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Tribal Criminal Jurisdiction
After U.S. v. Lara: Answering Constitutional Challenges to the Duro Fix

Will Trachman†

INTRODUCTION

Supreme Court cases that define the metes and bounds of Indian sovereignty often arise from facts that one would not expect to come before the Supreme Court. Perhaps this is why the facts in Morris v. Tanner,1 decided on October 28, 2003, seem so ominous. In Morris, a Montana district court upheld Indian sovereignty interests in a seemingly mundane case dealing with criminal law enforcement on tribal lands.2 However, if the issues dealt with in Morris come before the Supreme Court, tribal sovereignty interests as a whole could be seriously impaired.3

On June 13, 1999, Thomas Lee Morris, an enrolled member of the Chippewa Tribe from Leech Lake, Minnesota, was cited for speeding on the Flathead Indian Reservation near Ronan, Montana.4 The Flathead Reservation is home to the Confederated Salish and Kootenai Tribes ("CSKT"). Morris was not an enrolled member of the CSKT, but was nevertheless ordered to appear before the Flathead Reservation Tribal Court to answer for his traffic violation. In response, Morris filed a motion to dismiss the tribal action against him, which the tribal court denied. He later filed a motion for declaratory and injunctive relief in federal court, arguing...
that the CSKT had no jurisdiction over him as a nonmember Indian. The Montana district court granted the CSKT’s motion to dismiss.5

Since Morris was enrolled in the Chippewa Tribe, yet called to answer in the courts of the CSKT, the tribes could exercise jurisdiction over him only pursuant to the “Duro Fix.” The Duro Fix, codified as an amendment to the Indian Civil Rights Act,6 was enacted by Congress in 1990 in response to the controversial Rehnquist Court decision in Duro v. Reina.7 In Duro, the Court concluded that Indian tribes’ status as domestic dependent nations divested them of their inherent power to try nonmember Indians.8 The decision left tribes powerless to prosecute Indians who committed crimes on reservations other than their own, and had the potential to cut deeply into traditional notions of Indian sovereignty.9 The Duro Fix restored inherent10 tribal power to try nonmember Indians,11 allowing the CSKT to prosecute Morris more than a decade later despite his status as a member of the Chippewa Tribe.

Morris appealed the Montana District Court’s ruling to the Ninth Circuit. In dismissing his motion to enjoin the CSKT from prosecuting him, Morris argued, the lower court failed to consider his constitutional challenges to the Duro Fix. The Ninth Circuit agreed and remanded the case back to the district court to determine whether the Duro Fix violated the U.S. Constitution. Morris’s constitutional challenges included an equal protection claim under the Fifth Amendment Due Process Clause12 and an

5. Id. The district court relied on the 1990 amendments to the Indian Civil Rights Act (ICRA).

6. 25 U.S.C. § 1301(2) (2000). Congress stated in the amendment that the “powers of self government” reserved to tribes include “the inherent powers of Indian tribes to exercise criminal jurisdiction over all Indians.”


8. Id. at 688 (“In the area of criminal enforcement, ... tribal power does not extend beyond internal relations among members.”).


10. “Inherent” tribal powers consist of those capabilities not given up voluntarily by treaty or defeated by Congress, the Executive, or the Judiciary. While such notions of “inherent” power may be inconsistent with our standard definition of the term, they continue to be used heavily in modern Indian law jurisprudence and scholarship. See Philip P. Frickey, A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers, 109 Yale L.J. 1 (1999); Joseph William Singer, Canons of Conquest: The Supreme Court’s Attack on Tribal Sovereignty, 37 New Eng. L. Rev. 641 (2003).


12. The Supreme Court has held that the Due Process Clause encompasses certain equal protection guarantees of Section 1 of the Fourteenth Amendment against the federal government. See Bolling v. Sharpe, 347 U.S. 497 (1954); infra notes 81, 179.
argument that the Duro Fix violated the separation of powers doctrine. The Ninth Circuit also instructed the district court to consider whether Morris had a legitimate Fifth Amendment claim under standard notions of procedural due process.\(^{13}\) The Ninth Circuit placed special emphasis on two questions for the district court: (1) whether the use of the term "Indian" in the Indian Civil Rights Act (ICRA) amendments "amounts to a political or racial classification,"\(^{14}\) and (2) whether, under the analysis set forth in United States v. Enas,\(^ {15}\) Congress exceeded its constitutional power by interfering in a matter properly reserved to the judiciary.

Congress's power to enact the Duro Fix attracted little attention before Morris v. Tanner. Until Morris, courts that grappled with the Duro Fix tended to concede its underlying legitimacy, assessing only whether it was a delegation of federal power or an acknowledgement of inherent tribal power.\(^ {16}\) Perhaps the history of Congress's power over Indian affairs, often described as plenary,\(^ {17}\) has led courts to question only the ramifications of the Duro Fix, rather than its underlying legitimacy. Notably, while questions about the Duro Fix's implications for the constitutional rights of nonmember Indians have emerged,\(^ {18}\) most challenges have been limited solely to the effects of the Duro Fix, and have left the underlying question of its constitutionality to be answered at a future date.\(^ {19}\)

For example, in United States v. Lara, the Supreme Court addressed only whether Congress possessed the ability to restore inherent tribal power to prosecute nonmember Indians, rather than addressing the greater


\(^{14}\) Id.

\(^{15}\) 255 F.3d 662, 675 (9th Cir. 2001) (en banc) ("It cannot be the case that Congress may override a constitutional decision by simply rewriting the history upon which it is based.").

\(^{16}\) See, e.g., United States v. Enas, 255 F.3d 662, 668 (9th Cir. 2001); United States v. Weaselhead, 156 F.3d 818, 822 (8th Cir. 1998); Means v. N. Cheyenne Tribal Court, 154 F.3d 941, 946 (9th Cir. 1998).

\(^{17}\) See United States v. Kagama, 118 U.S. 375, 383-84 (1886) (inferring plenary power from a trust relationship between tribes and the U.S. federal government); see also Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."); Philip P. Frickey, Domesticating Federal Indian Law, 81 Minn. L. Rev. 31, 59 (1996) (suggesting that Kagama "indicates that Congress has power over Indian affairs based more on inherent notions of centralized national power . . . than on a strict interpretation of the congressional powers enumerated in the Constitution"). For one argument that Congress's power should not be plenary, see Saikrishna Prakash, Against Tribal Fungibility, 89 Cornell L. Rev. 1069 (2004).

\(^{18}\) See, e.g., United States v. Lara, 541 U.S. 193 (2004) (finding that tribal prosecution of a nonmember Indian occurred pursuant to inherent tribal power, not a federal delegation of power, and thus did not implicate the Fifth Amendment's Double Jeopardy Clause).

\(^{19}\) See, e.g., id. at 209. ("[T]his equal protection argument is simply beside the point, therefore we do not address it. At best for Lara, the argument (if valid) would show, not that Lara's first conviction was federal, but that it was constitutionally defective. And that showing cannot help Lara win his double jeopardy claim.").
question of the *Duro* Fix's constitutionality.\(^{20}\) The question arose when Billy Jo Lara, a member of the Turtle Mountain Chippewa Tribe in North Dakota, was arrested on the Spirit Lake Reservation (also in North Dakota) for striking a federal officer. After Lara pleaded guilty in tribal court, and served ninety days in tribal jail, the federal government brought charges against him for the same action in the Federal District Court for the District of North Dakota. Lara claimed that since the tribe had prosecuted him pursuant to the *Duro* Fix and that the previous prosecution was therefore the result of a federal delegation of power to the tribe, a subsequent federal prosecution would violate the Double Jeopardy Clause of the Fifth Amendment.\(^{21}\) The Court held that the *Duro* Fix did not constitute a delegation of federal power, and that tribal prosecutions of nonmember Indians occur pursuant to inherent tribal sovereign power.\(^{22}\) Since the Double Jeopardy Clause is not implicated by prosecutions undertaken by separate sovereigns,\(^{23}\) both actions against Lara were constitutionally sound.

To the benefit of tribal sovereignty, the *Lara* Court found that individuals prosecuted by either a tribe or the federal government are not subsequently immune from prosecution by the other body. And while Lara also asserted equal protection and due process arguments against the *Duro* Fix, the Supreme Court, like many courts before it,\(^{24}\) ducked these questions.\(^{25}\) But the importance of the *Duro* Fix for tribal sovereignty cuts against any hope that these issues will simply go away. By reserving constitutional questions about the *Duro* Fix's legitimacy, the Court merely set

\(^{20}\) *Id.*

\(^{21}\) Although the Fifth Amendment states that "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb," this rule is modified by the "separate sovereigns" exception. U.S. Const. amend. V. Prosecutions by separate sovereigns, under the Fifth Amendment, do not implicate the Double Jeopardy Clause. Tribal prosecutions are considered to have been conducted by a sovereign government, and thus do not preclude another sovereign, the U.S. government, from concurrently exercising its own criminal jurisdiction. See United States v. Wheeler, 435 U.S. 313, 317 (1978); *Lara*, 541 U.S. 193.

\(^{22}\) One Justice in *Lara* noted the absurdity of conceiving of the *Duro* Fix as a federal delegation of power to tribes:

It does not appear that the President has any control over tribal officials, let alone a substantial measure of the appointment and removal power. Thus, at least until we are prepared to recognize absolutely independent agencies entirely outside of the Executive Branch with the power to bind the Executive Branch (for a tribal prosecution would then bar a subsequent federal prosecution), the tribes cannot be analogized to administrative agencies, as the dissent suggests.

*Lara*, 541 U.S. at 216 (Thomas, J., concurring) (citations omitted).

\(^{23}\) Heath v. Alabama, 474 U.S. 82, 88 (1985) (finding that the Double Jeopardy Clause reflects the "common-law conception of crime as an offense against the sovereignty of the government." Thus, "[w]hen a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'").

\(^{24}\) See infra note 65.

\(^{25}\) *Lara*, 541 U.S. at 205 ("[W]e are not now faced with a question dealing with potential constitutional limits on congressional efforts to legislate far more radical changes in tribal status. . . . Nor do we now consider the question whether the Constitution's Due Process or Equal Protection Clauses prohibit tribes from prosecuting a nonmember citizen of the United States.").
the stage for the next round of litigation, which has already commenced with *Morris*.

*Morris* involved legal questions heretofore discussed almost exclusively by academics. No longer however. The judiciary will likely find itself confronting these difficult issues within the near future. Successful equal protection and due process challenges would likely compel the Court to strike down the *Duro* Fix, leaving tribes to face a possible jurisdictional void with severe consequences. Such a void would endanger both tribal sovereignty as well as law and order on Indian reservations.

This Comment evaluates the arguments of both those who challenge and those who defend Congress's power to enact legislation like the *Duro* Fix. Part I sets forth the framework of constitutional power to which the federal government must adhere when regulating Indian affairs. Part II examines the role of equal protection in Indian affairs, concluding that congressional enactments benefiting or burdening enrolled members of Indian tribes are subject only to rational basis review, not strict scrutiny. Part III discusses the larger implications for the *Duro* Fix stemming from due process concerns. Part IV evaluates the argument, articulated by the Ninth Circuit in *United States v. Enas*, that the *Duro* Fix may violate the separation of powers doctrine, since Congress may not legislatively alter history where constitutional decisions have relied on traditional notions of justice.

How the constitutional issues posed by the *Duro* Fix are dealt with by tribes and U.S. courts has broad implications for Indian sovereignty. Tribal governments can only maintain law and order on reservations to the extent they are capable of exercising jurisdiction over those who commit crimes. Moreover, if the Court found the *Duro* Fix unconstitutional, it seems unlikely that Congress would undertake any other meaningful attempts to

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27. Consider a situation in which a nonmember Indian commits a misdemeanor on a reservation. The federal government, per the Major Crimes Act, possesses jurisdiction over Indians (of any tribe) only with regard to felonies. 18 U.S.C. § 1153 (2000). States, on the other hand, possess no jurisdiction under *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), and its progeny (discussed infra, note 37). Tribes, stripped of the *Duro* Fix, would possess no jurisdiction whatsoever. Thus, a finding that the *Duro* Fix is unconstitutional would give nonmember Indians who commit misdemeanors on reservations effective immunity from prosecution.

28. *Duro v. Reina*, 495 U.S. 676, 693 (1990) (citing *Reid v. Covert*, 354 U.S. 1 (1957), and noting that "[o]ur 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").

29. 255 F.3d 662, 675 (9th Cir. 2001) ("Congress surely cannot negate the effect of a Fourth Amendment decision by penning its own account of the scope of lawful searches at the time of the Founding.").
restore tribal sovereignty. Prospects for other congressional "fixes"\textsuperscript{30} would surely suffer as well. Thus, the constitutionality of the \textit{Duro} Fix is likely the linchpin to the manner in which tribal sovereignty is viewed in the foreseeable future.

I

\textbf{BACKGROUND}

A. \textit{Competing Sovereignty Interests in Criminal Jurisdiction}

During the colonial era, the British Crown treated Indian tribes as foreign sovereigns.\textsuperscript{31} Several of the colonies, as well as the Crown itself, entered into treaties with the various Indian tribes, indicating that they viewed tribes as independent and sovereign.\textsuperscript{32} After the American Revolution, federal policy continued to treat Indian tribes as distinct political communities. As Felix Cohen noted in his definitive \textit{Handbook on Federal Indian Law}:

Federal policy from the beginning recognized and protected separate status for tribal Indians in their own territory. Treaties established distinct boundaries between tribal territory and the areas open to white settlement, and federal laws were enacted to control white entry, settlement, trade, and other activities on tribal lands. The tribes governed their own internal matters, reflecting the general rule of international law that the internal laws of acquired territories continue in force until repealed or modified by the new sovereign.\textsuperscript{33}

However, while American law recognized tribes as separate and distinct, it continued to recognize that tribal sovereignty would need to give way to American colonial interests.\textsuperscript{34} The Supreme Court, from the tenure of Chief Justice John Marshall until today, has thus placed limits on the sovereignty of Indian tribes. The Court noted early on that, upon discovery by European powers, tribes necessarily lost a significant portion of their original sovereign capabilities.\textsuperscript{35} The Marshall Court’s initial findings in the arena of Indian law also established that tribes could not classify themselves as foreign nations. Instead,

\begin{itemize}
\item \textsuperscript{31} \textit{William C. Canby, Jr., American Indian Law: In a Nutshell} 175-76 (4th ed. 2004).
\item \textsuperscript{32} \textit{Id}.
\item \textsuperscript{33} Coh\textit{en, supra} note 9, at 28.
\item \textsuperscript{34} For an argument that this balancing of tribal sovereignty with American colonial interests continues to this day, see Frick\textit{ey, supra} note 10.
\item \textsuperscript{35} \textit{Johnson v. McIntosh}, 21 U.S. (8 Wheat.) 543, 588, 590 (1823) ("Conquest gives a title which the courts of the conqueror cannot deny . . . [T]he Indian inhabitants are to be considered merely as occupants.")
\end{itemize}
for the purposes of American law, tribes constituted domestic, dependent nations. The relationship between tribal governments and the federal government, said Chief Justice Marshall, was similar to that between a ward and his guardian. Such a relationship entailed limitations on tribes' inherent power to act in a manner inconsistent with notions of their dependent sovereignty. While the Court fashioned few new limitations on tribal sovereignty from Chief Justice Marshall's time through the late 1970s, the Supreme Court has since developed a substantial body of non-constitutional common law impairing tribal sovereignty.

Tribal criminal jurisdiction became the first victim of the Supreme Court's renewed efforts to limit tribal sovereignty in *Oliphant v. Suquamish Indian Tribe*. This development came at a particularly difficult time for tribes. In response to increasing criminal acts by non-Indians living on reservations, tribes in the 1970s sought to exercise their long-dormant, but generally accepted criminal jurisdiction over non-Indians.

In *Oliphant*, the Supreme Court, under Chief Justice Burger, heard a challenge to this assertion of criminal jurisdiction, alleging that it violated the Due Process Clause of the Fifth Amendment as well as ICRA. Although the Court did not find that Congress had removed tribal criminal jurisdiction over non-Indians, and made no specific finding regarding due process,

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37. *Id.*; see also Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 581 (1832) ("By various treaties, the Cherokees have placed themselves under the protection of the United States: they have agreed to trade with no other people, nor to invoke the protection of any other sovereignty.").
38. See infra note 47 and accompanying text.
41. Note that ICRA implicitly assumes that non-Indians will enter tribal courts; its applicability is directed at "any person," not "any Indian," the phrase used by many statutes which apply exclusively to Indians. An earlier version, rejected by Congress, contained only the words "American Indians" in directing the applicability of the statute. Frickey, supra note 10, at 35 n.169.
42. *Canby*, supra note 31, at 175-76. *But see Oliphant*, 435 U.S. at 198-99 (noting that the Choctaw Tribe in the early nineteenth century requested, and was denied, authorization to exercise criminal jurisdiction over non-Indians). The Court used the nineteenth century Choctaw request as evidence that no pre-existing criminal jurisdiction was present. *Id.*
43. While ICRA, enacted in 1968, includes most of the protections of the federal Constitution, it does not contain a guarantee of counsel for indigent defendants. It also does not require that a jury be made up of both tribal members and nonmembers, and therefore may offer less protection to defendants' jury trial rights than the federal Constitution. Indeed, the Suquamish Tribe in *Oliphant* excluded non-Indians from serving on juries in tribal courts. *Oliphant*, 435 U.S. at 194 n.4.
it held that tribal courts' jurisdiction over non-Indian American citizens had been implicitly divested upon discovery by European powers.\textsuperscript{44}

\textit{Oliphant} sent shockwaves through Indian country.\textsuperscript{45} Prior to the decision, the Supreme Court had described only two inherent limitations on the power of tribes that derived from the ward-guardian relationship of the U.S. government and tribal governments: (1) tribes could not freely alienate their lands,\textsuperscript{46} and (2) they were precluded from making agreements with foreign powers.\textsuperscript{47} The \textit{Oliphant} decision led to an atmosphere of lawlessness on tribal reservations and substantially hindered the ability of tribal governments and police to combat crimes committed by non-Indians on reservations.\textsuperscript{48} One scholar has argued that the decision single-handedly stopped a burgeoning movement toward tribal political legitimacy and credibility.\textsuperscript{49} To this day, tribal police badges mean little to non-Indians.\textsuperscript{50}

\textit{Oliphant} alone was devastating for tribal sovereignty. However, the Court's jurisprudence in the arena of tribal law continued to expand the category of tribal actions deemed "inconsistent with the dependent status of tribes" at the expense of tribal sovereignty.\textsuperscript{51} In addition to divesting the tribes of criminal jurisdiction over non-Indians, the Court has deprived tribes of the ability to hear civil cases between non-Indians in tribal courts,\textsuperscript{52} zone portions of reservations owned by nonmembers,\textsuperscript{53} regulate

\begin{itemize}
  \item \textsuperscript{44} See \textit{Oliphant} at 208.
  \item \textsuperscript{45} See, e.g., Matthew L.M. Fletcher, \textit{Sawnawezewog: "The Indian Problem," and the Lost Art of Survival}, 28 AM. INDIAN L. REV. 35, 54 (2003) ("[\textit{Oliphant}] was a huge shock to the Suquamish Tribe and every other tribe. As soon as tribes establish their tribal courts and seek to establish their political legitimacy and credibility, the Supreme Court shoots them down, saying they cannot prosecute non-Indians, no matter what the circumstances."); Russell Lawrence Barsh & James Youngblood Henderson, \textit{The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark}, 63 MINN. L. REV. 609 (1979) (criticizing \textit{Oliphant} line-by-line); see also \textit{Wilkinson}, supra note 9, at 61 ("The \textit{Oliphant} opinion marked the low ebb of the doctrine of tribal sovereignty.").
  \item \textsuperscript{46} See \textit{Johnson v. McIntosh}, 21 U.S. (8 Wheat.) 543, 584-85 (1823) ("It has never been doubted, that either the United States, or the several States, had a clear title to all the lands . . . subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it.").
  \item \textsuperscript{47} See \textit{Cherokee Nation v. Georgia}, 30 U.S. (5 Pet.) 1, 17-18 (1831). The Court observed: They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.
  \item \textsuperscript{48} Fletcher, \textit{supra} note 45, at 56-57.
  \item \textsuperscript{49} See \textit{id.} at 55 ("Indian tribes and tribal members know that non-Indians feel completely free to commit whatever crimes they so desire, as long as they avoid the Major Crimes Act, which would possibly (but not necessarily) interest the United States Attorneys Office.").
  \item \textsuperscript{50} See \textit{id}.
  \item \textsuperscript{51} See \textit{sources, supra} note 39; \textit{infra} notes 52-56.
  \item \textsuperscript{52} \textit{Strate v. A-1 Contractors}, 520 U.S. 438 (1997).
  \item \textsuperscript{53} \textit{Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation}, 492 U.S. 408 (1989).
\end{itemize}
on-reservation liquor sales,\textsuperscript{54} regulate on-reservation non-Indian hunting and fishing on fee land,\textsuperscript{55} and tax non-Indian activity occurring on non-Indian land within a reservation.\textsuperscript{56} Significant populations of non-Indians live on Indian reservations,\textsuperscript{57} and impairing tribal regulatory and civil jurisdiction over non-Indians inevitably has serious consequences for tribal governance.

While this erosion of tribal sovereignty over civil and regulatory matters left tribal criminal jurisdiction unchanged for some years, the Court eventually expanded \textit{Oliphant} and its implications for tribal criminal jurisdiction. In \textit{Duro v. Reina}, the Supreme Court found that tribes lacked the inherent authority to exercise criminal jurisdiction over Indians who were not enrolled members of the prosecuting tribe.\textsuperscript{58} This restriction had the potential to destroy much of what little effective tribal law enforcement remained on reservations after \textit{Oliphant}.\textsuperscript{59} For a short time, the decision appeared to have the necessary consequence of forcing tribes with significant nonmember or non-Indian populations to turn over much of their on-reservation criminal jurisdiction to the states.\textsuperscript{60}

\textit{Duro} was handed down on May 29, 1990. Passionate lobbying efforts and dire warnings from Indian tribes caused Congress to overturn the effects of \textit{Duro} promptly by amending ICRA on October 24, 1990.\textsuperscript{61} Clearly intending to restore tribal power, rather than delegate its own,\textsuperscript{62} Congress

\begin{footnotes}
\item 55. \textit{Montana v. United States}, 450 U.S. 544 (1981). There are two exceptions to the \textit{Montana} rule. Tribes retain inherent sovereignty, even on fee land, to (1) regulate by taxation, licensing, or other means, activities of nonmembers who enter consensual relationships, such as commercial dealings, with the tribe or its members, and (2) regulate conduct of non-Indians that threatens or directly affects the "political integrity, the economic security, or the health or welfare of the tribe." \textit{Id.} at 565-66.
\item 57. For substantive data on non-Indian populations on Indian reservations, see Gould, \textit{supra} note 26, at 123-42. Professor Philip Frickey has argued that it is because of, not in spite of, these large non-Indian reservation populations that the Court had been so hostile to tribal governments. \textit{See} Frickey, \textit{supra} note 10, at 36-37.
\item 58. 495 U.S. 676, 679 (1990).
\item 59. \textit{See} L. Scott Gould, \textit{Tough Love For Tribes: Rethinking Sovereignty After Atkinson and Hicks}, 37 \textit{NEW ENG. L. REV.} 669, 690 (2002) ("Pandemonium did occur in 1990 when \textit{Duro v. Reina} was announced. Stopgap measures had to be employed until Congress acted.").
\item 60. Responding to concerns that divesting tribes' criminal jurisdiction over nonmember Indians would create a jurisdictional void, Justice Kennedy suggested that tribes could simply consent to the states' criminal jurisdiction over nonmember Indians on reservations. \textit{Duro}, 495 U.S. at 697.
\end{footnotes}
purported to reinvest in tribes the inherent power to prosecute members of other Indian tribes who commit on-reservation criminal offenses.

Several courts have since grappled with the strange concepts contained in the controversy over nonmember criminal jurisdiction. That a tribe could exercise its “inherent” sovereign power at one moment, be divested of it at another, and then have it restored by Congress at yet a later date, obviously posed difficulties for courts that were often unfamiliar with intricate Indian law issues. For example, the Ninth Circuit avoided one difficult Duro Fix question by finding that the Duro Fix cannot be applied retroactively to crimes occurring in the period prior to the ICRA amendments.63 Many lower courts, before Lara, differed over another important Duro Fix question: whether the legislation constitutes a restoration and recognition of tribal power which was always inherent but eliminated temporarily, or a congressional delegation of federal power, which would presumably entail that the full protections of the Constitution apply to defendants in tribal prosecutions.64

The Supreme Court resolved the latter issue in Lara. By finding that Congress possesses the plenary power to relax common law limitations that courts or the political branches have placed on tribal sovereignty, the Court gave Congress substantial muscle to restore judicially-divested tribal power. However, an unfavorable ruling in Morris or a case involving the same issues would strike a serious blow against this reading of Lara. While Congress may have the power to relax common law restrictions on tribal power, there is little reason for tribes to be hopeful that Congress could relax constitutional constraints on its own power to authorize tribal interaction (whether civil, regulatory, or criminal) with non-Indians and nonmember Indians.

Morris suggests that courts may soon look beyond challenges to the Duro Fix’s implications and instead question its underlying constitutionality. The merits of such challenges must therefore be closely considered.

B. Constitutional Constraints on Congress’s “Plenary” Power

Prior to Morris, courts declined to address whether the Duro Fix constitutes a legitimate exercise of Congress’s traditional power over Indian affairs, and whether it violates equal protection or due process principles when applied. Because of the increasing need for these questions to be

63. Means v. N. Cheyenne Tribal Court, 154 F.3d 941, 947 n.7 (9th. Cir. 1998).
64. Although a full discussion of Congress’s delegatory powers is outside the scope of this Comment, and perhaps irrelevant to the Duro Fix question after Lara, there was a general consensus that Congress could not delegate to Indian tribes an exemption from constitutional provisions. See Alex Tallchief Skibine, Duro v. Reina and the Legislation that Overturned It: A Power Play of Constitutional Dimensions, 66 S. Cal. L. Rev. 767, 770 (1993) (“The Duro Court stated that criminal jurisdiction over nonmember Indians could only have come to the tribe by delegation from Congress, subject to the constraints of the Constitution.”) (citations and internal quotation marks omitted).
resolved, however, the Supreme Court may soon take up the question. However, a resolution of this question by the Supreme Court will likely come soon.

Because Congress has plenary power over Indian affairs, the judiciary generally gives particular deference to Congress’s enactments in that arena. The origins of the plenary power, discussed briefly above, do offer to Congress a rationale for directing its legislation at Indian tribes and their members. Thus, Congress usually enacts legislation directed at Indians without being bound by enumerated principles like those set forth in Article I, Section 8 (including the Indian Commerce Clause itself). However, the lack of such a limitation does not entail that Congress may affirmatively violate other provisions of the Constitution. Thus, the

65. See, e.g., United States v. Enas, 255 F.3d 662, 675 n.8 (9th Cir. 2001) ("We do not address whether the exercise of tribal criminal jurisdiction over non-member Indians violates the Equal Protection Clause."); Means, 154 F.3d at 946 n.7 ("[S]ince we find that the amendments should not be retroactively applied to Means’ alleged crimes, we do not reach the question of whether the amendments are unconstitutional even when prospectively applied."). Courts are not alone in seeing that challenges to the Duro Fix follow only after many of its implications have been thoroughly litigated. See also Canby, supra note 31 at 174 ("Lurking in the background of this issue is the question whether, if the Supreme Court views § 1301(2) as a delegation of federal power, it violates the citizenship or equal protection rights of nonmember Indians by treating them differently from non-Indians.") (emphasis added). This is true even now that the Lara Court has found the Duro Fix to be a recognition of the inherent power of Indian tribes. Since Congress’s legislation must pass constitutional muster, and since tribes continue to be bound by ICRA, future challenges are certain. Note that although tribal courts will be compelled to decide the equal protection questions raised under ICRA, they may decide to stray from the standard federal interpretation of the phrase “equal protection.” See infra Part II.

66. Oral argument before the Ninth Circuit was held in the Morris case, No. 03-35922, on March 11, 2005. Briefs in another case posing similar issues, Means v. Navajo Nation, No. 01-17489 (9th Cir.) (involving famed Indian activist Russell Means), have also been filed with the Ninth Circuit.


68. See, e.g., Lopez v. United States, 514 U.S. 549 (1995) (holding that Congress could not enact the Guns Free School Zone Act, 18 U.S.C. § 922(q)(1)(A), pursuant to its Interstate Commerce Clause power); see also Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) ("[T]he Interstate Commerce and Indian Commerce Clauses have very different applications . . . . [W]hile the Interstate Commerce Clause is concerned with maintaining free trade among the States . . . . the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.") (citations omitted); Cohen, supra note 9, at 219 (comparing congressional plenary power over Indians to congressional power over the District of Columbia, federal enclaves, as well as the administration and government of territories and possessions). The plenary power of Congress, which arose from nontextual sources in the late nineteenth and early twentieth centuries, has remained a cornerstone of Indian law while continuing to be criticized by academics. See Robert N. Clinton, There Is No Federal Supremacy Clause for Indian Tribes, 34 ARIZ. ST. L.J. 114 (2002) (tracing the history of the emergence of the federal plenary power doctrine in Indian affairs).

69. See Rice v. Cayetano, 528 U.S. 495, 497 (2000) ("Congress may not authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians to the exclusion of all non-Indian citizens."); United States v. Creek Nation, 295 U.S. 103, 111 (1935)
phrase "plenary powers" is mostly used as a summary of congressional powers, not as a synonym for "complete" or "absolute."  

While it is now clear that Congress may not assert its authority over Indian affairs as a buffer to the Constitution, it has not always been so. In the early twentieth century, it appeared that Congress might truly have plenary power over Indian relations—unbounded by other constitutional constraints—because judicial review would be restricted. In *Lone Wolf* v. *Hitchcock*, the Court held that Congress's involvement in Indian affairs was a nonjusticiable political question. *Lone Wolf* involved a tribal challenge to a congressional abrogation of the 1867 Medicine Lodge Treaty. Finding that Congress had always possessed the ability to withdraw from its treaty obligations, the *Lone Wolf* Court seemed to suggest that the judiciary would refrain from reviewing the constitutionality of any exercise of federal power with regard to Indian tribes.  

If this were the jurisprudential model today, legislation like the *Duro* Fix would of course stand, since it would never receive judicial review. However, such a result would come from a process with potentially dangerous results. If every Indian law question were a political one, hence untouchable by the judiciary, tribes would have little defense against burdensome regulations and would be subject to the unfettered whims of Congress.  

The *Lone Wolf* political question framework thankfully did not survive. Thus, in a number of modern-era cases, the Supreme Court has scrutinized congressional legislation regarding Indian affairs for constitutional validity. In *United States v. Sioux Nation of Indians*, for example, the Court found that Congress's power to act as a trustee for the benefit of Indians was bounded by the Fifth Amendment's Takings Clause. The Court ruled that the federal government's power over Indians, "[w]hile
extending to all appropriate measures for protecting and advancing the tribe, [is] subject to limitations inhering in a guardianship and to pertinent constitutional restrictions.”

Thus, Congress may not overcome relevant constitutional limitations merely by invoking its “plenary” power over Indian affairs and its role as a trustee to tribes.

While Sioux Nation restricts Congress from placing unconstitutional burdens on Indian tribes, the Constitution also places limits on the benefits that Congress may confer on tribes and their individual members. Presumably, equal protection principles forbid Congress from singling out members of federally recognized Indian tribes for benefits that are not rationally tied to the fulfillment of Congress’s unique obligation toward the Indians. Moreover, Congress may not authorize tribes, even in the interest of enhancing Indian sovereignty, to violate individuals’ otherwise applicable constitutional rights. For instance, if the Court in Lara had found that the Duro Fix was indeed a delegation of congressional power to Indian tribes, and that the Fifth Amendment’s Double Jeopardy Clause attached when a tribe invoked it to prosecute nonmembers, Congress could not have subsequently authorized Indian tribes to violate the Fifth Amendment.

Thus, despite the decision in Lara that tribes may prosecute nonmember Indians pursuant to their inherent power as Indian tribes, the Duro Fix remains vulnerable to attacks on the basis that Congress overstepped constitutional boundaries by enacting it. Courts in the near future are consequently likely to hear complex due process, equal protection, and separation of powers challenges to the Duro Fix. These decisions will likely establish the metes and bounds of Indian sovereignty in the twenty-first century.

76. Id. at 415 (internal citations omitted).

77. Congress functions legally as a trustee to Indian tribes. That role is based generally on the notion that tribes are mere wards to the federal government. The Supreme Court has explained:

In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic. Board of County Comm’rs v. Seber, 318 U.S. 705, 715 (1943). A complete examination of the usefulness of the federal trustee role is outside the scope of this piece.

78. See, e.g., Morton v. Mancari, 417 U.S. 535, 554-55 (1974) (noting the converse: benefits conferred which are rationally tied to Congress’s unique obligations toward Indians are constitutionally sound); Williams v. Babbitt, 115 F.3d 657, 666 (9th Cir. 1997) (noting that benefits which are not related to uniquely Indian interests are constitutionally suspect).

79. This assumes that Congress may not delegate to others what it itself does not have. See Skibine, supra note 26 (describing Congress as lacking the “power to prosecute U.S. citizens without affording them Constitutional protections”).

80. Id. Congress may not “waive” constitutional violations merely by interacting with other sovereigns. See infra notes 289-92 and accompanying text.
II

EQUAL PROTECTION AND THE DURO FIX

A. Equal Protection and Rational Basis Review

1. A Standard of Review for the Duro Fix

Whether the Duro Fix classifies nonmember Indians as either a political or a racial group makes a substantial difference for a court’s inquiry of constitutionality. The federal government, under the Fifth Amendment’s Due Process Clause, may not ordinarily discriminate amongst its citizens any more than a state could under the Fourteenth Amendment.81 Equal protection analysis for states is generally lenient where social or economic legislation is at issue.82 The same is true for legislation that operates to classify individuals into political groups, such as Republicans or Democrats.83 Yet, where government action classifies individuals on the basis of their race—such as when it singles out minorities for race-based admissions preferences—the most exacting form of judicial review is applied.84

Most of the limitations placed on states also apply to the federal government. Congress and the states have broad powers to classify citizens when neither fundamental rights nor a discrete and insular minority are the subject of their regulation.85 When Congress makes political classifications, courts review congressional action under mere rational basis review—the most lenient standard available—determining only whether legislation

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81. Bolling v. Sharpe, 347 U.S. 497, 500 (1954). See also Weinberger v. Wiesenfeld, 420 U.S. 636, 639 n.2 (1975) (“The Court’s approach to Fifth Amendment equal protection claims has always been precisely the same as to the equal protection claims under the Fourteenth Amendment.”); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 231-32 (1995) (“[T]he Constitution imposes upon federal, state, and local government actors the same obligation to respect the personal right to equal protection of the laws.”). But see Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976) (“[T]he two protections are not always coextensive ... there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State.”). Such overriding interests have been found in several instances to be implicated by the relationship of the federal government to Indian tribes. See, e.g., Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 500-02 (1979) (“It is settled that the unique legal status of Indian tribes under federal law permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive. States do not enjoy the same unique relationship with Indians.”) (internal citations and quotations omitted).

82. U.S. Const. amend. XIV, § 1 (“No state shall ... deny to any person within its jurisdiction the equal protection of the laws.”).

83. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 639 (6th ed. 2000) (“[T]he Justices have determined that they ... have no [superior] institutional capability to assess the scope of legitimate governmental ends in these areas ... [T]he Court will ask only whether it is conceivable that the classification bears a rational relationship to an end of government which is not prohibited.”).

84. See infra note 140.


serves a rational relationship to a legitimate government interest.\textsuperscript{87} Just as these general categories of judicial review apply to state action, they generally limit the power of the federal government.

Courts do not give such deferential review to legislation that distinguishes between citizens on the basis of race. Rather, courts apply heightened judicial scrutiny to legislation that implicates fundamental rights or draws distinctions between individuals based on race or gender.\textsuperscript{88} Distinctions drawn specifically on the basis of race, whether “burdensome” or “benign,” are reviewed by the court under strict scrutiny where only a compelling state interest pursued by narrowly tailored legislation is constitutionally permissible.\textsuperscript{89}

The Ninth Circuit, in remanding \textit{Morris} to the Montana District Court, was concerned that the use of the term “Indian” in the \textit{Duro} Fix classified individuals on the basis of race rather than political affiliation.\textsuperscript{90} If so, the legislation would seemingly be subject to strict scrutiny.\textsuperscript{91} Although some legislation that classifies individuals according to race has survived strict scrutiny,\textsuperscript{92} a court’s application of strict scrutiny generally sounds a death knell for any and all state action.\textsuperscript{93} The question of what the \textit{Duro} Fix actually classifies becomes particularly complicated in Indian law because of the Rehnquist Court’s less-than-deferential attitude toward precedents establishing that Indian tribes constitute a political class.\textsuperscript{94}

Cutting against notions that Indians constitute a racial class, courts have traditionally granted a great deal of deference to congressional

\begin{thebibliography}{99}
\bibitem{88} See Grutter, 539 U.S. at 306 (upholding the University of Michigan’s race-based preferences admissions policy under strict scrutiny); Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982) (invalidating gender-based discriminatory admissions policy after applying intermediate scrutiny).
\bibitem{89} Grutter, 539 U.S. at 306; Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); see also Johnson v. California, No. 03-636, 2005 WL 415281, at *5 (U.S. Feb. 23, 2005) (“We have insisted on strict scrutiny in every context, even for so-called “benign” racial classifications, such as race-conscious university admissions policies, race-based preferences in government contracts, and race-based districting intended to improve minority representation.”) (citations omitted).
\bibitem{91} The district court, on remand, found that the classification was political, not racial, and thus applied the rational basis test. It found, however, that even under strict scrutiny analysis, the legislation would pass constitutional muster. See \textit{Morris}, 288 F. Supp. 2d at 1142 n.7.
\bibitem{92} Grutter, 539 U.S. at 306; Korematsu v. United States, 323 U.S 214 (1943) (finding Japanese internment valid in the face of an equal protection challenge).
\end{thebibliography}
enactments that burden or benefit Indians as a class. Courts rarely give equal protection challenges to Indian-related legislation even serious consideration, often noting that the federal Constitution singles out Indians for exclusive commercial regulation by Congress. Most courts reason that when Congress legislates to burden or benefit Indians, it is acting pursuant to its inherent constitutional and trustee powers; consequently, such legislation is typically subject to rational basis review as “Indians” constitute a political, not racial, group. For example, the Court has held that where Congress assigns criminal jurisdiction to federal courts over major crimes committed by Indians, or offers preferences to Indian applicants for jobs in the Bureau of Indian Affairs (BIA), Congress acts within the permissible scope of fulfilling its unique obligation to tribes. When acting under this authority, Congress need only demonstrate that its recognition of Indians as a group is rationally tied to its stated goal.

In the foundational case regarding tribes and their members as a political group, the Court unanimously found that Congress could offer preferences to individual Indians for employment in the BIA. Alleging that such preferences constituted an invidious racial classification, applicants who had failed to obtain jobs in the BIA argued that it violated both the Equal Protection Clause and Title VII of the Civil Rights Act. The Court in Morton v. Mancari refused to strike down the preference as violative of the Equal Protection Clause, finding that tribes and their members—because of their unique relationship to the federal government and the longstanding history of being singled out for certain burdens or benefits—constituted merely a political, not racial, group.

95. Morris, 288 F. Supp. 2d at 1136; see also Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 85 (1977) (finding that managing the lands and property of tribes is an “authority drawn both explicitly and implicitly from the Constitution itself.”) (internal citations and quotations omitted).

96. See, e.g., Am. Fed'n of Gov't Employees v. United States, 330 F.3d 513, 520 (D.C. Cir. 2003) (“[O]rdinary rational basis scrutiny applies to Indian classifications just as it does to other non-suspect classifications under equal protection analysis.”); United States v. Male Juvenile, 280 F.3d 1008, 1016-17 (9th Cir. 2002) (stating that differential treatment between Indians and non-Indians arises not from race, but from political membership in tribes); Livingston v. Ewing, 455 F. Supp. 825, 830 (D.N.M. 1978) (upholding state law granting enrolled Indians monopoly status over museum gift shop and stating that “[b]ecause of their unique cultural, legal, and political status, Indians have consistently received special or preferential treatment, from the federal and state governments.”).

97. U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power...[t]o regulate Commerce...with the Indian Tribes.”).


100. Mancari, 417 U.S. 535.

101. Id.


103. 417 U.S. at 552 (“Article I, § 8, cl. 3, provides Congress with the power to ‘regulate Commerce...with the Indian Tribes,’ and thus, to this extent, singles Indians out as a proper subject for separate legislation.”).
Only a few years later, the Court confirmed that its holding in *Mancari* conceived of tribal status appropriately. In *United States v. Antelope*, the Court confronted a challenge from a member of the Coeur d'Alene tribe alleging that the Major Crimes Act, which allowed federal prosecutors to charge Indians in federal courts for most serious felonies, discriminated against Indians on the basis of their race. Since non-Indians in state courts were often subject to a much more lenient criminal justice system (including sentencing regimes), Antelope argued that his race was the "but-for" cause of his harsh sentence. The Court rejected the challenge, finding that the distinction between non-Indians and Indians was merely a political one, and that Indian defendants were treated no worse than other defendants entering federal courts. Thus, the Court evaluated the burdens on tribes and their members under the same form of scrutiny applied to tribal benefits in *Mancari*. Note, however, that *Antelope* appears to give Congress even more power over tribes and their members, since it found that legislation need only meet the more lenient standard of "implicating Indian interests." Ultimately, the Court has held, since *Mancari* and *Antelope*, that "federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications."

Without a compelling argument that the Duro Fix in some way classifies Indians differently than the statutes at issue in *Mancari* and *Antelope*, it would be difficult to apply anything more exacting than mere rational basis scrutiny to the Duro Fix. That the Duro Fix defines the term "Indian" in precisely the same manner as does the statute challenged in *Antelope* should further convince courts that there is little merit to the equal protection argument brought by Morris. Yet, Morris, as well as others, has

107. *Antelope*, 430 U.S. at 644:

[Respondents] argued that a non-Indian charged with precisely the same offense, namely the murder of another non-Indian within Indian country, would have been subject to prosecution only under Idaho law, which in contrast to the federal murder statute, 18 U.S.C. § 1111, does not contain a felony-murder provision. To establish the crime of first-degree murder in state court, therefore, Idaho would have had to prove premeditation and deliberation. No such elements were required under the felony-murder component of 18 U.S.C. § 1111.

108. Id. at 646 ("Both *Mancari* and *Fisher* involved preferences or disabilities directly promoting Indian interests in self-government, whereas in the present case we are dealing, not with matters of tribal self-regulation, but with federal regulation of criminal conduct within Indian country implicating Indian interests.").
109. Id. at 645.
110. 25 U.S.C. § 1301 (4) ("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 applies.").
continued to make the argument that the classification of nonmember Indians constitutes a racial one. These flawed arguments, as well as a number of responses, are outlined below.

2. Indians as a Political Class

In *Morris*, the petitioner advanced several arguments, not all frivolous, that the *Duro* Fix violates the Equal Protection Clause.\(^{111}\) Admittedly, since the *Duro* Fix authorizes Indian tribes to prosecute Indians criminally, but not non-Indians, jurisdiction over defendants obviously turns on the status of the defendant. Once more, courts will need to decide whether classification as an Indian constitutes a political or racial classification to assess whether the *Duro* Fix should receive strict scrutiny. Strictly speaking, the Supreme Court has answered the question on several occasions.\(^{112}\) However, the unique nature of the burden placed on Indian defendants,\(^{113}\) coupled with the Rehnquist Court's particular scrutiny of tribal institutions,\(^{114}\) may cause the Court to stray from its own precedent.

Suppose that two accomplices, one nonmember Indian and one non-Indian, commit a crime jointly on a reservation. The tribe, even armed with the *Duro* Fix, may prosecute only the nonmember Indian defendant, leaving the non-Indian to either federal or state authorities, both of whom may be hesitant to prosecute crimes committed on reservations.\(^{115}\) Even if the non-Indian defendant is prosecuted in federal court, the nonmember Indian will have fewer constitutional protections in tribal courts than the non-Indian who will appear in federal courts.\(^{116}\) Thus, the *Duro* Fix requires that a clear distinction be made between nonmember Indians and non-Indians—a distinction that is based solely on their membership in an Indian tribe.

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113. *See infra* Part III.
114. *See, e.g.*, *Nevada* v. *Hicks*, 533 U.S. 353, 367-69 (2001) (discussing potential jurisprudential difficulties if tribal courts functioned as courts of general jurisdiction); *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 211 (1978) ("These considerations ... speak equally strongly against the validity of respondents' contention that Indian tribes ... retain the power to try non-Indians according to their own customs and procedure.").
115. *See Canby*, supra note 31, at 169 ("Enforcement of the Major Crimes Act (like that of the General Crimes Act) has often been criticized by tribal authorities as being too lax. Overburdened United States Attorneys have often been unenthusiastic about prosecuting the less serious of the major crimes.").
116. 25 U.S.C. § 1302(6) includes no guarantee that an indigent defendant will be provided an attorney, and § 1302(10) includes no guarantee that a jury will be composed of both tribal members and nonmembers. For an argument that Congress may need to enact an *Oliphant* Fix in order to solve the equal protection problems posed by this hypothetical, see Bryan H. Wildenthal, *Fighting the Lone Wolf Mentality: Twenty-First Century Reflections on the Paradoxical State of Indian Law*, 38 TULSA L. REV. 113, 130 (2002).
Since most tribes have a blood quantum component⁷ as a prerequisite for membership, one's status as an Indian may rely, to some extent, on an individual's ethnic background.⁸ Thus, Duro Fix critics argue, Indian defendants' race is the "but-for" cause of the deprivation of their rights.⁹

In truth, when member Indians and non-Indians commit crimes jointly, the same racial divide can arise under Oliphant, which forbids prosecution of non-Indians in tribal court.¹⁰ However, the Court has generally expressed few reservations when tribes prosecute their own members, since member Indians' consent to tribal jurisdiction is presumed as part of tribal membership.¹¹ Moreover, another race-related result could occur if an Indian and non-Indian committed serious felonies jointly. While the non-Indian could be tried in state court, under standard criminal law, the Indian defendant would be subject to federal court jurisdiction.¹² The relevant punishment under federal law can be substantially harsher than penalties under state law.¹³

The Court has never considered disparities in the forums in which defendants are prosecuted or the sentences to which they are subject to be based on race. In Antelope, the Court emphasized that Indians in federal court, despite being subject to harsher sentences than in state courts, received precisely the same rights as non-Indians in federal court.¹⁴ The

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¹⁷ Blood quantums describe the level of Indian ancestry one possesses. For an argument that the blood quantum requirement of most tribes requires that legislation involving Indians demands strict scrutiny, see Gould, supra note 26; David C. Williams, The Limits of Equal Protection, 38 UCLA L. Rev. 759, 803 (1991) ("Virtually all tribal membership qualifications themselves contain two requirements: a political affiliation and a tribal blood quantum. On its face, the tribal blood quantum—based as it is on genetic material—should be suspect."). But see William Bradford, 27 AM. IND. L. REV. 1, 126 n.597 ("Although a one-fourth or greater blood quantum requirement was once a common standard, in recent years cultural identification has gained acceptance as more constitutive of Indian identity and thus more important in ascertaining membership.").

¹⁸ Presumably, one's ethnic background is linked closely to one's race—particularly where ethnic background correlates with skin color. See, e.g., Carole Goldberg, Descent Into Race, 49 UCLA L. Rev. 1373 (2002).

¹⁹ Gould, supra note 26, at 94.

²⁰ See Oliphant, 435 U.S. at 210.

²¹ See United States v. Lara, 541 U.S. 193, 211-12 (2004) (Kennedy, J., concurring) ("[I]t is the historic possession of inherent power over the relations among members of a tribe that is the whole justification for the limited tribal sovereignty the Court [has] recognized.") (citations and quotation marks omitted); Duro v. Reina, 495 U.S. 676, 694 (1990) ("Tribal authority over members, who are also citizens, is not subject to these objections. Retained criminal jurisdiction over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent.").


²³ Id. ("Since Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian country, it is of no consequence that the federal scheme differs from a state criminal code otherwise applicable within the boundaries of the State of Idaho.") (internal citations omitted); United States v. Big Crow, 523 F.2d 955, 959 (8th Cir. 1975) (overturning pre-Antelope sentence that punished an Indian defendant ten times more harshly than if he had been a defendant in state court).

²⁴ Antelope, 430 U.S. at 648.
appropriate comparison for equal protection purposes seems, therefore, to be between nonmember Indians and member Indians in tribal court. However, even if the Court does shift away from its Antelope jurisprudence, the Duro Fix should still be found constitutional.

Consistent with Mancari, the Court can easily find that the classification of individuals as Indians is not truly racial. In contrast to impermissible classifications based on race or gender, legislation that classifies individuals as Indians leaves open an avenue shut to discrete and insular minorities: one's status as an enrolled member of an Indian tribe is entirely voluntary and may be relinquished at any time. Moreover, the definition of “Indian” under the Duro Fix is modeled after the definition under the Major Crimes Act, which the Court has already upheld as constituting a burden on a political, not racial, class. Thus, any argument contending that the Duro Fix applies to all ethnic Indians—not only to enrolled members of federally recognized Indian tribes but to any individuals of Indian ancestry—ignores a substantial body of Indian law.

The argument regarding race-based disparities between nonmember Indians and non-Indians is unpersuasive for other reasons. Antelope confronted a situation where Indians contended that their race was the “but-for” cause of being tried in federal court. In such a case, the class relevant for evaluating equal protection challenges is the class of individuals, subject to the same jurisdiction as the defendant, but of a different race. There is no equal protection violation if Indians prosecuted in federal court under the Major Crimes Act are treated the same as similarly situated non-Indians. If the Court takes Antelope at its word, the “but-for” argument compares the wrong class of individuals. It should not compare nonmember Indians to non-Indians, but nonmember Indians to member Indians. Thus, the Court should acknowledge the constitutionality of the Duro Fix under the Equal Protection Clause so long as nonmember Indians

125. See Duro, 495 U.S. at 694. The court in Morris v. Tanner noted:

Th[e] situation [of the Indians] is entirely distinct from the situation of Africans who were brought to this country enslaved and deprived of their governmental structures before arrival.
The rhetoric of race relations derived from the history of African-Americans is only partially applicable to the situation of Indians, and to overlook the crucial differences minimizes the great respect owed to the remaining sovereignty of tribes.


127. See Antelope, 430 U.S. at 646 (“[R]espondents were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d’Alene Tribe.”).

128. Id. at 641.

129. See id. at 649. The Court noted that “[u]nder our federal system, the National Government does not violate equal protection when its own body of law is evenhanded, regardless of the laws of States with respect to the same subject matter.” Id. If this language holds true for tribal exercises of criminal jurisdiction, Morris’s equal protection argument (regardless of whether the Duro Fix targets a political or racial class) is almost certainly a losing one.
“enjoy the same procedural benefits and privileges as all other persons” in tribal court.\textsuperscript{130}

It is, of course, arguable that nonmember Indians, in contrast to member Indians, do not “enjoy the same procedural benefits and privileges as all other persons” when they step into tribal courts. Because there is no ICRA guarantee of a mixed tribal jury,\textsuperscript{131} nonmember Indians are not guaranteed juries of their peers as member Indians are. Moreover, indigent nonmember defendants may suffer more heavily than member defendants without lawyers. And of course, the unfamiliarity of the tribal forum, or the cultural practices of the tribes, may unintentionally cause some due process deficiencies. Special care must be taken here to avoid conflating the analysis of two different due process inquiries. One inquiry, addressed below, discusses due process in terms of procedural mechanisms to ensure justice is done in criminal trials. The other inquiry discusses due process in terms of the Fifth Amendment’s Equal Protection Clause. Thus, even if these two irregularities do not constitute violations of the Fifth Amendment’s due process procedural guarantees, they may violate a very narrow notion of equal protection that was carved out by \textit{Antelope}. If so, tribes face the difficulty that a court would read \textit{Antelope} to suggest that the \textit{Duro} Fix is legitimate only if nonmember Indians are exactly equal to member Indians in tribal courts.

Even with inequities between nonmember Indians and member Indians, however, it would be rash for the Supreme Court to overturn the \textit{Duro} Fix in its entirety. As suggested in the Solicitor General’s brief in \textit{Lara}, the Court should instead wait for purported inequities to emerge before nullifying tribal prosecutions wholesale.\textsuperscript{132} Moreover, the significance of such inequities is difficult to predict. Tribes like the CSKT may question whether the \textit{Antelope} Court ever contemplated that the mere potential for biased juries or unfamiliar tribunals could invalidate the Major Crimes Act. Indeed, the Court emphasized in \textit{Antelope} that each defendant in federal court would be “subjected to the same body of law.”\textsuperscript{133} Whether a court applying the same body of law must account for and minimize the incidental effects of potentially unfriendly fora is unclear. If it becomes obvious that \textit{Antelope} requires mixed juries to maintain equal protection of nonmember defendants, tribes might seemingly comply by simply utilizing mixed juries when prosecuting nonmember Indians under the \textit{Duro} Fix. Although it is, for tribes, suboptimal for tribal sovereignty to be held ransom to U.S. equal protection principles, such a result is clearly preferable to an outright invalidation of the \textit{Duro} Fix.

\textsuperscript{130} Id. at 648.
\textsuperscript{133} \textit{Antelope}, 430 U.S. at 648.
B. Surviving Rational Basis Review

1. A Rational Basis for the Duro Fix

If the Rehnquist Court continues to follow traditional notions of equal protection analysis, it will apply rational basis review to evaluate legislation directed at tribes and their enrolled members. Should the Duro Fix come before the Court, the case law currently on the books would guide the Court toward evaluating whether the legislation is "tied rationally to the fulfillment of Congress's unique obligation toward the Indians." Efforts that are "reasonable and rationally designed to further Indian self-government" constitute satisfactory legislative goals. The Supreme Court has never found any congressional attempt to enhance tribal sovereignty violative of the Fifth Amendment's equal protection component. Thus, a Court strictly following precedent would apply mere rational basis review to the Duro Fix and uphold it.

Limits may exist, however, on Congress's ability to legislate broadly on behalf of Indians and Indian tribes. At least one court has stated that a clear nexus must exist between the benefit granted and the Indian interest pursued by the federal government. Indeed, a nexus requirement seems implicit in the rational basis review undertaken by the Court in Mancari. Had Mancari involved a broader assertion of congressional authority, such as bestowing upon all Indians a complete waiver of the civil service examination or guaranteeing employment in the public sector, the Court would have faced an "obviously more difficult question." The Court thus seemed to imply that some judicial scrutiny would obtain where haphazard or broad benefits were given to Indians that did not prima facie aid unique Indian interests. Where legislation offers Indian tribes or their members a benefit so great or broad as to have no rational nexus to Congress's unique

134. Morton v. Mancari, 417 U.S. 535, 552 (1974); see id. at 552 ("Literally every piece of legislation dealing with Indian tribes and reservations singles out for special treatment a constituency of tribal Indians. . . . If these laws . . . were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased.") (citations omitted).
135. Id. at 555.
136. At least one scholar has argued that the trustee relationship between the federal government and Indian tribes ensures that congressional benefits to tribes are reviewed under rational basis scrutiny. See Alex Talchif Skibine, Integrating the Indian Trust Doctrine into the Constitution, 39 TULSA L. REV. 247, 247-48 (2003).
137. Mancari, 417 U.S. at 554 (noting that the Court "need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations."); see also Williams v. Babbitt, 115 F.3d 657, 664 (9th Cir. 1997) (finding that laws which benefit Indians as a distinct group, but which "in no way relate to native land, tribal or communal status, or culture" are likely invalid).
138. Williams, 115 F.3d at 664-65.
139. Mancari, 417 U.S. at 554. But see Am. Fed'n of Gov't Employees v. United States, 330 F.3d 513, 521 (D.C. Cir. 2003) (noting that Mancari states only that the question would be "more difficult," but that the blanket exemption might well have passed constitutional muster).
obligations toward Indian tribes, a court will be hard-pressed to rule in favor of that legislation.\textsuperscript{140}

There is little doubt that Congress succeeded, by enacting the \textit{Duro} Fix, in furthering the cause of Indian self-government. Several commentators have suggested that the \textit{Duro} Fix is absolutely necessary to maintain the rule of law within reservations.\textsuperscript{141} Intermarriage has led to significant nonmember Indian populations living within the boundaries of reservations; consequently, members of the same extended family will not always possess the same status in relation to the tribe.\textsuperscript{142} Without the \textit{Duro} Fix, tribes will be unable to prosecute these nonmember residents in criminal court. Prohibiting tribes from prosecuting substantial portions of their respective reservation populations would likely lead to severe consequences for tribal law enforcement and the victims of criminal behavior. The disastrous effects of \textit{Oliphant}, which held that tribal courts lacked criminal jurisdiction over non-Indians, would only be heightened if tribes were to lose the power to prosecute nonmember Indians.\textsuperscript{143}

Of course, opponents of the \textit{Duro} Fix may argue that allowing tribes to prosecute nonmembers is not the only means of maintaining law and order on reservations. Indeed, Justice Kennedy suggested in \textit{Duro} at least one alternative for tribal governments that wished to maintain the rule of law on reservations.\textsuperscript{144} Namely, Kennedy suggested that tribes ask states to assume criminal jurisdiction for crimes committed by nonmembers on reservations.\textsuperscript{145} This argument, however, is unavailing for the purposes of the rational basis test; the test does not require that the government enact the \textit{best} method of achieving its goals. Rather, the rational basis test merely

\begin{itemize}
  \item \textsuperscript{140} One can imagine an analogy with more common notions of political affiliations. For example, Congress probably has authority to classify groups of Republicans and Democrats for the purpose of defining the political composition of the Federal Elections Commission. See Buckley v. Valeo, 424 U.S. 1, 293 (1976) (Rehnquist, J. dissenting) ("[Congress] has enshrined the Republican and Democratic parties in a permanently preferred position."). However, Congress could not give all government positions exclusively to Republicans and Democrats, since "courts should strike down laws under the rationality test when . . . there is no purpose for a classification other than denying a benefit . . . to a group . . . when the denial of the benefit can serve no possible purpose other than the desire to discriminate against a group which is disfavored." NOWAK \& ROTUNDA, supra note 83, at 655. In one context, the federal interest and the political classifications may have a rational nexus. In the other context, they clearly do not.
  \item \textsuperscript{141} Frickey, supra note 10, at 42 n.211 ("By denying tribal courts jurisdiction over nonmembers, \textit{Duro} thus seemed to create a jurisdictional void in which no sovereign could prosecute . . . [T]he Court[s] . . . suggestions [for fixing the void] substitute either formless judicial revisionism or tribal capitulation for any serious grappling with the conundrum.") (internal citations omitted).
  \item \textsuperscript{142} Gould, supra note 26, at 82-93 (presenting a tongue-in-cheek hypothetical where each member of a single family is subject to a different sovereign's criminal prosecution).
  \item \textsuperscript{143} See supra notes 45, 48, 59-61, and accompanying text.
  \item \textsuperscript{144} \textit{Duro} v. Reina, 495 U.S. 676, 696-97 (1990) ("States may, with the consent of the tribes, assist in maintaining order on the reservation by preventing more crime."); see Frickey, supra note 141 (taking issue with the Court's suggestion that states take over criminal jurisdiction in Indian country).
  \item \textsuperscript{145} \textit{Duro}, 495 U.S. at 696-97.
\end{itemize}
requires a method that is rationally related to those goals. Other methods of maintaining the rule of law on reservations should not enter the calculus of determining whether the Duro Fix passes rational basis review.

Thus, if courts follow available precedent and find that the Duro Fix is directed at a political, instead of a racial class, there is little doubt that the statute can pass constitutional muster. Rational basis review in Indian law, although occasionally more demanding than "regular" rational basis review, renders ineffective almost all equal protection challenges. In general, this enables Congress to direct legislation, burdensome or benign, at enrolled members of federally recognized Indian tribes without violating equal protection.

2. A Stricter Test: Would the Duro Fix Survive Serious Bite?

Putting due process concerns aside momentarily, the Duro Fix's burdening of individual nonmember Indian criminal defendants likely does not violate equal protection. The Supreme Court has historically upheld burdens on individual Indians where such burdens possess a logical nexus to enhancing the status of Indians as a unique politically sovereign body. In Fisher v. District Court, for example, the Supreme Court found no equal protection violation in denying two prospective Indian adoptive parents access to the state court in Montana where they could have brought suit had they been non-Indian. Once they received a less-than-favorable ruling in tribal court, the prospective foster parents sought relief in state court, which would have been available had they not been enrolled Indians. The Supreme Court found that the state court lacked jurisdiction. The Court noted that tribal jurisdiction was exclusive only because the petitioners were Indian; however, because this classification derived from the "quasi-sovereign status of the... Tribe," it did not violate equal protection.

146. See, e.g., Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 390 (1978) ("That Montana might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional.") (internal citations omitted).
147. Compare Williamson v. Lee Optical of Okla., 348 U.S. 483 (1955) (upholding law disadvantaging opticians because the law bore a 'rational relation' to a legitimate government interest), with Williams v. Babbitt, 115 F.3d 657 (9th Cir. 1997) (explaining that only actions with a rational relationship to Congress's trust relationship with tribes are constitutional). But see Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States, 367 F.3d 650 (7th Cir. 2004) (finding that not all congressional legislation directed at tribes or enrolled members must be tied to the federal government's trust responsibilities).
148. Gunther, supra note 93, at 8 ("In other contexts, the deferential 'old' equal protection reigned, with minimal scrutiny in theory and none in fact."). See also FCC v. Beach Communications, 508 U.S. 307, 323 n.3. (1993) (Stevens, J., concurring) ("The Court states that a legislative classification must be upheld 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification'... Judicial review under the 'conceivable set of facts' test is tantamount to no review at all.").
149. See infra Part III.
protection. The Court was unwilling to find that impositions, even highly burdensome ones, violated equal protection. Thus, even if burdening individual Indians "results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government." Fisher seemingly establishes a nuanced burden/benefit framework: the Supreme Court stated explicitly that the difference in treatment afforded members of Indian tribes could be justified if that treatment was intended to benefit the class in which the individual was a member. Thus, individual Indians can be made to give up certain rights without violating equal protection so long as their tribe experiences a concomitant benefit in sovereignty. Although the Court's statement seemed to imply that such disparate treatment might receive a more searching "rational basis test" than standard legislation, it is likely that the Duro Fix would also pass this level of judicial review.

The Duro Fix seemingly creates a burden/benefit equation roughly analogous to that of Fisher, since the legislation at issue, while certainly burdening nonmember Indian defendants, will benefit tribal sovereignty generally by bolstering tribal criminal jurisdiction. This argument would likely be sufficient to persuade courts to uphold the Duro Fix against equal protection concerns.

Yet, some courts may see the benefit/burden equation of the Duro Fix as much more tenuous than the one in Fisher. For instance, suppose that hypothetical tribe X denied entry into its reservation to all nonmember Indians. Meanwhile, its own members are being prosecuted by tribe Y pursuant to the Duro Fix. Members of tribe X could suffer a burden—being prosecuted in "foreign" tribunals—yet never enjoy the benefits of enhanced sovereignty. Even if tribe X will never utilize the Duro Fix in prosecuting nonmembers, its own members remain burdened by tribe Y. Unlike Fisher, then, the direct benefit to tribal sovereignty is tenuous in many circumstances. All nonmember Indians are burdened by the Duro Fix when prosecuted in tribal courts, yet not all tribes themselves benefit by invoking the Duro Fix's terms in their own prosecutions. Such a distinction from Fisher might convince some courts, in the context of the Duro Fix, to give less weight to the benefit/burden equation articulated in previous Supreme Court decisions. Opponents of the Duro Fix urge courts to make

151. Id. at 390.
152. Id. at 390-91.
such a finding and contend that the appropriate equal protection inquiry must begin and end with the relevant, individual, nonmember Indian criminal defendant.  

A closer look at Fisher, however, demands a different result. Fisher did not state that a burden placed on enrolled Indians must be accompanied by a proportional benefit to that specific Indian's tribe. Indeed, the Fisher Court instead referred to the "class in which [the petitioner] is a member." Nowhere did the Court find that the petitioner's class was limited solely to his own tribe, nor would such a construction emerge from an honest interpretation of Fisher's language. The Court referred specifically to "furthering the congressional policy of Indian self-government." Thus, even if the Court compares the burden placed on Indians with that placed on similarly situated non-Indians, a faithful reading of past precedent should lead the Court to uphold the Duro Fix.

The temptation for courts to stray from a straightforward reading of Antelope and Mancari may arise from the burdens that the Duro Fix places on nonmember Indians. When a tribe exercises criminal tribal jurisdiction, it enhances its own sovereignty while diminishing the rights of nonmember Indians. In Morris, for example, the CSKT could prosecute Morris only by subjecting him to a foreign and potentially unfamiliar tribunal. At first glance, this might not pose much of a concern. Courts generally have little difficulty in upholding congressional enactments that benefit tribes or enrolled tribal members, even where those enactments work to the detriment of non-Indians. For instance, by upholding the constitutionality of the BIA's hiring preference for enrolled Indians in Mancari, the Supreme Court approved of a policy that disadvantaged non-Indian applicants. In the same vein, the Court in Delaware Tribal Business Commission v. Weeks gave substantial leeway to Congress to determine which groups of Delaware Indians should receive land and funds previously earmarked for the tribe. Although Congress did indeed confer a substantial benefit on some Indians, its decisions also worked to the disadvantage of those Indians who were not chosen for benefits.

None of these cases, however, subjected American citizens to criminal prosecution without the constitutional protections required in U.S. courts. Indeed, if the nexus inquiry is framed as requiring a connection between

157. Id. This policy is both more generic and more consistent with Congress's actual role in Indian affairs than is a myopic view of Fisher's language. For an argument that this sort of broad notion of tribes as an amalgamated mass, even if adhered to in modern times, is inconsistent with the Constitution's text, see Prakash, supra note 17.
160. Id.
subjecting nonmember Indian defendants to prosecution in non-U.S. courts and the benefit to tribes of this jurisdiction, judicial scrutiny might be less favorable. In fact, in one lower court opinion before *Antelope*, the Eighth Circuit invalidated a federal prosecution under the nexus inquiry when the burden on individual Indians was overly harsh, and where there was no accompanying benefit to Indians. Specifically, *United States v. Big Crow* involved the prosecution of an Indian under the Major Crimes Act. While part of the opinion directly contradicts the later *Antelope* opinion, the court’s decision regarding the burden placed on individual Indians may have some sway over the Court’s analysis. For instance, if Congress truly did deprive Indian defendants of certain rights in federal courts that were regularly offered to non-Indian defendants, the benefit/burden equation, even under rational basis, seems to cut against Congress’s action.

But even if the *Big Crow* model were applied today, and assuming the now defunct race-based arguments made by the Eighth Circuit were not dispositive to the holding, the *Duro Fix* would still likely pass constitutional muster. The *Duro Fix*’s benefit to Indian tribes as entities intuitively benefits tribes more than the application of the Major Crimes Act in *Big Crow*. Tribes obviously reap more sovereignty from the use of their own powers than they do from the federal government harshly punishing their members because of their political status. Such a strong nexus, however, may not be necessary. Indeed, courts have been willing to reject equal protection claims even when the disparate treatment offers no tribal sovereignty benefits and all Indians are burdened by congressional legislation.

This is demonstrated by the Court’s affirmation of disparate treatment for Indian criminal defendants in *Antelope*, in spite of the equal protection challenges. Surely, the *Duro Fix* constitutes congressional legislation which meets *Antelope*’s standard of “implicating Indian interests.” It is undoubtedly the case that the *Duro Fix* very much affects tribal sovereignty and the rule of law on reservations—both extraordinarily important “Indian interests.” Under this more relaxed “implication of Indian interests” standard, courts would likely find a clear nexus between Congress’s actions and its guardianship role towards Indians, regardless of the burdens imposed on individual nonmember Indian criminal defendants.

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161. *See United States v. Big Crow, 523 F.2d 955, 959 (8th Cir. 1975) (distinguishing *Mancari* and noting, "[i]t is difficult for us to understand how the subjection of Indians to a sentence ten times greater than that of non-Indians is reasonably related to their protection.").

162. *Id.* at 959-60 (questioning “whether the rational basis test is the appropriate standard where racial classifications are used to impose burdens on a minority group rather than, as in *Mancari*, to help the group overcome traditional legal and economic obstacles. ... [T]he government bears the burden of showing a compelling interest necessitating racially discriminatory treatment."). This was later overturned in *Antelope*, 430 U.S. 641 (1977).


164. *Id.* at 646.
There are, of course, distinctions between subjecting enrolled members of federally recognized Indian tribes to U.S. federal courts that offer constitutional protections and subjecting U.S. citizens to prosecutions where the Constitution does not apply. While this distinction may ultimately be important, courts have not yet recognized it in any of the relevant equal protection case law. Obviously, the Duro Fix is a special breed of legislation and may require the Court to distinguish its previous rulings, but many of these concerns are more properly raised as due process issues and are addressed in Part III.

C. Surviving Strict Scrutiny

If the judiciary departs from longstanding case law, and instead finds the Duro Fix to classify individuals on the basis of their race, tribal sovereignty interests may be in substantially more peril. In almost every instance, legislation that implicates a suspect class\textsuperscript{165} passes constitutional muster under the Equal Protection Clause only if it is narrowly tailored to achieve a compelling governmental interest.\textsuperscript{166} Interestingly, however, "overriding national interests" can occasionally allow federal legislation more leeway than state legislation.\textsuperscript{167} Whether the federal government's relationship with Indian tribes falls into the category of an overriding national interest, and whether the Duro Fix could survive strict scrutiny if it does not, are difficult questions yet to be answered by the Supreme Court.

Although the district court in Morris stated explicitly that it would have upheld the Duro Fix even if it had applied strict scrutiny, the court's analysis may be highly atypical. The court, without addressing the complicated equal protection framework discussed above, stated in confident dicta that the Duro Fix would "easily pass strict scrutiny."\textsuperscript{168} While it is questionable that any legislation could "easily" pass strict scrutiny, the court's decision does show some judicial support for the notion that the Duro Fix is narrowly tailored to a compelling governmental interest.

Moreover, the Court continues to shrug off any notion that strict scrutiny is "fatal in fact"—that is, results in an automatic rejection of the law.\textsuperscript{169} In one of the Court's most recent pronouncements on the use of race by

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\textsuperscript{165} Legislation that targets discrete and insular minorities is constitutionally suspect. See Carolene Prods. v. United States, 323 U.S. 18, 21 n.4 (1944). The phrase "suspect class" originated in Korematsu v. United States, 323 U.S. 214, 216 (1944), and includes racial and religious groups, as well as aliens. See NOWAK & ROTUNDA, supra note 83, at 640.


\textsuperscript{167} Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976); see infra Part II.D.

\textsuperscript{168} Morris v. Tanner, 288 F. Supp. 2d 1133, 1142 n.7 (D. Mont. 2003).

\textsuperscript{169} Grutter, 539 U.S. at 326 (2003) ("[S]trict scrutiny is not strict in theory, but fatal in fact.") (citations omitted); see also Johnson v. California, No. 03-636, 2005 WL 415281, at *10 (U.S. Feb. 23, 2005) ("Strict scrutiny does not preclude the ability of prison officials to address the compelling interest in prison safety.").
government actors, it found that University of Michigan’s race-based admissions preferences program was constitutionally sound. Despite the University’s discrimination against white applicants, the Court found that the compelling state interest of promoting racial diversity had been pursued by a sufficiently narrow admissions policy.

Certainly, there is reason to believe that courts will accept that Congress’s fulfillment of its obligations, whether they emerge from its responsibility as trustee or otherwise, to tribal sovereignty is a compelling government interest. The question would then become an analysis of whether Congress could have pursued its goal more narrowly than it did when it amended ICRA. Congress has a persuasive argument that it could not have. Had it authorized tribal prosecutions only of nonmember Indians who constructively consented to jurisdiction, or perhaps only over defendants who received full constitutional protections, its efforts to enhance tribal sovereignty would have been significantly less successful.

If the Duro Fix is held to implicate a suspect class, it is impossible to predict the reaction of courts generally, and in particular, the Supreme Court. Although the Morris court expressed in dicta that it found the question to be an easy one, the Supreme Court would undoubtedly be fiercely divided over such a difficult issue. Still, before Grutter v. Bollinger, it appeared that only the most incidental and unintentional burdens on race would be upheld. After Grutter, however, tribal sovereignty via the Duro Fix may be able to survive an equal protection claim even if analyzed under strict scrutiny.

D. Another Possibility for Review?

Because the federal government functions as a guardian to its tribal wards and plays the role of trustee to Indian tribes, there is some

171. Id. at 343 (“[T]he Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”).
173. 539 U.S. 306 (2003). Indeed, the Grutter Court was divided 5-4, with two Justices (Thomas and Scalia) appearing to find that the Equal Protection Clause demands a colorblind notion of governance. Grutter, 539 U.S. at 378 (Thomas, J., concurring in part and dissenting in part) (“Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”) (citations omitted). But see Johnson, No. 03-636, 2005 WL 415281, at *15 (Thomas, J., dissenting) (arguing, with Scalia, that racial segregation in prisons might not even trigger strict scrutiny under the Equal Protection Clause).
174. See Hunt v. Cromartie, 526 U.S. 541, 546 (1999) (“Our decisions have established that all laws that classify citizens on the basis of race, including racially gerrymandered districting schemes, are constitutionally suspect and must be strictly scrutinized.”).
175. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (“Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.”).
176. See generally Skibine, supra note 136.
possibility that the *Duro* Fix might be subjected to less than strict scrutiny even if it is found to entail racial classifications. Professor Phillip Frickey has suggested that whether equal protection should constrain Congress as it constrains states should revolve around the nature of the federal action. When the federal government classifies groups by race while performing functions similar to those typically performed by states, such as providing primary education, the government should be subject to strict scrutiny. However, when the federal government carries out exclusively national functions, such as legislating regarding tribal sovereignty, equal protection leeway may justify greater judicial deference to Congress.

Of course, no such deference is in any way guaranteed. Courts could utilize strict scrutiny, rational basis review, or perhaps walk a narrow intermediate line between the two. Due to the issues involved with burdening a suspect class, however, it would be foolish to assume that a court will offer any degree of leeway whatsoever. The Court might only do so if it became convinced of the *Duro* Fix’s prudential necessity, but could not persuade itself that the regulation involved anything other than a racial classification.

## II

**DUE PROCESS AND THE *Duro* FIX**

### A. Tribes and the Constitution

Although *Lara* held that Indian tribes could prosecute nonmember Indians pursuant to their inherent powers as tribes, it neglected to answer

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177. The Supreme Court has already found that federal legislation directed at Indians is given substantially more leeway than state legislation implicating the same. The question is how much more leeway. *See* Washington v. Confederated Bands & Tribes of the Yakima Nation, 439 U.S. 463, 500-02 (1979) (finding the federal authorization of the State of Washington to assume partial criminal and civil jurisdiction over tribal lands constitutional).


179. *See* *Boiling* v. *Sharpe*, 347 U.S. 497 (1954). *Boiling* involved a challenge to segregated schools in the District of Columbia, which was not subject to the Fourteenth Amendment’s Equal Protection Clause as were the states, but was held to a parallel standard under the Fifth Amendment nonetheless. *Id.* at 498-500.

180. For an argument that special congressional powers are the only way to justify the state of Indian law, see Frickey, *supra* note 178, at 1765 (“I am not suggesting... that there is (or should be) an 'Indian exception to the Constitution.' What I... suggest is that any meaningful and intellectually coherent constitutional analysis in this field cannot simply follow the customary lawyerly path of beginning today and working backward.”).

181. Intermediate scrutiny, at least within the confines of equal protection jurisprudence, generally requires that the state show “an exceedingly persuasive justification” for its discriminatory behavior. *See* United States v. Virginia, 518 U.S. 515, 531 (1996). Deployed with regard to gender classifications, intermediate scrutiny also demands that a state show that “the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” *Id.* at 533 (internal citations and quotations omitted).
whether prosecutions under the Duro Fix might deny due process of law\textsuperscript{182} to some defendants in tribal courts.\textsuperscript{183} Since all American Indians are American citizens,\textsuperscript{184} there remains a serious question whether Congress may subject them to tribunals that lack certain constitutional protections. Justice Kennedy expressed these very concerns in Lara, and likely tipped his proverbial hand as to how he will eventually rule on the due process issues surrounding the Duro Fix.\textsuperscript{185} Whether other justices on the Court will join him depends largely on the manner in which difficult constitutional and statutory questions are answered.

Justice Kennedy’s reference in Duro to Reid v. Covert is especially worrisome for tribes in the due process context, and may ultimately set the framework for the constitutionalization of Duro’s result.\textsuperscript{186} In Reid, the Court held, in a plurality opinion, that civilian dependents of armed personnel overseas could not constitutionally be prosecuted in military courts. The case involved a defendant prosecuted for the murder of her husband, who was originally brought under court-martial to stand trial. The Supreme Court, finding that such a trial deprived the defendant of the constitutional protections outlined in the Fifth and Sixth Amendments, overturned the defendant’s conviction.\textsuperscript{187}

For Justice Kennedy, Reid may stand for the proposition that where Congress has the power to provide constitutional protections to U.S. citizen defendants, Congress must do so.\textsuperscript{188} Thus, the Court could find due process violations wherever the full scope of constitutional protections are not available to U.S. citizen defendants, such as under the Duro Fix.\textsuperscript{189}

\begin{footnotesize}
\textsuperscript{182} For this inquiry, “due process” does not include any equal protection component.
\textsuperscript{183} United States v. Lara, 541 U.S. 193, 209 (2004) (“\textsc{We} need not, and we shall not, consider the merits of Lara’s due process claim.”).
\textsuperscript{184} See 8 U.S.C. § 1401(b) (2000).
\textsuperscript{185} Lara, 541 U.S. at 213 (Kennedy, J., concurring) (“The terms of the statute are best understood as a grant or cession from Congress to the tribes, and it should not be doubted that what Congress has attempted to do is subject American citizens to the authority of an extraconstitutional sovereign to which they had not previously been subject.”).
\textsuperscript{186} 354 U.S. 1 (1957).
\textsuperscript{187} Id. at 5-6 (“\textsc{W}e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.”).
\textsuperscript{188} Duro v. Reina, 495 U.S. 676, 693-94 (1990) (“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. Cf. Reid v. Covert, 354 U.S. 1 (1957).”). Presumably, an extension of Reid to this degree would force the Court to reevaluate its longstanding holding in Talton v. Mayes, 163 U.S. 376 (1896), that tribal actions are not subject to constitutional limitations. See infra note 195 and accompanying text. For support of this reevaluation, see James A. Poore III, The Constitution of the United States Applies to Indian Tribes: A Reply to Professor Jensen, 60 MONT. L. REV. 17 (1999).
\textsuperscript{189} Except, perhaps, where the consent of the prosecuted is obtained. See Lara, 541 U.S. at 214 (Kennedy, J., concurring) (“Perhaps the Court’s holding could be justified by an argument that by enrolling in one tribe Lara consented to the criminal jurisdiction of other tribes, but the Court does not
\end{footnotesize}
Although Justice Kennedy suggested that Congress’s power over tribal affairs was not seriously diminished even after Indians were considered U.S. citizens,\(^9\) he will likely attempt to convince his colleagues that Congress may not allow tribes to constructively violate constitutional norms.\(^9\)

However, it seems odd to argue that Congress must preempt tribal actions that would violate the Constitution had a state or federal actor performed them. Clearly, no such preemption is required against private actors, whose actions might violate the Constitution if the individual were considered a state actor. Of course, tribes hold a legal status distinct from that of individuals or private associations.\(^9\) Perhaps opponents of the *Duro* Fix will argue that Congress must preempt only other uniquely sovereign entities, a category which surely includes Indian tribes,\(^9\) from interacting with U.S. citizens without guaranteeing full constitutional protection.

However, such a claim belies the great weight of longstanding Supreme Court Indian law jurisprudence. Since the 1896 decision in *Talton v. Mayes*,\(^9\) the Supreme Court has found that tribal actions are not subject to constitutional limits. Indeed, *Talton* has been affirmed consistently since its holding.\(^9\) In *Talton*, a member of the Cherokee Nation was prosecuted by the tribe for murder after being indicted by a grand jury consisting of only five members.\(^9\) Alleging that the small size of the grand jury violated the Fifth Amendment’s protections in criminal trials, the defendant challenged his tribal conviction in federal court. The Supreme Court rejected the challenge, noting that “the existence of the right in congress to regulate the manner in which the local powers of the Cherokee Nation shall be exercised does not render such local powers federal powers arising from and

\(^9\) For an analysis of why tribes should not be treated as fungible entities more generally, see Prakash, *supra* note 17 (discussing problems surrounding treating all tribes as subject to the plenary powers doctrine).

\(^9\) *See* *Duro*, 495 U.S. at 692 (“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.”).

\(^9\) *Id.* at 693 (“As full citizens, Indians share in the territorial and political sovereignty of the United States . . . Indians like all other citizens share allegiance to the overriding sovereign, the United States. A tribe’s additional authority comes from the consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority.”) (emphasis added).

\(^9\) *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (“Indian tribes within ‘Indian country’ are a good deal more than ‘private, voluntary organizations.’”).

\(^9\) *Id.* at 557 (“Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory; they are a ‘separate people’ possessing ‘the power of regulating their internal and social relations.’”) (internal citations omitted).

\(^9\) 163 U.S. 376 (1896).

\(^9\) *Id.; see also* *Duro*, 495 U.S. at 693 (“It is significant that the Bill of Rights does not apply to Indian tribal governments.”); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194 n.3 (1978) (“In *Talton v. Mayes*, this Court held that the Bill of Rights in the Federal Constitution does not apply to Indian tribal governments.”) (internal citations omitted).

created by the Constitution of the United States.\footnote{197} As recently as 2001, the Supreme Court stated that "it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes."\footnote{198} Thus, if courts find that \textit{Reid} requires tribes to provide constitutional protections to those they prosecute, more than a century of Indian law may be overturned.\footnote{199}

Furthermore, the \textit{Talton} decision is buffered by more than just \textit{stare decisis} principles—it is consistent with the text of the Constitution and the Framers' intentions. From the language of the Constitution, it is clear that Indian tribes are separate and distinct from federal or state entities. Although the original Constitution mentions Indians only twice,\footnote{200} both references arguably support the notion that tribal sovereignty exists independently of federal government. Indian tribes were undeniably considered by the Framers to exist outside of the American polity.\footnote{201} Indeed, the Framers could not have intended for tribes, as members of distinct nations, to abide by the Constitution made in Philadelphia in 1789.\footnote{202} The Marshall Court recognized this principle several decades before \textit{Talton} was decided.\footnote{203} Later, in \textit{Elk v. Wilkins}, the Court declared that "[t]he Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states; but they were alien nations, distinct political communities."\footnote{204} Thus, constitutional text and subsequent judicial interpretations of the Framers' meaning both offer insight into the proper status of tribes in relation to the U.S. government and Constitution.

Staring down the barrel of constitutional text and what would be an explosive reversal of precedent, a majority of the Supreme Court is highly unlikely to vote to extend \textit{Reid} and overturn \textit{Talton}. Preserving \textit{Talton}, however, would not guarantee that the \textit{Duro} Fix is safe from constitutional deficiencies. Even if the Court found that Congress could sit idly while

\begin{itemize}
  \item \footnote{197} \textit{Id.} at 384.
  \item \footnote{198} Nevada v. Hicks, 533 U.S. 353, 383 (2001).
  \item \footnote{199} In instances where the Court found that a tribe need adhere to the limitations embodied in the federal Constitution, it did so apparently because the tribe had agreed to such terms by treaty. \textit{See} \textit{Roff v. Burney}, 168 U.S. 218, 220 (1897) ("So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction, over persons and property, within their respective limits.").
  \item \footnote{200} Indians are mentioned only in the Apportionment Clause, U.S. CONST. art. I, § 2, cl. 3, as "Indians not taxed" and in the Indian Commerce Clause, U.S. CONST. art I, § 8, cl. 3, as distinct both from "foreign nations" and from "the several states."
  \item \footnote{201} \textit{Prakash, supra} note 17, at 1083.
  \item \footnote{202} For an excellent explication of the thoughts of the Founders with regard to tribal status, see \textit{Mark Savage, Native Americans and the Constitution: The Original Understanding}, 16 AM. INDIAN L. REV. 57 (1991).
  \item \footnote{203} \textit{See} \textit{Cherokee Nation v. Georgia}, 30 U.S. (5 Pet.) 1, 18 (1831) ("At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe.").
  \item \footnote{204} 112 U.S. 94, 99 (1884).
\end{itemize}
tribes took actions that, had a state or federal actor performed them, would violate the Constitution, the Court might find that Congress may not assist other sovereigns in taking such actions. Walking the narrow line between upholding *Talton* while invalidating the *Duro* Fix thus seems at least possible, if haphazard. Just how the Court could navigate this Scylla and Charybdis problem is addressed in the following section.

B. Tribunals Without Full Constitutional Protections

The Sixth Amendment to the Constitution, applicable originally to the federal government and later incorporated against the states through the Fourteenth Amendment, demands that indigent defendants in criminal cases have access to effective assistance of counsel at the expense of the state.\(^ {205} \) Because their sovereignty predated the Union, however, Indian tribes are not bound by the terms of the American Constitution.\(^ {206} \) Thus, even though state and federal courts must provide indigent defendants with assistance of counsel free of charge, neither the federal Constitution nor the terms of ICRA require tribes to provide free assistance of counsel to defendants in tribal courts.\(^ {207} \) Additionally, the Sixth Amendment requires that defendants in criminal prosecutions be afforded an impartial jury comprised of one's peers.\(^ {208} \) ICRA requires only that tribal courts provide a jury at the defendant's request where imprisonment is a potential punishment; however, there is no provision for either the jury's impartiality or its makeup.\(^ {209} \) Lastly, the Fifth Amendment to the Constitution demands that persons not be held to answer for infamous crimes without being presented before a grand jury.\(^ {210} \) ICRA has no such requirement.


\(^ {206} \) *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."); *Talton v. Mayes*, 163 U.S. 376, 383-84 (1896) (holding that the Fifth Amendment is inapplicable to tribal actions).

\(^ {207} \) 25 U.S.C. § 1302(6) (2000) ("No Indian tribe in exercising powers of self-government shall... deny to any person in a criminal proceeding the right... at his own expense to have the assistance of counsel for his defense.") (emphasis added). At least one court has held that the limited right to counsel under ICRA renders another constitutional protection inactive. In *United States v. Doherty*, the Sixth Circuit found admissible a confession taken in the absence of defense counsel from a defendant who had been charged. 126 F.3d 769 (6th Cir. 1997).

\(^ {208} \) See U.S. CONST. amend. VI; see, e.g., *Neder v. United States*, 527 U.S. 1, 30 (1999) (Stevens, J., concurring) ("[T]he constitutional right to be tried by a jury of one's peers provides an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.") (internal citations and quotations omitted); Neb. Press Ass'n v. Stuart, 427 U.S. 539, 572 (1976) (Brennan, J., concurring) ("The right to a fair trial by a jury of one's peers is unquestionably one of the most precious and sacred safeguards enshrined in the Bill of Rights.").

\(^ {209} \) § 1302(10) ("No Indian tribe in exercising powers of self-government shall... deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.").

\(^ {210} \) U.S. CONST. amend. V.
The possibility that U.S. citizens like Morris might be subject to the jurisdiction of unfamiliar tribunals, without previous indictment by a grand jury, without a lawyer, or without a jury of peers, may be difficult for some Supreme Court Justices to stomach. Even if it imposes no per se differential treatment between member and nonmember Indians, the Duro Fix still compels nonmember Indians to stand trial before tribunals, within U.S. borders, where they lack many constitutional protections. This will undoubtedly pose difficult issues for courts. Because of the challenges involved, the Supreme Court will likely visit the issue within a few years, and its decision could have serious consequences for both tribal sovereignty and the rule of law on reservations.

Conditions for nonmember Indian defendants in tribal courts, however, are not as dire as Duro Fix opponents may suggest. In fact, the court in Morris found that ICRA provides a “sufficient floor” of rights for U.S. citizens who come before tribal courts. Indeed, ICRA provides that tribes shall not conduct unreasonable searches and seizures subject any person to double jeopardy, compel defendants to incriminate themselves, deny to any person within its jurisdiction the equal protection of the laws, or deprive any person of liberty or property without due process of law. Moreover, ICRA provides most of the procedural guarantees of the Bill of Rights, including a habeas corpus provision that permits criminal defendants to petition a federal court in the case of illegal detention by a tribal court.

Nevertheless, the differences between the Constitution and ICRA are not insignificant. For instance, if nonmember Indians can demonstrate that tribal courts regularly deny effective assistance of counsel to indigent defendants in tribal courts, it will appear that Congress has, through the Duro Fix, recognized the inherent power of Indian tribes to under-protect the constitutional rights of U.S. citizens. Congress’s reversal of the original Duro opinion would undeniably be the but-for cause of these denials of justice.

Even in this regard, however, opponents of the Duro Fix confront several rejoinders. First, federal and tribal courts are free to interpret ICRA’s due process provision broadly. For example, where a defendant’s lack of resources has affected the outcome of his or her criminal proceeding, an ICRA due process violation has likely occurred and may be

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211. Morris v. Tanner, 288 F. Supp. 2d 1133, 1144 (D. Mont. 2003) (“ICRA provides a sufficient floor of rights that protects all Indians of all tribes no matter in which tribal court they find themselves and provides them a mechanism for federal review with complete constitutional protection.”).
212. § 1302(2).
213. § 1302(3).
214. § 1302(4).
215. § 1302(8).
216. See § 1303; Morris, 288 F. Supp. 2d at 1143.
vindicated in federal court. Second, federal courts may have the power to independently define the substance of ICRA’s guarantees, since ICRA guarantees that mirror the provisions of the Constitution are often interpreted using federal, not tribal, standards. Thus, the Supreme Court may find that the ICRA Due Process Clause protects the full spectrum of constitutional rights.

The Montana district court in *Morris* offered two arguments for denying the due process challenge to the *Duro* Fix. First, the court noted that a nonmember Indian’s trial in tribal court is no more unjust than a non-Montanan’s trial in a Montana court. Each forum brings criminal defendants before “judges whom they did not elect and subject to laws they may not support.” The next question, then, for the court in *Morris* was whether tribal courts sufficiently protected the rights of defendants brought before them. The court found that ICRA provided a sufficient baseline for securing the rights of nonmembers, and relied on habeas corpus review by federal courts to ensure that tribal courts did not abuse their jurisdiction.

The district court was unswayed by Morris’s contention that he possessed no formal political power in the CSKT and would thus be at a disadvantage in the CSKT’s courts. The court reasoned that Morris’s situation was analogous to that of an individual who is haled into a court in a state where he is not a citizen—a situation that is clearly constitutional as long as the court has jurisdiction over the noncitizen defendant. However, this analogy is not entirely accurate: while non-Indian citizens can be brought before state and, of course, federal judges for whom they did not vote, it is not the case that the criminal defendant could never vote for a state judge where he is being prosecuted. At least in theory, citizens of one state may change residences and become familiar with the courts of another state. Such is not the case with many tribes and nonmember Indians. The *Morris* court conceded that, “Morris’ situation does differ insofar as a Seminole may never be allowed to vote in a CSKT election.”

217. Randall v. Yakima Nation Tribal Court, 841 F.2d 897 (9th Cir. 1988) (finding due process violation where tribal court failed to rule on defendant’s request in forma pauperis, despite convincing evidence of indigency).
218. See id. at 900 (“Where the rights are the same under either legal system, federal constitutional standards are employed in determining whether the challenged procedure violates the Act.”).
219. *Morris*, 288 F. Supp. 2d at 1143 (“Non-Indian citizens are called into courts of other states all the time.”).
220. Id.
221. Id. at 1143-44. It has been suggested that a Court that would otherwise find the *Duro* Fix unconstitutional on these grounds might instead opt to construe ICRA in a manner so as to avoid the constitutional question. ICRA could conceivably be construed to contain every protection in the Constitution. See Skibine, supra note 26, at 40 n.248.
222. *Morris*, 288 F. Supp. 2d at 1143. Note that if voting in local or state elections is genuinely a necessary condition of being criminally prosecuted, there seems to be a constitutional problem with prosecuting those convicted felons who have previously been legally disenfranchised.
The second argument—that ICRA provides a sufficient baseline of rights—responds to Justice Kennedy’s misgivings in *Duro* that U.S. citizens could face prosecutions within U.S. borders without full constitutional protections. However, this baseline is unlikely to entirely eliminate this concern. Indeed, ICRA’s due process provisions are the same as they were when Justice Kennedy found significant deficits emanating from ICRA’s lack of guaranteed counsel in *Duro.* Additionally, Justice Kennedy’s focus on the consent necessary for one to be tried in a court “influenced by the unique customs, languages, and usages of the tribes they serve” is unlikely to be altered by any contention that justice delayed (through ICRA’s habeas provisions) is anything but justice denied.

The Supreme Court may resolve this by finding that enrollment in a federally recognized Indian tribe constitutes consent to being brought before the tribunals of other tribes. However, as Justice Kennedy observed in *Duro,* “Tribes are not mere fungible groups of homogenous persons among whom any Indian would feel at home.” Justice Kennedy repeated this premise in *Lara,* noting that while the Court may have implicitly accepted the notion of fungibility by confirming the power of Congress to restore inherent tribal authority, it “should be cautious about adopting that fiction.” Thus, unless the procedural guarantees between member and nonmember Indians are precisely the same (either through tribal or federal court actions), other Justices may align themselves with Justice Kennedy. Tribal courts would maintain jurisdiction to try their own members, but such jurisdiction might be found acceptable only because member Indians presumably consent to their loss of rights by voluntary association with politically sovereign entities. The only way around a judicial divestiture of criminal jurisdiction might be for tribes who wish to maintain jurisdiction over nonmember Indians to offer protections to defendants commensurate with the protections provided by the Constitution.

**C. Prosecution by an Unfamiliar Sovereign**

In addition to arguing that the provisions of ICRA under-protect the specific constitutional guarantees of U.S. citizens, Morris also alleged that he was denied due process by being haled into the tribunal of an unfamiliar

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224. *Id.*

225. *Id.* at 695. See also Prakash, *supra* note 17.

souvereign. Although a tribe does not violate the Constitution by prosecuting nonmembers, Morris alleged a due process violation because Congress had explicitly authorized and allowed such a prosecution to occur by enacting the Duro Fix.\textsuperscript{228} Despite the fact that U.S. citizens are often prosecuted by foreign sovereigns,\textsuperscript{229} the Court may be unwilling to permit domestic dependent sovereigns to prosecute nonmember U.S. citizens, with or without congressional authorization.\textsuperscript{230} The Court could thus find that the Duro Fix is unconstitutional and return to nonmember Indians the immunity from tribal prosecutions they enjoyed before the Duro Fix.\textsuperscript{231}

Interestingly, courts have implicitly accepted the ability of federal actors to subject U.S. citizens to tribunals offering less than the full panoply of constitutional guarantees.\textsuperscript{232} Although the federal government clearly cannot exempt itself from its own constitutional demands, it does appear that it need not protect its citizens from foreign—or perhaps domestic dependent—tribunals that offer sub-constitutional rights. This is most obvious in instances where the United States extradites its citizens to other nations. The firm rule in these matters is that a suspect who is otherwise extraditable may not escape extradition simply by demonstrating that he is a U.S. citizen.\textsuperscript{233} Since extraditions occur solely by treaty agreements,\textsuperscript{234} it appears that individuals charged with offenses in other countries are subject to the jurisdiction of the foreign sovereign only because the United States has accepted and assisted in the exercise of that jurisdiction. Note

\textsuperscript{227} Morris, 288 F. Supp. 2d at 1143.

\textsuperscript{228} Id.

\textsuperscript{229} One instance of this phenomenon, involving a young male from Missouri who pleaded guilty to vandalism in Singapore and was subsequently caned with a bamboo rod, is quite memorable. See Robert Laurence, Symmetry and Asymmetry in Federal Indian Law, 42 ARiz. L. REV. 861, 902 (2000) ("Again, if one envisions a tribe as effectively a foreign nation, then the asymmetry affects the boundary crossers, but it becomes an asymmetry that we have all learned to tolerate. When one is in Singapore, the laws of Singapore apply, even if one is non-Singaporean. Ask Michael Fay.").

\textsuperscript{230} Id. ("[A]gain the question becomes the tolerability of Talton's result: will the American dominant society accept the fact that there are within its territory pockets of non-constitutional asymmetry?").

\textsuperscript{231} See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978) ("[F]rom the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty.").

\textsuperscript{232} See, e.g., Charlton v. Kelly, 229 U.S. 447 (1913) (finding U.S. citizen extraditable to Kingdom of Italy); Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986) (finding U.S. citizen extraditable to Great Britain).

\textsuperscript{233} Charlton, 229 U.S. at 465 ("That the word 'persons' etymologically includes citizens as well as those who are not can hardly be debatable. The treaty contains no reservation of citizens of the country of asylum."); Quinn, 783 F.2d at 782 ("United States citizenship does not bar extradition by the United States.").

\textsuperscript{234} See Factor v. Laubenheimer, 290 U.S. 276, 287 (1933) ("While a government may... voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled,... the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty.").
that in these extradition cases, no demonstration that the foreign tribunal offers protections commensurate with those of the U.S. Constitution is required.\textsuperscript{235} Thus, under ICRA, tribal courts may actually protect constitutional rights to a greater degree than many other sovereigns with which the United States holds extradition agreements. If tribal courts offer to criminal defendants procedural rights that more closely mirror the guarantees of the Constitution than do nations with which the United States possesses extradition agreements, there seems little reason to doubt that Congress does have the constitutional capability to subject its own citizens, at least in some instances, to sub-constitutional judicial forums.

Indeed, the Supreme Court has previously approved of Congress’s actions in instances where it has failed to apply the full force of the Constitution to quasi-foreign entities.\textsuperscript{236} In one of the most prominent of the Insular Cases, the Court emphasized that the Constitution itself only bore relevance for “states, their people, and their representatives.”\textsuperscript{237} Perhaps more notably, \textit{Reid v. Covert}, the very authority that Justice Kennedy invoked for his proposition that Congress may not subject tribes to sub-constitutional forums, cites the Insular Cases for the principle that the Constitution did not fully apply to Puerto Rico because it was a recently conquered territory\textsuperscript{238} with “entirely different cultures and customs from those of this country.”\textsuperscript{239} Moreover, the \textit{Reid} Court stated that “that certain constitutional safeguards were not applicable to these territories” because “they had not been ‘expressly or impliedly incorporated’ into the Union by Congress.”\textsuperscript{240} Other than the fact that the nations at issue had been “recently” conquered, there appear to be striking similarities between the status of the territories in the Insular Cases and Indian tribes today. If the Court were to agree, the \textit{Duro Fix} would likely be safe from any sort of constitutional attack. Such a result is probably unlikely, however, since the idea of expanding the holding of the Insular Cases appears to receive substantial judicial criticism in the modern era.\textsuperscript{241}

\begin{itemize}
\item \textsuperscript{235} Courts will often require merely that a magistrate make a showing of probable cause and that the crime also be an offense against the laws of the United States. \textit{See} \textit{Quinn}, 783 F.2d at 783.
\item \textsuperscript{236} \textit{Downes v. Bidwell}, 182 U.S. 244 (1901) (finding, as the most famous of the Insular Cases, that the Constitution did not apply in full force to the territory of Puerto Rico). For a comprehensive analogy to the Insular Cases as well as their relation to the \textit{Duro Fix} (and the \textit{Morris} decision), see Alex Tallchief Skibine, United States v. Lara, \textit{Indian Tribes, and the Dialectic of Incorporation}, 40 TULSA L. REV. 47, 62-70 (2004).
\item \textsuperscript{237} \textit{Downes}, 182 U.S. at 251.
\item \textsuperscript{238} \textit{Reid v. Covert}, 354 U.S. 1, 13 (1957).
\item \textsuperscript{239} \textit{id}.
\item \textsuperscript{240} \textit{id}.
\item \textsuperscript{241} \textit{id} at 14 (“[I]t is our judgment that neither the cases nor their reasoning should be given any further expansion.”); \textit{see also} United States v. Pollard, 209 F. Supp. 2d 525, 539-40 (D.V.I. 2002) (“The Supreme Court . . . fabricated out of whole cloth a brand new constitutional doctrine to accommodate these territories populated by non-white, non-Anglo-Saxon, non-European peoples. This
D. Mirroring the U.S. Constitution

Unfortunately for tribes, the only means of avoiding further deprivation of Indian sovereignty may be an argument to an unsympathetic Supreme Court that it must hold to its word. Duro’s language is specifically confined to a review of inherent power absent congressional legislation.242 Since Congress enacted the Duro Fix, all agree that there is no longer an absence of such legislation. If the Duro Fix permits tribal courts to prosecute U.S. citizens, but allows such prosecutions only to the extent that the tribal courts offer full constitutional protections to defendants, the Court might yet decide to affirm the Duro Fix’s legitimacy despite due process concerns. At the very least, federal courts might wait until actual due process violations occur in tribal courts and only then intervene, pursuant to their habeas jurisdiction, to ensure that ICRA is enforced.243

Perhaps the best outcome for retaining tribal sovereignty may be for federal courts simply to construe ICRA broadly and find that Congress has already incorporated the constitutional protections for defendants. Alternatively, tribal court systems could themselves find that U.S. notions of equal protection and due process are incorporated by ICRA.244 However contrary these restrictions may be to traditional notions of tribal sovereignty,245 they may well be a necessary evil. Tribes can likely afford grand juries and lawyers more than they can afford a fundamental loss of law enforcement jurisdiction over their populations. Moreover, there remains the possibility that a judicially approved “Fix” in one context may lead Congress to restore other inherent tribal powers recently divested by the Court.246 In order to continue prosecuting nonmember Indians pursuant to their inherent sovereignty, tribes might paradoxically need to allow ICRA

is the racist doctrine of the ‘unincorporated’ territory, judicially created in the infamous series of decisions known as the Insular Cases.”(citations and footnotes omitted).

242. Duro v. Reina, 495 U.S. 676, 692 (1990) (“In the absence of such legislation, however, Indians like other citizens are embraced within our Nation’s great solicitude that its citizens be protected from unwarranted intrusions on their personal liberty.”) (internal citations and quotations omitted).


In any event, the appropriate way for Archambault (or any other nonmember Indian for that matter) to raise equal protection and due process objections to the exercise of criminal jurisdiction by a tribe or to the procedures applicable in tribal court is to present and seek a ruling on these objections as part of his tribal prosecution. Then, if the tribal court does not provide him relief, his objections can be made to the District Court via a petition for habeas corpus under 25 U.S.C. § 1303 challenging the legality of his detention by order of an Indian tribe.


244. See infra notes 247-53 and accompanying text.

245. See supra notes 9, 31-39 and accompanying text.

246. See, e.g., Skibine, supra note 26, at 34 (alluding to rumors of tribal lobbying efforts directed at a “Hicks Fix”).
to further impede on their self-governance—such that the Supreme Court will look favorably on the procedural protections of tribal courts.

The cost to tribal sovereignty of incorporating the Constitution against Indian tribes would of course be high. From *Talton* forward, there has been little doubt that tribes need not offer the full range of constitutional protections to defendants in tribal court. After all, tribes constitute independent quasi-sovereign governments that existed prior to the formation of the United States. Congress confirmed this notion by amending ICRA to include the *Duro* Fix and seeking to restore tribal sovereignty to its status prior to *Duro*. Had the Supreme Court read Congress’s tea leaves more acutely, it would have upheld the inherent power of tribes to prosecute nonmember Indians, and subsequent congressional legislation would be unnecessary. But the need for congressional legislation like the *Duro* Fix has once more drawn the judiciary back into the dispute and will compel a resolution to the dispute in the very near future.

Small deficits of procedural due process, as compared to those guaranteed by the U.S. Constitution, currently exist in tribal courts. These deficits are real and may have the cumulative effect of causing federal courts to invalidate the *Duro* Fix. It appears that at least one member of the Supreme Court will likely transfer that lack of trust in tribal court justice into an invalidation of congressional legislation. Other members of the Court may not follow, however, if it becomes clear to them that ICRA substantially incorporated constitutional protections.

### E. Possible Tribal Preemptive Maneuvers

Any individual, Indian or not, entering a tribal court is able to draw on the provisions of ICRA. Thus, while the *Duro* Fix is subject to constitutional challenges, individual tribal prosecutions of nonmember Indians under the *Duro* Fix are also subject to the equal protection and due process clauses of ICRA. Tribes should consider preempting aggressive attempts by federal courts to expand the coverage of these clauses by doing so

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248. A radical conception of constitutional common law might actually lead courts to refrain from reviewing the *Duro* Fix’s constitutionality. If courts found that congressional reversals of erroneous judicial decisions did not constitute state action *per se*, then those reversals might not be subject to constitutional challenges. The very complicated issues surrounding constitutional common law, and Congress’s attempts to reverse Supreme Court decisions through statutes, are outside the scope of this Comment.
themselves and ruling that U.S. notions of equal protection and due process are incorporated against the tribes through ICRA.249

As discussed above, ICRA contains no explicit provisions guaranteeing that defendants will be indicted by grand juries, legally represented at the tribe’s expense, or tried by an impartial jury of their peers. However, ICRA never states that its provisions may not be interpreted to include these rights—rights that would be protected were a defendant in a court subject to the Constitution. Thus, tribal courts could legitimately find, through ICRA’s due process clause,250 that depriving defendants of these rights in tribal courts is unlawful.

If tribal courts elect not to interpret ICRA in such a manner, federal courts may decide to step in and do so themselves. Federal courts, while exercising the habeas jurisdiction granted to them by ICRA,251 could themselves ratchet up ICRA protections by construing equal protection and due process guarantees broadly. With the looming threat of federal habeas review, tribal courts could simply try to beat federal courts to the punch. Assuming that tribal institutions have a better grasp on cultural and traditional norms than do federal courts, it seems that tribal courts serve as a better vehicle for preserving Indian sovereignty than do federal fora.252 Even if tribal decisions are similar to those that otherwise might have been handed down by federal judges, the mere fact that tribal institutions maintain control over tribal government is useful for Indian sovereignty.253

Federal court interpretations of tribal law are particularly haphazard. Because several provisions of ICRA are in para materia with federal law, federal courts often impose their own understanding of relevant provisions. Thus, the Eighth Circuit found that the equal protection clause of ICRA creates a “one person, one vote” rule in tribal elections,254 similar to the U.S. Constitution’s equal protection right.255 Similarly, the Ninth Circuit

249. Indeed, tribes are given the primary responsibility to interpret ICRA. See Cohen, supra note 9, at 669 (“The interpretation and application of [ICRA] are largely matters for tribal institutions alone.”).

250. § 1302(8).

251. § 1303.


253. For an argument that this is precisely the outcome that Congress anticipated, see Cohen, supra note 9, at 670 (“Congress did not intend that equal protection and due process principles . . . disrupt settled tribal customs and traditions. . . . With federal court review confined[,] . . . the accommodation of the ICRA standards to tribal traditions and structures will be made more gradually, and tribal institutions will have the most significant role in the process.”).

254. White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973). In light of Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), it is unlikely that the federal court was authorized to hear this challenge to tribal election law. Federal review of tribal court decisions after Martinez is limited to the habeas corpus review available in criminal, not civil matters.

held that the search and seizure provisions contained in ICRA are identical to those in the Fourth Amendment.\(^{256}\)

Some courts, particularly when evaluating whether tribal law deprives individuals of equal protection or due process rights, acknowledge that tribal law must be interpreted with sensitivity to the specific tribal context in which it arose.\(^{257}\) At least one of these courts, however, disregarded its own statement, finding that there is no need to weigh tribal interests if the tribal court procedures parallel those of federal law.\(^{258}\) While tribal interpretations of ICRA, including an intentional expansion of its due process clause, would likely impair Indian sovereignty, such a diminishment of sovereignty would at least keep tribal law out of the hands of federal courts.\(^{259}\)

At least one tribal court, the Supreme Court of the Navajo Nation, has attempted to avoid (without apparent success)\(^{260}\) the complicated questions surrounding tribal prosecutions of non-member Indians pursuant to the Duro Fix. Instead, the Navajo Supreme Court claimed to rely on the status of the nonmember defendant, Russell Means, as an in-law to tribal members, to find constructive consent to tribal criminal jurisdiction.\(^{261}\) Such consent was held to have emerged from the defendant’s status as a hadane, or one who assumes an intimate relationship with the tribe.\(^{262}\) The Navajo Supreme Court made this ruling despite the holding in Duro that political rights were the *sine qua non* of consent to be governed, and thus entailed

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\(^{256}\) United States v. Strong, 778 F.2d 1393, 1395 (9th Cir. 1985).

\(^{257}\) Randall v. Yakima Nation Tribal Court, 841 F.2d 897 (9th Cir. 1988); Wounded Head v. Tribal Council of the Oglala Sioux Tribe, 507 F.2d 1079, 1082-83 (8th Cir. 1975).

\(^{258}\) Randall, 841 F.2d at 897 (ruling specifically on the procedural due process implications of ICRA, and finding that the tribe’s failure to provide a lawyer constituted a violation of due process).

\(^{259}\) Of course, tribal court jurisprudence regarding constitutional concepts might also lead to some difficulties in the application of these doctrines. Such difficulties could occur even after a Supreme Court holding on the Duro Fix’s constitutionality. For instance, some confusion would inevitably result if the Court finds that the Duro Fix implicates the suspect class of Indians as a race, but nevertheless upholds the statute as satisfying a level of review similar to, but distinct from, strict scrutiny. If the Court allows legislation related to Indians the sort of equal protection leeway commonly applied to overriding national interests, problems will quickly emerge. If the Duro Fix only satisfies the constitutional inquiry because of Congress’s unique status as a trustee to Indian tribes, it would be unclear whether tribes would receive the same constitutional leeway in implementing the Duro Fix. Presumably, tribes could not disagree with a Supreme Court ruling that the Duro Fix implicates a suspect class. However, it is unclear whether tribes, in evaluating subsequent challenges to the Duro Fix under ICRA, must apply the constitutional concept of strict scrutiny. Theoretically, this issue could return to the Supreme Court, since federal court *habeas* review of tribal court decisions can bring tribal law issues into federal courts. Endless litigation, accompanied by confusion, could result.

\(^{260}\) Briefs have been filed in Means v. Navajo Nation, No. 01-17489 (9th Cir.), which has yet to be docketed.


\(^{262}\) For a thorough explication of the Navajo Supreme Court decision and the Court’s argument on consent, see Paul Spruhan, Means v. District Court of the Chinle Judicial District and the Hadane Doctrine in Navajo Criminal Law, TRIBAL L.J. (Winter 2000), available at http://tlj.unm.edu/articles/volume_1/spruhan/content.php#rfn1.
the corollary right of the government to bring the governed before its
courts.\(^{263}\)

While the specific foundation for the Navajo Supreme Court decision
may be not be revisited in federal court for some time, if ever, continued
reliance on Navajo common law for the purposes of classifying defendants
as \textit{hadanes} is likely misplaced. Although Means was free to sit in on tribal
meetings and arrange protests against the Navajo government, he main-
tained no formal political power to determine the political decisions of the
Navajo government.\(^{264}\) This lack of formal political control seems deter-
native. Any method of analysis which relies on a constructive consent, or a
contacts theory of consent, has already been disclaimed by the Court.\(^ {265}\)

Since constructive consent is unlikely to form a basis for jurisdiction
for a prosecution that falls outside of the \textit{Duro} Fix, tribal courts might con-
sider interpreting ICRA in a manner consistent with the constitutional pro-
tections available in federal courts. To interpret ICRA as a congressional
means of protecting the constitutional rights of U.S. citizens in tribal court
is not overly difficult and would likely assuage the concerns of federal
judges. If federal judges are unconcerned about tribal courts functioning
with constitutional deficiencies, it is much more likely that the \textit{Duro} Fix
will pass constitutional muster. While certainly not an optimal means of
preserving tribal sovereignty, and somewhat paradoxical in effect,\(^ {266}\) an
expansive ICRA construction may be necessary to ensure that Justice
Kennedy’s fears regarding the prosecution of U.S. citizens in tribal courts
are not shared by the other members of the Supreme Court.

\section*{IV Separation of Powers Doctrine and the \textit{Duro} Fix}

There is no doubt that the \textit{Duro} Fix reverses the effects of the
Supreme Court’s decision in \textit{Duro v. Reina}.\(^ {267}\) Arguably, however,
Congress could not make such a change without invading the authority of
the judicial branch in conflict with separation of powers principles. In
\textit{United States v. Enas}, the Ninth Circuit expressed grave reservations about

\begin{itemize}
  \item \(^{263}\) \textit{Duro v. Reina}, 495 U.S. 676 (1990) ("A tribe’s additional authority comes from the consent
of its members, and so in the criminal sphere membership marks the bounds of tribal authority.").
  \item \(^{264}\) \textit{Spruhan}, supra note 262.
  \item \(^{265}\) \textit{Duro}, 495 U.S. at 695 ("The contacts approach is little more than a variation of the argument
that any person who enters an Indian community should be deemed to have given implied consent to
tribal criminal jurisdiction over him. We have rejected this approach for non-Indians.... [N]on-
members... share the same jurisdictional status.").
  \item \(^{266}\) Indeed, the fact that ICRA did not fully extend the guarantees of the Constitution to criminal
defendants in tribal courts was seen as a victory for both tribal resources and sovereignty. \textit{See Pooldry v. Tonawanda Band of Seneca Indians}, 85 F.3d 874 (2d Cir. 1996) (describing the history of ICRA).
  Conceding the differences between ICRA and the Constitution is undoubtedly a loss for tribal
sovereignty, but perhaps a means to avoiding a much larger loss to sovereignty.
  \item \(^{267}\) 25 U.S.C. §1301 (2); \textit{Duro}, 495 U.S. at 676.
\end{itemize}
the ability of Congress to overturn a ruling of the Supreme Court legislatively.\textsuperscript{268} Since it is traditionally the function of the judiciary to "say what the law is,"\textsuperscript{269} the assertion by Congress that it could restore the power of Indian tribes to prosecute nonmember Indians seemed to conflict with the proper role of the legislative branch.\textsuperscript{270}

In the recent past, Congress has taken aggressive legislative measures in an attempt to overturn other Supreme Court decisions based on constitutional principles.\textsuperscript{271} For example, in City of Boerne v. Flores,\textsuperscript{272} the Supreme Court thoroughly rebuked Congress for attempting to legislatively reverse the effects of the Court's earlier decision in Department of Human Resources of Oregon v. Smith.\textsuperscript{273} Specifically, when Congress, pursuant to Section 5 of the Fourteenth Amendment, enacted legislation that purported to reestablish the pre-Smith Free Exercise jurisprudence, the Court struck it down.\textsuperscript{274}

However, the Duro Fix does not present the same separation of powers concerns. When faced with this question in Enas, the Ninth Circuit overcame its reservations by finding the Duro Fix to be a special breed of congressional legislation; the Duro Fix overturned a Supreme Court decision based neither on constitutional nor statutory interpretation. The Supreme Court's decision in Duro, the Enas Court found, functioned as constitutional common law and thus could be "repealed" by Congress.\textsuperscript{275}

The defendant in Duro, a member of the Torres-Martinez Band of Cahuilla Mission Indians, was brought before the Salt River Indian Reservation tribal court to stand for prosecution on the charge of murder.

\textsuperscript{268} 255 F.3d 662, 670 (9th Cir. 2001) ("In short, Duro squarely conflicts with the 1990 amendments to the ICRA. The Supreme Court said that Indian tribes did not have inherent jurisdiction over nonmember Indians; Congress said that they did.").

\textsuperscript{269} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

\textsuperscript{270} United States v. Enas, 255 F.3d 662, 673 (9th Cir. 2001) ("It is not uncommon for Congress and the courts to disagree. And, in certain contexts, it is clear which institution holds the trump card. When the issue is a constitutional one, the courts have the last word. This principle has a long pedigree, and requires no discussion here.").

\textsuperscript{271} City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997). For an argument that the result of City of Boerne was correct, even if based on somewhat faulty constitutional principles, see Will Trachman, The Danger of the Drafters' Intent: Section 5 of the Fourteenth Amendment and the Need to Limit Congressional Power, Findlaw, at http://writ.news.findlaw.com/student/20040414_trachman.html (Apr. 14, 2004).

\textsuperscript{272} City of Boerne, 521 U.S. at 536.

\textsuperscript{273} 494 U.S. 872 (1990).

\textsuperscript{274} City of Boerne, 521 U.S. at 536. See also United States v. Weaselhead, 156 F.3d 818, 824 (8th Cir. 1998) (finding, in a pre-Lara case, that the Duro Fix constitutes a delegation of federal power, and citing City of Boerne for the proposition that "[f]undamental, ab initio matters of constitutional history should not be committed to 'shifting legislative majorities' free to arbitrarily interpret and reorder the organic law as public sentiment veers in one direction or another.").

\textsuperscript{275} See Enas, 255 F.3d at 673 ("Although the Court speaks throughout of sovereignty—a term with constitutional implications—the decision does not rest on any constitutional provision. Nowhere does Duro intimate that it is announcing a constitutional precept, nor does it state that its analysis is compelled or influenced by constitutional principles.").
Challenging his conviction in federal court through the habeas provision of ICRA, Albert Duro alleged that the tribal prosecution was violative of the equal protection guarantee of ICRA. The district court found in his favor, but the Ninth Circuit reversed in a divided opinion. Although the Supreme Court’s opinion occasionally mentioned that it had concerns about the fairness of trying nonmember Indians in tribal courts, the Court’s actual holding in Duro was specifically related to common law divestiture notions discussed above. The Court stated only that:

Criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States.

Since the Duro ruling was not a constitutional one, Congress neither violated the Constitution, nor permitted tribes to do so, by enacting the Duro Fix; instead, it simply reversed a decision made on the basis of common law principles.

Without much explanation, the Ninth Circuit, in its instructions for remand in Morris v. Tanner, asked the Montana district court to reconsider the separation of powers question decided in Enas. The Montana district court, perhaps unclear why the Ninth Circuit would ask a lower court to reconsider an issue that had previously been decided by the Circuit’s en banc panel, simply repeated the logic set forth by the Enas majority and added the uncontroversial statement that Congress may exercise plenary power over Indian affairs. Such power, said the district court in Morris, conclusively entailed that “[the] law does not violate the principle of separation of powers.” By asking a lower court to reconsider its earlier en banc ruling, the Ninth Circuit seemingly demonstrated its lingering ambivalence toward the Duro Fix, as well as its reluctance to affirm congressional ability to overturn Supreme Court decisions.

While the separation of powers concern is not entirely without merit, qualms about congressional attempts to overturn decisions of the judiciary are unfounded when the initial decision is based on principles not contained within the Constitution. The Court has consistently held that Congress may reverse the effects of a Supreme Court judgment in a number of arenas. One of the most prominent examples, which provides a useful analogue for Indian law, is the congressional reversal of Supreme Court decisions involving the negative implications of the Interstate Commerce

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276. Duro v. Reina, 851 F.2d 1136 (9th Cir. 1988). Both the panel opinion and the dissent were later revised. Id. at 1136.
277. See supra notes 36-60.
 Clause.\textsuperscript{281} Since the Constitution grants Congress the explicit power to regulate commerce amongst the states, the Supreme Court has long held that state regulations that discriminate against interstate commerce are constructively precluded from taking effect.\textsuperscript{282} However, Congress may waive its exclusive ability to regulate commerce and thus authorize states to discriminate against interstate commerce in some limited contexts.\textsuperscript{283}

The parallel between the dormant Commerce Clause and the separation of powers issues in \textit{Morris} is clear. Justice Kennedy's \textit{Duro} opinion seems to view the attempts of tribes to exercise criminal jurisdiction over nonmember Indians as similar to a state burdening interstate commerce. \textit{Duro} noted that tribes lack powers—such as the ability to try nonmember Indians—that would be inconsistent with their domestic dependent status, implicitly assumed upon discovery.\textsuperscript{284} The \textit{Duro} Fix is arguably the return of that power and is therefore within Congress's ability. Congress should not be bound by the Supreme Court's interpretation of non-constitutional Indian law principles any more than it is bound by decisions limiting the ability of states to discriminate against interstate commerce.\textsuperscript{285} Since Congress is permitted to reinvest what judges have taken away (without the benefit of constitutional text) in the dormant Commerce Clause arena, it must be the case that the analogue should obtain in federal Indian law.

This argument appears to have been confirmed by the Supreme Court in \textit{Lara}.\textsuperscript{286} While only Justice Stevens was willing to note explicitly that the analogy to the Court's dormant Commerce Clause jurisprudence was

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\item \textsuperscript{281} U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power...[t]o regulate Commerce... among the several States.").
\item \textsuperscript{282} \textit{See, e.g.,} Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 231 (1824) (Johnson, J., concurring) ("If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the states free from all invidious and partial restraints."); \textit{Camps Newfound/Owatonna, Inc. v. Town of Harrison}, 520 U.S. 564, 571 (1997) ("We have subsequently endorsed Justice Johnson's... conclusion that the Commerce Clause had, not only granted Congress express authority to override restrictive and conflicting commercial regulations adopted by the States, but that it also had immediately effected a curtailment of state power.").
\item \textsuperscript{284} \textit{Duro}, 495 U.S. 676. For a strong criticism of this contention, see \textit{Frickey, supra} note 10, at 37-44.
\item \textsuperscript{285} \textit{Frickey, supra} note 10, at 69 ("In essence, the Court has inferred, from a grant of congressional power, an implied, judicially enforceable limitation upon state power... In many respects, the dormant Commerce Clause methodology seems analogous to the implicit-divestiture approach of \textit{Oliphant} and its progeny.").
\item \textsuperscript{286} \textit{United States v. Lara}, 541 U.S. 193 (2004).
\end{itemize}
apt, the Court’s finding that the Duro Fix was the product of Congress’s plenary power to raise or lower the inherent ability of tribes seems to imply that the Court’s Duro decision was not binding on Congress. Since the Enas Court was concerned that Congress had attempted to overturn a constitutional decision, which we know, after Lara, was not the case, the separation of powers concerns raised by the court in Enas are unfounded.

Critics of the analogy between the dormant Commerce Clause doctrine and the Duro Fix may argue that Congress is unable to waive nonmember Indians’ rights in the same way that it waives its own authority to legislate in a given arena. Specifically, while congressional authorization may occur where implicit doctrines emerge from enumerated legislative powers, such authorization may not occur if the judiciary has interpreted the explicit provisions of the Constitution to preclude government action generally. For example, Congress may not waive the requirements of equal protection or due process guarantees simply by waiving its exclusive authority over interstate commerce.

In the case of the dormant Commerce Clause, Congress merely authorizes the states to burden interstate commerce in a way that Congress could have chosen to do on its own. Critics of the Duro Fix would argue, then, that while Congress may delegate the authority to try nonmember Indians, it may only do so as long as that delegation does not violate defendants’ constitutional rights. Congress may not simply waive the federal governmental interest in preventing “unwarranted intrusions [into its citizens’] personal liberty.” In Lara, Justice Kennedy echoed these concerns, noting that the majority may have gone too far in confirming Congress’s constitutional power to enact the Duro Fix.

287. Id. at 1639 (Stevens, J., concurring) (“Given the fact that Congress can authorize the States to exercise—as their own—inherent powers that the Constitution has otherwise placed off limits, I find nothing exceptional in the conclusion that it can also relax restrictions on an ancient inherent tribal power.”) (internal citations omitted).

288. Id. at 1636 (“Oliphant and Duro make clear that the Constitution does not dictate the metes and bounds of tribal autonomy, nor do they suggest that the Court should second-guess the political branches’ own determinations.”).

289. See, e.g., Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 881 (1985) (“Equal protection restraints are applicable even though the effect of the discrimination in this case is similar to the type of burden with which the Commerce Clause also would be concerned.”); Cf. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 732-33 (1982) (“[N]either Congress nor a state can validate a law that denies the rights guaranteed by the Fourteenth Amendment.”). Also unclear is the extent to which Congress may waive its own powers over interstate commerce to benefit an individual state. If Congress, for example, authorized the Massachusetts legislature to enact an airline travel policy for the entire nation, it seems unlikely that the Court would remain silent. See Laurence H. Tribe, 1 American Constitutional Law 1038 (3d ed. 2000).


292. Lara, 541 U.S. at 212 (Kennedy, J., concurring).

To hold that Congress can subject him, within our domestic borders, to a sovereignty outside the basic structure of the Constitution is a serious step. The Constitution is based on a theory of original, and continuing, consent of the governed. Their consent depends on the
In this respect, the issues relating to the separation of powers concerns mirror precisely the issues of equal protection and due process. If the Duro Fix cannot pass constitutional muster under these clauses, then enacting repeated versions of the Duro Fix, all constitutionally infirm, would necessarily violate the separation of powers doctrine. The two questions posed by the Ninth Circuit in Morris—whether the Duro fix (1) violates equal protection and due process and (2) violates separation of powers—thus collapse into one. The separation of powers question is therefore an afterthought to the other constitutional questions, any one of which would have the effect of invalidating the legislation.

One final note on this point is required. If the Supreme Court were to find that the Duro Fix is invalid, confusion would inevitably result over the status of nonmember Indians in both past and future tribal criminal prosecutions. The interaction of Congress and the judiciary would further complicate these important legal questions. Entirely apart from the difficult retroactivity questions, we might ask whether tribes could ever return to their pre-Duro position after a finding that the Duro Fix is unconstitutional. Suppose, for instance, that the Court finds Congress indeed violated the Due Process Clause of the Fifth Amendment when it enacted the Duro Fix. Opponents of the Duro Fix would likely argue that nonmember Indians would then return to their post-Duro position—that is, immunity from prosecution by tribes in which they are not enrolled members. The question is more nuanced, however.

The decisions that divested tribal governments of inherent authority, both criminal and civil, claimed to have rested on the “shared presumptions” of Congress, the executive branch, and the lower federal courts. The Court noted in Oliphant that, while not conclusive, congressional legislation, as well as the other sources of these “shared presumptions,” factored heavily in guiding the Supreme Court to determine whether tribes had been implicitly divested of their inherent power upon discovery. But if this is the case, and the original Duro opinion followed...

Understanding that the Constitution has established the federal structure, which grants the citizen the protection of two governments, the Nation and the State.

Id. (citations omitted).


294. Oliphant, 435 U.S. at 206 (“While not conclusive on the issue before us, the commonly shared presumption of Congress, the Executive Branch and lower federal courts that tribal courts do not have the power to try non-Indians carries considerable weight.”).

295. Id. at 203 (“Congress’ concern over criminal jurisdiction in this proposed Indian Territory... suggests that Congress shared the view of the Executive Branch and lower federal courts that Indian tribal courts were without jurisdiction to try non-Indians.”).
the same rationale, it would seem that the very attempt by Congress to enact the Duro Fix, even if the attempt failed to pass constitutional muster, could be used as evidence of Congress’s presumption that the ability to try nonmember Indians in tribal courts is one component of a tribes’s inherent authority. Thus, Congress and the Court might indeed influence one another, but only to the extent that Congress would alter the original basis for the Duro decision. If so, then a finding that the Duro Fix is unconstitutional might only set the stage for a dramatic reversal of the original 1990 Duro decision. Such a result would be a surprising, but certainly possible, turn of events.

CONCLUSION

Morris appears to signal a significant shift in the nature of legal challenges to the Duro Fix. Initially, courts confined their reviews of the statute to assessing the Duro Fix’s implications, avoiding questions of its underlying legitimacy. Now, however, challenges to the Duro Fix’s constitutionality have emerged, and courts will have to wrestle with questions of its legitimacy. This trend likely implies that both equal protection and due process challenges to the Duro Fix will soon be heard by appellate courts and eventually the Supreme Court, which postponed the question in Lara. A finding on the Duro Fix’s underlying legitimacy seems inevitable.

The danger for tribal sovereignty after Lara may not be that the Court will strike down the Duro Fix in its entirety. Indeed, the Court may be reluctant to reject the will of Congress while simultaneously creating a jurisdictional void. Because of these considerations, it seems likely that the Court’s skepticism of Indian sovereignty and tribal courts will bow to Congress’s near-plenary power over Indian affairs. However, Indian tribes may win only a pyrrhic victory. The Court’s willingness to uphold the Duro Fix may come at a significant price to tribes if it requires construing ICRA to incorporate wholesale protections for defendants that are imported from the Constitution. Such a construction would significantly hinder tribal

296. See United States v. Enas, 255 F.3d 662, 668 (9th Cir. 2001) (“Much of the Court’s analysis [in Duro] was explicitly historical. The Court considered the history of tribal jurisdiction at length, pointing to various federal jurisdictional statutes, the courts of Indian offenses, and the history of tribal courts. This approach was not surprising, as Duro chiefly relied on two earlier cases—Wheeler and Oliphant—that employed a similarly historical methodology.”). Although Justice Kennedy in Duro never repeated the phrase “shared presumptions,” he did look closely at congressional legislation which broadly classified all groups of Indians. Noting that these were merely statutes describing how the federal government treated Indians, he declined to find them useful for how Congress expects tribes to treat nonmember Indians. See Duro v. Reina, 495 U.S. 676, 689-90 (1990). The Duro Fix appears to fill the gap that Justice Kennedy noted in the original Duro opinion.

297. See Robert N. Clinton et al., supra note 154, at 21 (“[T]he Court in these cases based its descriptions of inherent tribal authority upon the sources as they existed at the time . . . . Congressional legislation constituted one such important source. And that source was subject to change. Indeed Duro itself anticipated change by inviting interested parties to address the problem to Congress.”) (citations omitted).
court independence and sustain the *Duro* Fix only at a significant expense to tribal sovereignty. Tribes may thus face the very real paradox of exercising their inherent criminal jurisdiction only by voluntarily subjecting themselves to a Constitution that has previously been held inapplicable to them.