people who live on a reservation but are not enrolled anywhere. In some cases, not enrolling may be a protest against Indian Reorganization Act governments seen as federally imposed or may be an expression of religious or cultural conviction. In other cases, the tribe itself may be lax about keeping its rolls up to date, allowing benefits and political participation to many who are not enrolled

(and in some cases not even technically eligible for enrollment under the tribe's own constitution). Indians do not have to enroll formally to obtain tribal benefits in many tribes; some even have a separate roll for internal purposes or an informal "census roll." Moreover, unenrolled Indians are eligible for a wide range of federal benefits directed to persons recognized by the Secretary of Interior as Indians without statutory reference to enrollment.[29] Tribal and BIA officials have variously stated that as many as one-half of the Indians on some reservations may not be enrolled.[30]

Tribal formal enrollment provisions can thus vary dramatically from the actual tribal community. A well-known example is illustrated in *Santa Clara Pueblo v. Martinez*.[31] The children in that case were half Navajo and half Santa Clara and had lived at Santa Clara all their lives, but were not enrolled in either tribe. According to former BIA Commissioner Robert Bennett, the same problem arises in the Northeast. If a child's mother is a Mohawk and father is a Seneca, the child cannot be enrolled in either tribe.[32] Commissioner Bennett has reported other policies that may exclude Indians, including a tribe that requires members to return to the reservation every ten years to re-enroll. Other tribes may still have the formal requirement that the parents reside on the reservation when the children are born for the children to be eligible. In addition, on some reservations, such as Hopi, a large percentage of traditional members are not enrolled.

This demographic evidence, while impressive, is at present anecdotal. All agree that accurate information is absolutely essential to assess both the impact of the decision and to fashion an appropriate solution. After the *Oliphant* case it was reported that often no one was policing crimes by non-Indians on reservations because of lack of interest or willingness to commit money by the states and because federal prosecutors were too far away or too strapped for resources to take an interest.[33] *Duro* can only add to this problem. It is unlikely that the federal government will be willing to expend resources to prosecute minor crimes and state governments, even if granted jurisdiction, may not want the extra burden or responsibility. For example, the Western Governors' Association, after consulting with tribal leaders, expressed concern that states may not be able to fill the jurisdictional gap created by *Duro*, and asked Congress to hold hearings in the west on the impact of the case.[34] In contrast, the Western Attorneys General organization voted to take the position that giving the states jurisdiction over these crimes will not unduly burden state law enforcement officials, apparently on pure conjecture that the added caseload would be minimal and heedless of the fact that state Attorneys General are rarely, if ever, involved in the day-to-day, largely misdemeanor law enforcement affected by *Duro*.[35] We believe, however, that when accurate statistics are collected they will reveal that this third group, those who are not enrolled anywhere, is larger than many presently suppose.

The 1990 amendment is designed to restore the status quo before *Duro* until Congress can gather the information needed to determine if a comprehensive legislative solution is necessary. To evaluate the efficacy of this legislation, it is necessary to examine in greater detail the Court's recent activist role in Indian law.

Indian Law Jurisprudence in the Supreme Court

Two aspects of the Court's jurisprudence in recent Indian law cases are particularly disturbing. First, under the rubric of federal common law, the Court has begun to impose its own notions of the role of tribal governments in the United States system, arrogating to itself an authority committed by the Constitution to Congress. Second, it has begun sending signals of an overt willingness to restrict congressional power over Indian affairs. We will discuss these two trends before turning to an analysis of the specific federal legislation.

The Court's method of setting policy on the reach of tribal authority has been to employ federal common law. In other words, the rules of *Oliphant* and *Duro* are not rules of constitutional law. When a rule is not clearly suggested by a federal enactment, the courts may perform more than an interpretive function by adopting common law rules to further congressional intent. Nevertheless, federal common law is illegitimate unless it is linked, however tenuously, to a determination of congressional intent. If the rule is not so linked, the Court has engaged in lawmaking that invades the sphere of Congress.

Indian law presents a classic example of an area in which the Court often and legitimately creates law designed to effectuate congressional policy. But Congress retains control of policy toward Indian tribes, and can correct the Court's rule by appropriate legislation. Unless the Court's rule is based on constitutional law, the Court must respect Congress' determination or exceed its authority under Article III of the Constitution by interfering with congressional authority to make policy in Indian law.[36]

The second disturbing trend is the Court's recent fixation on racial classifications in Indian law. The Court states a very crabbed view of congressional power in *Duro*:

> That Indians are citizens does not alter the Federal Government's broad authority to legislate with respect to *enrolled* Indians as a class, whether to impose burdens or benefits.[37]

The inclusion of the word "enrolled" suggests that perhaps this power of Congress does not extend to unenrolled Indians, however defined by Congress.

The current administration takes the position that only enrolled Indians fall within the government's responsibility. According to the President's statement accompanying the signing of S. 1846, dated May 25, 1990:

> The Supreme Court has made clear that the Congress and the executive branch may act to benefit members of Indian tribes, as opposed to Indians defined as a racial category, and I fully support efforts to provide such assistance. I am very concerned, however, that section 2(a)(6) of the bill authorizes racial preferences, divorced from any requirement of tribal membership, that will not meet judicial scrutiny under the Constitution. Accordingly, I am hereby directing interested Cabinet Secretaries to consult with the Attorney General to clarify and resolve this issue.

The object of the President's concern was a provision that amended an Indian Self-Determination and Education Act provision regarding conversions to permanent appointments to reference explicitly the definition of Indian in the Indian Reorganization Act (IRA).[38]

The Justice Department has also taken the position that Congress cannot grant any preferences to Indians that are not linked to membership. In a letter to Senator Daniel Inouye, the Office of Legislative Affairs opposed the employment preference provided by the law creating the Office of Indian Education in the Department of Education.[39] According to the Department:

> We believe that the preference granted by the Act to those who are actual members of an Indian tribe is constitutional under *Morton v. Mancari*, 417 U.S. 535 (1974). Those preferences for Indians, however, that do not depend solely upon *membership* in an Indian tribe, but rather depend solely upon being a person of the Indian racial group, are not justified under that decision, and accordingly must be examined under Supreme Court precedent governing the use of racial classifications.[40]

Specifically, the letter objected to the statutory definition of Indian as including all those "considered by the Secretary of the Interior to be an Indian for any purpose."[41]

A judicial narrowing of the scope and purpose of federal power over Indian affairs to reach only enrolled members of federally recognized Indian tribes would have devastating results. As stated above, the government's policies toward Indians have radically altered the demographics of Indian country. If the trend to narrow the reach of federal policy taking place in the judicial and executive branches continues, these people would not only not be subject to tribal criminal jurisdiction, but could soon become non-Indians for all purposes under federal law. This group of people, unenrolled in any tribe, are as poor as any other group on the reservation, if not poorer. Although the states would then become responsible for this group, because of their poverty and the greater likelihood that they are landless, they would offer little revenue to the states, even in the form of tax sales of property. It is doubtful that the states could expect special help from Congress to serve this group. If it is beyond Congress's constitutional power to fund the tribes and, consequently, beyond the power of agencies such as the BIA and IHS to serve them as Indians, Congress could hardly reimburse the states for the cost of assuming the burden.

In sum, Congress' response to the criminal jurisdiction void created by *Duro* needs to take into account both of these trends, so as not to give the Court any basis for assuming that Congress acquiesces with the Court's vision of both the reach of congressional power and its vision of its own role in making Indian policy. We believe that the amendment, while not a model of clarity, represents an important first step for Congress to reassert its role in Indian law.

The 1990 ICRA Amendment

The Conference Committee Report leaves little doubt regarding the purpose of the amendment, by stating congressional action was necessary "to address an emergency situation in Indian country that is the result of a recent holding of the Supreme Court in [*Duro.*]"[42] The report also makes a strong statement affirming congressional power and purpose in the field of Indian law:

> Throughout the history of this country, the Congress has never questioned the power of tribal courts to exercise misdemeanor jurisdiction over non-tribal member Indians in the same manner that such courts exercise misdemeanor jurisdiction over tribal members. Instead, the Congress has recognized that tribal governments afford a broad array of rights and privileges to non-tribal members. Non-tribal member Indians own property on Indian reservations, their children attend tribal schools, their families receive health care from tribal hospitals and clinics. Federally-administered programs and services are provided to Indian people because of their status as Indians without regard to whether their tribal membership is the same as their reservation residence. The issue of who is an Indian for purposes of Federal law is well-settled as a function of two hundred years of Constitutional and case law and Federal statutes.[43]

What makes the amendment so unusual is that it does not purport to create new law, as would, for example, a delegation of power to tribes. Instead of granting jurisdiction to tribes, section 8077(b) "recognize[s] and affirm[s]" tribal inherent power over "all Indians."[44] The conference report also uses the term "recognizes" consistently. Congress does have the power to delegate to tribes criminal jurisdiction over all Indians. By delegating, however, Congress would be acceding to the Court's vision of the extent of tribal sovereignty. More importantly, a delegation would mean that tribes would be exercising federal power to which federal constitutional standards are applicable.[45] Tribal court systems, which are often informal and always poorly financed, would then have to accord defendants all rights, privileges and protections now in force in the most sophisticated legal systems in the majority society, including free licensed attorneys for all defendants facing jail time.[46] These constitutional requirements might also include such requirements as a republican form of government (questioning theocratic or hereditary governments at least insofar as they affect non-members). The applicability of the Establishment clause to these cases would also call into question the legitimacy of theocratic tribal governments.

In addition to amending the definition of powers of Indian tribes to reassert tribal criminal jurisdiction over all Indians, the amendment also contains a unique definition of the term "Indian." Although federal statutes in recent years have defined the term, the amendment references existing judicial definitions of the term, as they have been developed in the 100 years since the Major Crimes Act was enacted.[47] Consistently interpreting the term "Indian" as including both members and non-members, federal courts have developed a definition of who is an Indian for purposes of the federal criminal statutes that also requires a sufficient recognition and identification in the community as an Indian to prevent the arbitrary application of the term to someone who has had only a tenuous connection with his or her Indian heritage.[48]

The amendment raises complex and subtle issues of constitutional law, especially relating to separation of powers. Although a full analysis of these issues is not permitted by the limited space, we do believe these questions can and must be resolved in favor of preserving congressional prerogatives to set policy in Indian affairs. It has been argued, for example, that appropriations riders "undermine the spirit of *[INS v.] Chadha*"[49] because "they are frequently not the product of legislative deliberation and consensus."[50] Congress can and has amended substantive legislation through provisions in appropriations acts.[51] The Court polices the process by requiring Congress to state explicitly its intent to modify an existing law in an appropriations rider,[52] a requirement that has been satisfied in this case by explicit reference to the Indian Civil Rights Act and by the Conference Committee Report, even if we were to interpret a statute amending a definition section of an existing law as a modification. The objections to lawmaking through riders carry greater force in the context of a law making a substantive change through a back door. For example, a new civil rights bill with quotas, slipped into a National Endowment for the Arts appropriation, could rightly be

criticized for subverting the congressional process. In contrast, however, this law is a statement of policy, akin to a Joint Resolution of Congress which seeks to clarify Congress' belief that tribal powers include the power to exercise criminal jurisdiction over all Indians. Only if the Court's decision in *Duro* is not correctable, should this law be denied any effect.

Moreover, Congress has a history of making Indian policy through appropriations riders. In 1871, the House attached a rider to the Appropriations Act stating that "[N]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."[53] By this mechanism the House insisted on being included in Indian policymaking, formerly dominated by the President and Senate through the treaty mechanism. At most, this statute should have been read as barring federal-tribal agreements through the treaty process. After the 1871 law, the executive branch continued to negotiate agreements with the tribes which were then enacted into laws meeting the bicameralism and presentment requirements of the Constitution. But the Supreme Court gave this policy statement the broadest possible interpretation. In cases such as *United States v. Kagama*[54] and *Lone Wolf v. Hitchcock*[55] (referred to by a Court of Claims judge as the *Dred Scott* decision of Indian law),[56] the Court read into this policy statement about shared responsibility a broader purpose to subjugate Indian tribes to United States domestic law, and thus ushered in the plenary power era.[57] This forced subjugation is what the Court is today fond of calling the period when tribes were "incorporated" within the United States."[58]

It is possible that the Court could interpret the amendment so as to avoid any serious constitutional questions while retaining the structure created by Duro. For example, although the language and legislative history does not appear to permit such an interpretation, the Court might interpret the language in section 8077(b) as a grant of power, despite the apparently careful efforts of the drafters to avoid this interpretation. In so doing, the Court could resort to the sort of "savings construction"[59] it employs when Congress has sailed unacceptably close to the shoals of constitutional permissibility.[60]

If the Court interprets the amendment as an exercise of congressional power to set the limits of tribal sovereignty, it may nevertheless hold that the rule of *Duro* is not one that can be corrected by Congress. The Court has stated that the rule of the *Oliphant* line of cases is a rule of federal law.[61] We believe that the law regarding tribal-national relations is rightly viewed as analogous to the law of federal-state relations in the absence of preemptive federal legislation. As in the dormant commerce clause cases, the Court is influenced by its impression of congressional expectations, which expectations, if incorrect, can be clarified.[62] In short, the decision did not rest on constitutional grounds, but on the peculiar *Oliphant* notion of the judicially discovered inherent limitations on tribal powers by virtue of their status as domestic dependent nations.

Nevertheless, the opinion is greatly influenced by constitutional values, even if they are values, such as the Lockean social contract theory, that should not necessarily be imposed on Indian tribes. Consequently, the Court could reinterpret its opinion as one resting on a constitutional basis by, for example, deciding that Indian tribes are either subsidiaries of the federal government, bound to the same constitutional limitations on all their functions as are agencies of government, or go to the opposite extreme and determine that Indian tribes are merely private clubs, despite Justice Rehnquist's often-quoted statement to the contrary.[63] As private clubs they would have no sovereign powers, but merely exercise powers over their own members. An equally disturbing alternative would be to interpret *Duro* as creating a constitutional right for nonmember Indians to be free from governance by another tribe. It is difficult to see how the Court could reach either result without overturning *Talton v. Mayes*, 163 U.S. 376 (1896), and destroying the vision of the unique role of Indian tribes that has informed the jurisprudence relating to the status of indigenous peoples that is rightly invoked as a model to be emulated by other nations. If tribes are not purely private organizations, they would be reduced to subsidiaries of the federal government.

To round out what looks like a parade of horribles, the Court could also choose a case challenging the amendments as an opportunity to limit congressional power to members of federally recognized Indian tribes. If Congress were to acquiesce to a limitation of its power to enrolled Indians, its acquiescence would unweave the complex fabric of federal jurisdiction and control in Indian country. The *Duro* opinion itself stated the Court's belief that Congress had greater power than other government entities to define the class of Indians to be benefitted from federal legislation.[64] Although the Court expressly left the question open, this language leaves open the possibility that the Court will uphold the classification in 18 U.S.C. § 1152 and other federal criminal laws.[65]

We have tried to describe some of the pitfalls and benefits to be gained by the ICRA amendments. We believe that it is appropriate for Congress to send the Court a clear signal that Congress is in charge of the scope of its power over Indians. Questions regarding what is necessary for a tribe to be considered to have a sufficient relationship to an indigenous group to qualify to be treated as an Indian tribe by Congress and what is necessary for an Indian to be treated as within the scope of Indian law are quite properly addressed by Congress and should not be resolved by the Court based on isolated anecdotal evidence, raising questions as to whether some defendants have been treated fairly in tribal courts. In fact, we believe that the amendments accord the judiciary its proper and appropriate scope while preserving the power of Congress to set the parameters of Indian law, within constitutional limits. For example, concerns regarding the classification of "Indian" as being purely racial have been taken into account by the 100 years of judicial precedent interpreting the term for purposes of the Major Crimes Act. By incorporating these judicial determinations, carefully made on a case-by-case basis, Congress has shown due deference to the judiciary's role of protecting the individual from being arbitrarily labeled an Indian purely on racial grounds. By announcing its intent to take comprehensive action, if necessary, but only after extensive consultations with the states, the federal government, and the tribes, Congress has also positioned itself to provide for a more permanent solution or one that more fairly balances the needs of the competing sovereigns, if such a solution is called for.

The Congressional response to *Duro* is unusual, but not without precedent. Both the War Powers Act and the Budget Impoundment Control Act were designed in effect to instruct the other branches regarding Congress' views on one of its powers.[66] Both statutes were controversial in that the Constitution

quite clearly provided for shared power over committing the nation's armed forces and allocating federal money. In contrast, the commerce clause's commitment of Indian commerce to the Congress has never been challenged by the Court, even in cases in which a challenge might have been appropriate in order to preserve tribal rights. Congressional plenary power over Indians rests on two footings: the political relationship between tribes and the United States and the Indians' need for protection from the states. To limit the broad power over Indians to only those enrolled in federally recognized tribes would usurp from Congress its power to determine the scope of its authority. Not since the conservative activist majority of the Court imposed its own vision of economic theory on Congress by reinterpreting and greatly restricting congressional power in the 1930's and 1940's, has the Court restricted the scope of congressional power.

The Court has continually shown extraordinary deference to Congress when it sought to abrogate treaties with tribes, break up the tribal estate and give it to individual Indians or sell it to non-Indians, and a host of other actions opposed by Indians, but found to be within the federal trust or plenary powers. Here, where the Congress is merely recognizing a power that Indian tribes have, *a priori*, had from time immemorial, we believe the Court should also defer.

ENDNOTES

[1]110 S. Ct. 2053 (1990).

[2]*E.g.*, Clinton, *Criminal Jurisdiction over Indian Lands: A Journey through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 559-60 n.295 (1976).

[3]The Indian Civil Rights Act, 25 U.S.C. § 1302(7)(1988).

[4]Although the Solicitor General argued that a void would result, the Court noted that section 1152 "could be construed to cover the conduct here." 110 S. Ct. at 2066. The Court reserved this question for a proper case, however.

[5]Defense Appropriations Act for FY 91, Pub. L. No. 101-938, § 8077, ___ Stat. ___, ___ (1990) (amending 25 U.S.C. § 1301 (1983)) [hereinafter 1991 Defense Appropriations Act]. Although the Court reserved the question whether *Duro* created a jurisdictional void, Congress certainly believes it has. According to the Conference Committee Report accompanying Public Law 101-938: "those who identify themselves as Indian and are recognized under Federal Law (18 U.S.C. § 1153) as Indian, may come onto an Indian reservation, commit a criminal misdemeanor, and know that there is no governmental entity that has the jurisdiction to prosecute them for their criminal acts." H. Rep. No. 101-938, 101st Cong., 2d Sess. 132 (1990).

[6]Of course, if *Duro* were a constitutional decision, Congress' ability to overturn it would be greatly limited. *Compare* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) *with* Katzenbach v. Morgan, 384 U.S. 641 (1966). For purposes of this article, we read *Duro* as not indicating the Court has decided to overrule Talton v. Mayes, 163 U.S. 376 (1896) and make tribes components of the federal government.

[7]1991 Defense Appropriations Act, *supra* note 5, at § 8077(b) (amending 25 U.S.C. § 1301(2)).

[8]*Id.* § 8077(c) (adding 25 U.S.C. § 1301(4)).

[9]*Id.* § 8077(d). The Conference Committee explains that this provision is designed to provide Congress an opportunity "to work with the Indian nations, the Departments of Interior and Justice, and the states, to develop more comprehensive legislation within the coming year to clarify the intent of the Congress on the issue of tribal power to exercise criminal misdemeanor jurisdiction over Indians." This last section was added in conference, and was probably designed to reassure conferees who feared that if *Duro* could so easily be corrected, so could *Oliphant*.

[10]*See, e.g., Rights of Indigenous Peoples: A Comparative Analysis*, 68 PROC. AM. SOC'Y INT'L L. 265, 276 (1974) (remarks by P.S. Deloria).

[11]The Indian Civil Rights Act, 25 U.S.C. § 1302(7)(1988).

[12]Pub. L. No. 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-90, *as amended by* the Indian Civil Rights Act (codified in scattered sections of 18, 28 U.S.C. and 25 U.S.C. §§ 1321-26).

[13]*See, e.g.*, Maine Indian Claims Settlement Act, 25 U.S.C. § 1725 (grant of criminal jurisdiction to State of Maine); 25 U.S.C. § 232 (grant of criminal jurisdiction to the state of New York).

[14]Indian country, as defined by federal statute, sets the physical boundaries for most questions regarding criminal jurisdiction and includes all land within the boundaries of a reservation. 25 U.S.C. § 1151 (1988).

[15]States retain jurisdiction over crimes when both victim and defendant are non-Indians on the theory that Indian tribes do not have a strong interest in prosecuting these kinds of crimes. *See* New York *ex rel.* Ray v. Martin, 326 U.S. 496, 500-01 (1946).

[16]18 U.S.C. § 1153 (1988).

[17]18 U.S.C. § 1152 (1988).

[18]Assimilative Crimes Act, 18 U.S.C. § 13 (1988).

[19]WILKINSON & STRICKLAND, ET AL., EDS., HANDBOOK OF FEDERAL INDIAN LAW 353 & n.44 (1982).

[20]Tribal concurrent jurisdiction over crimes covered by the General Crimes Act is expressly recognized in the statute itself. By excepting crimes by Indians which have already been prosecuted by the tribe, the statute recognizes tribal concurrent jurisdiction. Tribes presumably have concurrent jurisdiction over Major Crimes Act major offenses, but as the Court noted in *Oliphant*, since the ICRA limits the punishments tribes can impose in criminal cases, tribes rarely attempt to prosecute felonies in tribal court. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 203-04 n.14 (1978).

[21]25 U.S.C. § 1152 (1988). Necessarily this discussion is somewhat simplified. For a thorough analysis of the various federal provisions, *see* Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976).

[22]435 U.S. 191 (1978).

[23]F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (Univ. New Mexico reprint of 1942 edition).

[24]One might well wonder who kept an orderly flow of traffic across the Bering Strait in the absence of federal and state courts.

[25]110 S. Ct. at 2061. This admission is especially interesting in light of the scholarly criticism of *Oliphant* as an historical opinion. *See, e.g.*, Barsh & Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979); Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479 (1979).

[26]For a discussion with particular emphasis on tribal efforts to keep the peace on reservations after *Duro*, *see* Newton, *Responses to* Duro v. Reina, 23 AM. INDIAN L. NEWSLETTER 1 (1990).

[27]The demographics of Indian country have increasingly influenced the Court. In our view, the amount of tribal sovereignty the Supreme Court is willing to recognize is inversely proportional to the number of non-Indians that might become subject to tribal authority. *See, e.g.*, Brendale v. Confederated Tribes & Bands of the Yakima Indian Reservation, 109 S. Ct. 2994 (1989) (tribe has no jurisdiction to zone allotted portion of reservation in which majority of inhabitants are non-Indians). *Compare* Solem v. Bartlett, 465 U.S. 463 (1984) (lack of influx of non-Indians into reservation after opening by Congress indicates intent of Congress that area retain its reservation status) *with* Rosebud Sioux v. Kneip, 430 U.S. 584 (1977) (fact that opened area is now 90 percent non-Indian indicated congressional intent to redraw reservation boundaries).

[28]For a discussion of the many forces at work, *see* Miller v. Crow Creek Sioux Tribe, 12 Indian L. Rep. 6008, 6009-10 (Intertr. Ct. App., Mar. 22, 1984).

[29]*See, e.g.*, Indian Health Care Improvement Act of 1976, 25 U.S.C. § 1603(c) (member of a tribe including those terminated and those recognized in the future; descendent in first or second degree of a member; and anyone "determined to be an Indian under regulations promulgated by the Secretary"). The Native American Programs Act of 1974, creating the Administration for Native Americans, operates under regulations with a very broad definition of Indian: "any individual who claims to be an Indian and who is regarded as such by the Indian community in which he or she lives or by the Indian community of which he or she claims to be a part." 45 C.F.R. § 1336.1 (1989).

[30]We do not name any tribes because the evidence is anecdotal at this point.

[31]436 U.S. 49 (1978). The Court dismissed a tribal member's challenge to a tribal enrollment rule that excluded her children because their father was a Navajo tribal member. After *Martinez*, such claims are exclusively within the competence of the tribe.

[32]Speech at BIA Area Directors' Meeting, Albuquerque, New Mexico (July 9, 1990).

[33]*See generally Jurisdiction on Indian Reservations: Hearings on S. 1181, S. 1172, and S. 2832, Before the Senate Select Committee on Indian Affairs*, 96th Cong., 2d Sess. (1980).

[34]West. Govs. Ass'n Res. 90-014 (July 17, 1990).

[35]Conf. of West. Att'ys Gen'l, Res. 90-01 (Aug. 3, 1990).

[36]Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 948-50 (1986).

[37]110 S. Ct. at 2062 (emphasis added).

[38]The section originally provided for conversion of excepted appointments (those created by the Indian preference) to career appointments. The amendment added this clarifying language to the word "Indian" by stating: "An Indian (as defined in § 19 of the Act of June 18, 1934 [the IRA])." Pub. L. No. 101-301, § 2(a)(6), amending 25 U.S.C. § 450i(m) (West Supp. 1990).

[39]Pub. L. No. 100-297, §§ 5341(c) (preference to "Indians"), 5351(4) (defines Indians), 102 Stat. 395 (1988) (codified at 25 U.S.C. §§ 2641(c), 2651(4) (West Supp. 1990).

[40]Letter from Thomas M. Boyd, Assistant Attorney General, United States Department of Justice, Office of Legislative Affairs to Honorable Daniel K. Inouye, Chairman, Select Committee on Indian Affairs, January 30, 1989, at 2 (emphasis added).

[41] 25 U.S.C. § 5351(4)(C) (1988).

[42]H. REP. NO. 938, 101st Cong., 2d Sess. 132 (1990).

[43]*Id.* at 133. Admittedly, the report could more clearly state that it is for Congress and not the Court to decide, within due process limitations, the appropriate subjects of Federal Indian law. Nevertheless, it is hard to read the language and the report as a whole as merely containing a request that the Court, as ultimate arbiter, change its mind about the reach of tribal power.

[44]At this late date, Congress did not attempt to recognize tribal power over non-Indians, perhaps on the basis that attempting to correct *Oliphant* at this late date would not be politically feasible.

[45]It could be argued that such a delegation carried with it only the restrictions contained in the Indian Civil Rights Act. Such an intent would have to be stated more clearly than the amendments do, however. In addition, the Court dropped a very strong hint in the *Duro* opinion that Congress could not avoid the Constitution in a delegation:

> 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.

Duro, 110 S. Ct. at 2064, *citing* Reid v. Covert, 354 U.S. 1 (1956) (broad powers to make treaties do not permit national government to abrogate individual rights of citizens). This reference to *Reid* indicates the Court's belief that if Congress cannot "waive" provisions of the Bill of Rights for its citizens in an agreement with foreign nations, *a fortiori* it could not do so in a legislative delegation to Indian tribes.

[46]Although most tribes do provide indigent defendants with lay counsel, the ICRA requires only that tribes allow a defendant to retain counsel; it does not require tribes to pay for counsel, or that counsel be state or federally licensed or credentialed attorneys.

[47]In United States v. Rogers, 45 U.S. 567 (1845), the Supreme Court held that a white defendant adopted by a tribe and fully recognized by the tribal community as an Indian could not be considered an Indian for purposes of the Major Crimes Act. Federal and state courts have read *Rogers* as essentially requiring a two-pronged analysis: (1) some quantum of Indian blood; (2) recognition as an Indian by the Tribe or the federal government. *See, e.g.*, United States v. Broncheau, 597 F.2d 1260 (9th Cir. 1979) (indictment for major crimes act violation sufficient even though it did not specify whether defendant enrolled, because enrollment not absolute requirement for jurisdiction if blood quantum and recognition present); United States v. Dodge, 538 F.2d 770, 786 (8th Cir. 1976), *cert. denied*, Cooper v. United States, 429 U.S. 1099 (1977) (defendant having one-fourth Yurok Indian blood and named on a judgment roll is an Indian for Major Crimes Act purposes); United States v. Ives, 504 F. 2d 935, 953 (9th Cir. 1974), *vacated on other grounds*, 421 U.S. 944 (1975) (dicta) (defendant technically enrolled, although he had requested his name be removed from tribal rolls, is an Indian without reference to enrollment under test derived from *Rogers*); *Ex parte* Pero, 99 F.2d 28, 30 (7th Cir. 1938), *cert. denied*, 306 U.S. 643 (1939) (defendant not enrolled anywhere, but known in community as a Chippewa and residing and maintaining tribal relations, is an Indian); Dillon v. Montana, 451 F. Supp. 168 (D. Mont. 1978) (exclusive federal criminal jurisdiction under 18 U.S.C. § 1153 attaches to offenses in cases in which the perpetrator was not enrolled on the reservation on which the offense occurred); Goforth v. State, 644 P.2d 114, 116 (Okla. Crim. App. 1982) (although defendant close to one-fourth Indian blood, he was not recognized by tribal Indians as member of community, and therefore the state had jurisdiction).

[48]The Court should defer to Congress' judgment in determining the scope of tribal power. At the same time, the amendment appropriately defers to the Court's appropriate role, which is to check any unfair application of the federal jurisdictional scheme that would occur by labeling someone an "Indian" arbitrarily.

[49]472 U.S. 919 (1983). *Chadha* struck down a provision in the Immigration and Nationalization Act that permitted Congress by legislative veto to prevent the executive branch from barring the deporting of certain aliens. The veto in that case, and by implication all other legislative vetoes, conflicted with the Constitution's requirement that both houses of Congress and the President participate in making law.

[50]Bloch, *Orphaned Rules in the Administrative State: The Fairness Doctrine and Other Orphaned Progeny of Interactive Deregulation*, 76 GEO. L.J. 59, 112 (1987).

[51]*See, e.g.*, United States v. Dickerson, 310 U.S. 554, 55 (1940); Republic Airlines, Inc. v. United States Dep't of Transportation, 849 F.2d 1315, 1320 (10th Cir. 1988). The judiciary scrutinizes attempts to repeal legislation through such a backhanded device with great care, however, requiring explicit evidence of intent. Tennessee Valley Authority v. Hill, 437 U.S. 153, 190 (1978) (funding of Tellico dam ineffective to repeal § 7 of the Endangered Species Act).

[52]*See* Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832, 842 n.6 (1982).

[53]Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71). *See generally* M. PRICE & R. CLINTON, LAW & THE AMERICAN INDIAN 78 (2d ed. 1983).

[54]118 U.S. 375, 382 (1886).

[55]187 U.S. 553, 556 (1903).

[56]Sioux Nation v. United States, 601 F.2d 1157, 1173 (Ct. Cl. 1979) (Nichols, J., concurring), *aff'd*, 448 U.S. 371 (1980).

[57]*See generally* Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 207-228 (1984).

[58]*See, e.g.*, United States v. Wheeler, 435 U.S. 313, 323 (1978).

[59]"When the validity of an Act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." Ashwander v. TVA, 397 U.S. 288, 346 (1936)

[60]*See, e.g.*, United States v. Bass, 404 U.S. 336, 349 (1971) (concern that a federal criminal statute based on the commerce clause might "effect a significant change in the sensitive relationship" between federal government and the states influenced a narrow construction).

[61]National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 852 (1985).

[62]In other words, we argue that the Court's appropriate role absent a constitutional issue is to fill gaps left in the tribal-state relationship, which it is Congress's sphere to define. *See, e.g.*, Williams v. Lee, 358 U.S. 217, 222-23 (1959) (congressional expectations expressed in Public Law 280 giving consent to states to assert civil and criminal jurisdiction over Indian reservations informed the Court's decision that a state not availing itself of 280 jurisdiction had no judicial jurisdiction over a cause of action arising on the reservation); Kennerly v. District Court, 400 U.S. 423 (1971) (congressional ordering of tribal-state relationships expressed in Public Law 280 prevents a tribe from ceding jurisdiction to a state without following the law's procedures). Even recent cases, such as *Brendale*, are informed by the Court's attempt to glean congressional intent, while deciding the limits of inherent power. Both Justice White's and Justice Stevens' opinions drew heavily on their understanding of the expectations of the Congress that allotted the reservation in deciding that the Yakima Nation had no power to zone allotted land within the open area of the reservation. Brendale v. Confederated Tribes & Bands of the Yakima Indian Reservation, 109 S. Ct. 2994 (1989).

[63]"Indian tribes in Indian country are a good deal more than private, voluntary organizations." United States v. Mazurie, 419 U.S. 544, 557 (1975).

[64]*Duro*, 110 S. Ct. at 2066. Of course, the concern regarding application of the Bill of Rights is not present in the case of federal jurisdiction.

[65]*Id.* Certainly after these amendments, the Court will not be able to give the term "Indians" in those statutes an historical interpretation limited to "members," because Congress has expressed its intent so clearly.

[66]*See* War Powers Resolution, 50 U.S.C. §§ 1541-48 (1988); Congressional Budget and Impoundment Control Act of 1974, 31 U.S.C. §§ 1001 *et seq.* (1988).