

The Congressional Response to *Duro v. Reina*: Compromising Sovereignty and the Constitution

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INTRODUCTION

The drive into Lapwai, Idaho, can be puzzling for a first-time public defender in the Nez Perce Tribal Court. Several of the Main Street shops are boarded up; others are covered by graffiti. The streets are often empty, save for barking dogs. Frayed banners play against the facade of the Lapwai high school, proclaiming championships long past. The court itself is in a building built of cinder block, advertising "Nez Perce Printing" in turquoise letters on one side. The first-time defender queries, "Are we there?"

From this sear landscape of the Idaho Palouse, Chief Joseph, the "Indian Napoleon," led proud bands of "non-treaty" Indians in the Nez Perce Wars little more than one hundred years ago.¹ Two centuries ago, not far from here, the mighty Nez Perce tribes feted Lewis and Clark on their westward expedition. But seeing Lapwai through the eyes of a law student on her first visit to the Nez Perce reservation is like noticing the clutter in your house only when an unexpected guest arrives. You glance around uneasily. The clash of cultures that the student sees confounds her expectations of what an Indian nation is or ought to be.

The clash resounds still more when the first-time defender confronts the knot of tribal jurisdiction. She discovers that the Nez Perce tribe can prosecute her client, a member of the Umatilla tribe, for a misdemeanor committed on the reservation, but cannot try her client's confederate because he is non-Indian. She wonders at the inconsistency.

Five hundred years have passed since Columbus landed in the New World. Little in the culture of Native Americans has remained untouched, unchanged, or entirely consistent with the past. The number of people identifying themselves as Indians may be the same now as it was in 1492,² but the numbers belie

¹ ALVIN M. JOSEPHY, JR., *NEZ PERCE COUNTRY*, 123-52 (1983).

² HERMAN J. VIOLA, *AFTER COLUMBUS: THE SMITHSONIAN CHRONICLE OF NORTH AMERICAN INDIANS* 26-27 (1990); BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, *AMERICAN INDIAN AND ALASKA NATIVE AREAS*, 1990 Table 2 (1991). Viola observes that estimates of population vary widely. A figure of two million in 1492, used here for comparison with the contemporary population, was based on a tribe-by-tribe analysis of North American Indians by Douglas Ubelaker, a Smithsonian physical anthropologist. Other estimates vary widely. See STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 1 (1983) (estimating

five centuries in which the unwelcome consequences of "discovery" have been visited on Indians. Indian populations were sometimes vanquished in battle,³ often ravaged by disease,⁴ and more recently compelled to acculturate through policies of forced assimilation. In 1887 and for almost fifty years that followed, Congress attempted, through the Dawes Act, to assimilate Indians into mainstream culture by allotting reservation lands to individual Indians. Instead, the Act impoverished Indians and drastically reduced their lands.⁵ In 1953, Congress adopted a

population at one million); Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 3 n.1 (1987) (citing Louise Erdrich, *Where I Ought to Be: A Writer's Sense of Place*, N.Y. TIMES, July 28, 1985, § 7 (book review), at 1, 23) (estimating population at fifteen million).

³ Although settlers fought to defend against Indians, few tribes were in fact conquered in war. In a convincing indictment of federal Indian law, Milner Ball observes that the purported conquests occur principally in the pages of Supreme Court opinions. Ball, *supra* note 2, at 32, 36, 45, 115-16 (citing Nell J. Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215, 1244 (1980)). See also Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2295 (1989).

⁴ Depopulation occurred most often as a result of diseases brought by colonial Europeans for which Native Americans had little or no immunity. Authorities estimate that 50 to 90% of the American Indian population was killed by disease, principally in the 1500's. VIOLA, *supra* note 2, at 27, 47.

⁵ The Dawes Act, enacted as the General Allotment Act of 1887, 24 Stat. 388, attempted to transform tribal Indians into farmers. Each head of household was allotted either a 160-acre farming tract or a 320-acre grazing tract. The tracts were generally held in trust for 25 years, after which the allottees were given title in fee and granted citizenship. The Act was intended to cure the crippling poverty that characterized reservations in the late 19th century, but had the opposite result. Many of the tracts were virtually inaccessible to the allottees and many were leased to non-Indians during the trust period. As many as 26 million acres passed to non-Indians through sales, fraud, mortgage foreclosures, and tax sales. Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246, 256 (1989) (citing CHARLES WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 20 (1986)). Reservation boundaries were often diminished as unallotted lands were opened up for settlement. Compare *Rosebud Sioux Tribe v. Kneip*, 420 U.S. 584 (1977) (upholding diminishment of Rosebud Sioux reservation despite congressional silence with respect to boundaries) with *Solem v. Bartlett*, 465 U.S. 463 (1984) (finding no evidence of congressional intent to diminish boundaries of the Cheyenne River Sioux Reservation). See Pommersheim, *supra*, at 259-60. Between 1887 and 1934, following the Dawes Act, lands held in trust for, or in fee by, Indians diminished from 138 million acres to 48 million acres. CHARLES WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 20 (1986). Despite a moderate increase in reservation acreage since the 1930's, the most recent figures indicate that only 43.4 million of 70.2 million acres are held by tribes. BUREAU OF INDIAN AFFAIRS, U.S. DEPT. OF INTERIOR, ANNUAL REPORT OF INDIAN LANDS (hereafter REPORT OF INDIAN LANDS) 1 (1985); BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, SUMMARY POPULATION AND HOUSING CHARACTERISTICS, 1990, CPH-1-1, Table 10 (hereafter HOUSING CHARACTERISTICS). For a discussion of the Dawes Act and its repercussions, see WILLIAM C. CANBY, JR.,

concurrent resolution to force acculturation of tribal Indians by ceasing recognition of their tribal status.⁶ More than one hundred tribes and bands were terminated in the process.⁷ Although all but two of these tribes have since regained their status,⁸ many have been left with but a fraction of their former lands.⁹ The termination policy also caused countless Indians to abandon tribal life.¹⁰

Still, despite colonization and government efforts to force assimilation, a policy some now label ethnocide or genocide,¹¹

AMERICAN INDIAN LAW IN A NUTSHELL 19-25 (1988). See also, FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 206-36 (Five Rings Corp., 1986) (1942).

⁶ H. Con. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1953).

⁷ Charles F. Wilkinson and Eric Briggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 138, 151 (1977).

⁸ Fourteen tribal termination acts were passed between 1954 and 1962. Michael C. Walch, Note, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1187 (1983). By 1983, recognition had been restored to six of the tribes affected by these acts. *Id.* By late 1994, only the Mixed Blood Utes were unsuccessful in achieving restoration of their tribal status. *Tabbee v. United States*, 30 Fed. Cl. 1 (1993). Tribes restored after 1983 include the Klamath tribe, restored by the Klamath Indian Tribe Restoration Act, Pub. L. No. 99-398 (1986); Alabama-Coushatta tribe, restored by Ysleta del Sur Pueblo and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89 (1987); Ponca tribe, restored by the Ponca Restoration Act, Pub. L. No. 101-484 (1990); and Catawba tribe, restored by the Catawba Indians of South Carolina Land Claims Settlement Act of 1993, Pub. L. No. 103-116 (1993).

⁹ 67 Stat. B132 (1953). See, e.g., CANBY, *supra* note 5, at 23-26. Under the termination policy, members of terminated tribes were often given paltry sums in payment for their lands. The lands were often acquired by non-Indians, while the payments received by Indians were often dissipated in living expenses. Among tribes which were able to regain federal recognition, several could not reacquire reservation lands. Walch, *supra* note 8, at 1193. The Coquille tribe in Coos Bay, Oregon, restored in 1989, reportedly owns only a single acre. See, e.g., Timothy Egan, *Back From Oblivion, a Tribe Forges a Future*, N.Y. TIMES, Nov. 25, 1991, at D10. The termination policy failed as decisively as the Dawes Act to effect a general acculturation of American Indians, and was repudiated in 1970 when a new policy of Indian self-determination was announced. 116 CONG. REC. 23,258 (1970). Successive administrations have reiterated the latter policy. 19 WEEKLY COMP. PRES. DOC. 98 (Jan. 24, 1983); 27 WEEKLY COMP. PRES. DOC. 783 (June 14, 1991); 30 WEEKLY COMP. PRES. DOC. 936 (May 2, 1994).

¹⁰ In conjunction with the termination policy, the Bureau of Indian Affairs offered grants to attract reservation Indians into urban areas. For this reason, and because of the poverty the policy frequently engendered, the number of Indians living in urbanized areas increased by 536% between 1950 and 1970, or at 10 times the rate of increase among Indians living in rural areas. In 1950, only 16% of American Indians resided in urbanized areas. By 1970 the urban share had increased to nearly 45%. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES Table 21 (1965), Table 35 (1976). See, e.g., Canby, *supra* note 5, at 23-26.

¹¹ See, e.g., Robert N. Clinton, *The Rights of Indigenous Peoples as Collective Group Rights*,

Indians today have seemingly secured a lasting separate identity. The federal government recognized more than three hundred tribes and two hundred Alaska Native entities by the close of 1993.¹² As of 1994, more than one hundred other groups had either filed letters of intent to commence the process of acknowledgement or were in the process of review.¹³

The number of Americans identifying themselves as Indians has also surged. In 1890, when census counts of Indians began, they numbered scarcely one-tenth as many as they had five centuries before.¹⁴ Yet, during recent years, the Indian population has been expanding at nearly twelve times the rate of the nation as a whole. The Indian population increased by 1.2 million between 1970 and 1990, or by nearly one and one-half times.¹⁵ This increase occurred because of several factors: Indians have more children than do people in the population as a whole;¹⁶

32 ARIZ. L. REV. 739, 746 (1990) (referring to terminology expressed in the draft *Universal Declaration of Indigenous Rights*, U.N. Doc. E/CN.4/Sub.2/24, Annex II (1988)); Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 688 n.28; Todd Howland, *U.S. Law as a Tool for Social Change: A Contextual Examination of the Human Rights Violations by the United States Government Against Native Americans at Big Mountain*, 7 B.C. THIRD WORLD L.J. 61, 92 (1987).

¹² Notice, 58 Fed. Reg. 54,364 (1993). As of October 21, 1993, the Bureau of Indian Affairs enumerated 320 tribal entities in the contiguous 48 states, and 226 Alaskan Native entities. *Id.* In addition, Congress restored federal recognition of the Catawba tribe of South Carolina on October 27, 1993. Act of Oct. 27, 1993, Pub. L. No. 103-116.

¹³ BRANCH OF ACKNOWLEDGEMENT AND RESEARCH BUREAU OF INDIAN AFFAIRS, U.S. DEPT. OF JUSTICE, SUMMARY STATUS OF ACKNOWLEDGEMENT CASES (1994).

¹⁴ The count for 1890 totaled 243,524, although published results cautioned that "vital statistics in regard to Indians are somewhat defective." BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 122-23 (1901). Prior to 1890, "[f]igures for Indian Territory and Alaska are omitted from the census, as the inhabitants are not considered citizens." BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 146-47 (1879). Prior to 1924, comparatively few Indians were considered citizens of the United States. The Constitution provides that representatives and direct taxes shall be apportioned among the several states "according to their respective Numbers . . . excluding Indians not taxed . . ." U.S. CONST. art. I, § 2, cl. 3. On this basis, Indians who had not acculturated—"Indians not taxed"—were not citizens. Those who acquired citizenship did so as a result of treaties, receipt of allotments, military service, or marriage to citizens. COHEN, *supra* note 5, at 153-54. Universal citizenship was not granted until 1924, when all Indians born within the territory of the United States were naturalized. 8 U.S.C. § 3 (1988).

¹⁵ BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 31 (1976); BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, AMERICAN INDIAN AND ALASKA NATIVE AREAS: 1990 Table 2 (1991).

¹⁶ In 1986 the number of live births per 1,000 American Indians totaled 41.7, com-

census counts may be improving;¹⁷ and, there may be substantial intermarriage between Indians and non-Indians.¹⁸ The principal reason may lie, however, in a growing willingness among Americans of Indian ancestry to disclose their ethnic roots.¹⁹

But despite an apparent renaissance, American Indians in 1994 are a good deal different from those which Columbus came upon five hundred years ago. Comparatively few may be able to claim that, measured by blood alone, they are more Indian than not. Certainly, race is but one factor in determining whether a person may be called an Indian. It is a factor, moreover, that has been imposed on Indians by non-Indians.²⁰ Sociologically and politically, cultural identity with a tribe will often matter more.²¹ Yet, upon the occasion of the quincentennial,

pared with 23.7 per 1,000 people in the United States as a whole. HAROLD L. HODGKINSON, *THE DEMOGRAPHICS OF THE AMERICAN INDIANS: ONE PERCENT OF THE PEOPLE; FIFTY PERCENT OF THE DIVERSITY 15-19 (1990)*. Infant mortality rates among Indians, formerly more than twice the national average, fell in 1985 to the lowest of any ethnic group in the nation. *Id.* The decline may be attributable to the efforts of the Indian Health Service. *Id.* However, American Indians have a somewhat shorter life expectancy than do members of the nation's white population, a circumstance explained by death rates from accidents, suicides, and alcohol-related causes that far surpass those in the nation as a whole. *Id.*

¹⁷ Prior to the 1980 census, census counters' observations were the primary source of information about race and ethnicity. Since 1980, information on race has been obtained principally by self-identification. As a probable result, 1980 census results indicate a greater propensity than in 1970 for individuals to identify themselves as Indians, particularly in urban areas. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, *CHARACTERISTICS OF AMERICAN INDIANS BY TRIBES AND SELECTED AREAS: 1980 B-3, B-4 (1989)*. Self-identification aside, whether the total of 1.9 million American Indians counted in 1990 is accurate is open to dispute. *See infra* note 304 (discussing census data).

¹⁸ Some demographers have estimated that 50% of Indians marry non-Indians. Dirk Johnson, *Census Finds Many Claiming New Identity: Indian*, N.Y. TIMES, Mar. 5, 1991, at A1. Census figures for 1980, the most recent available, suggest a lower incidence of intermarriage, at least among Indians residing on reservations. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, *AMERICAN INDIANS, ESKIMOS, AND ALEUTS ON IDENTIFIED RESERVATIONS AND IN THE HISTORIC AREAS OF OKLAHOMA (EXCLUDING URBANIZED AREAS) Table 1 (1985)*. In 1980, among reservation households in which one or more American Indians, Eskimos or Aleuts resided, only 4.5% contained members of other races. *Id.*

¹⁹ Johnson, *supra* note 18 at A16. Johnson attributes the burgeoning increases among American Indians mainly to a change in attitudes. *Id.* He finds that being Indian, or of Indian ancestry, is no longer stigmatic. *Id.* Whites, not Indians, are now depicted as savages; Indians, not whites, are seen as sensitive to ecology and to the proper use of resources. *Id.*

²⁰ *See* Ball, *supra* note 2, at 17 ("From the Indian perspective. . . the tribe is the heart of Indian identity; tribal membership was not based on racial criteria but was a religious-political matter. . . . The United States has imposed upon Indians its own, alien, definitions of 'tribe,' and it has made race a dominant factor in determining tribal membership.").

²¹ *See, e.g.*, Ronald R. Garet, *Communitality and Existence: The Rights of Groups*, 56 S. CAL.

there may be few Indians who can claim lineages that are more than vaguely aboriginal. Some who claim to be Indian, and who may receive preferences in governmental programs upon such basis, may have less than 1/2000 Indian blood.²² Others who gain tribal membership may have no Indian blood at all.²³ Still

L. REV. 1001, 1066-75 (1990); Nell J. Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984). Robert Clinton writes that "Indians are not individualistic." Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1023 (1981). Indian culture is built around a closely integrated tribal society and spiritual world, and the Indian derives identity from his role and relationship within that society and spiritual world. *Id.*

²² Johnson, *supra* note 18, at A16.

²³ Whether one may become a member of an Indian tribe is a determination which has been left, historically, to the tribes themselves, and requisites vary widely. Most tribal constitutions require that a person seeking membership must have a specified quantum of tribal blood, or, without regard to blood quantum, must be descended from a member of the tribe. The tribal constitution for the Fort Apache reservation, for example, requires at least one-half degree White Mountain Apache blood. Conversely, membership can be granted to persons in North Carolina's Eastern Band of Cherokees with as little as 1/32 degree Indian blood. 25 C.F.R. § 75.6 (1991). Membership in the Tunica-Biloxi tribe requires only 1/64 degree Indian blood. As of July 1991, the Bureau of Indian Affairs reported that 26 tribes, containing 78,530 enrolled members, did not require a blood quantum for membership, requirements being based instead on descendency. BUREAU OF INDIAN AFFAIRS, U.S. DEPT. OF INTERIOR, unpublished report of Tribal Enrollment Division (July 1991).

Many tribes confer membership through adoption. For example, membership in the San Carlos Apache tribe is granted to the spouses of tribal members, provided they have at least one-quarter degree Indian blood from any tribe. Whites have also been recognized as Indians through marriage with tribal members. *Cherokee Intermarriage Cases*, 203 U.S. 76, 88 (1906). See COHEN, *supra* note 5, at 133-37, 430-34.

Although tribal recognition is usually dispositive of a person's status, the federal government may impose its own criteria before extending benefits under various federal programs. While many regulations accept tribal membership as sufficient indicia of Indian ethnicity, others require a threshold blood quantum. Compare 25 C.F.R. § 26.1 (1991) (accepting tribal membership for employment assistance benefits purposes); 25 C.F.R. § 27.1 (1991) (accepting tribal membership for vocational training purposes); 25 C.F.R. § 20.1 (1991) (accepting tribal membership for employment preferences purposes) with 25 C.F.R. § 20.20 (1991) (requiring tribal members in Alaska and Oklahoma to possess a one-fourth or higher quantum of Indian or Native blood to qualify for certain financial assistance and human services benefits).

others of full blood may not even be recognized as Indians by the federal government,²⁴ or if they are, may have little or no land upon which to operate a tribal government.²⁵

Despite roiling sociopolitical changes, however, scholars of Indian law often write as if Indians and tribes were frozen in an ethnic stasis. Explicit in some and implicit in much of the literature is a conception that Indians remain culturally distinct, manifestly separate peoples. But, because the literature often does not account for Indian demographics and the effects of forced assimilation, its prescriptions frequently confound.

This clash of cultures has seldom been more evident than in the convoluted knot of criminal jurisdiction confronting tribes and Indians. Indian tribes may mete out justice to some who offend, but not to all. Tribes have been stripped of the ability to try non-Indians for criminal offenses. In 1978, in *Oliphant v. Suquamish Indian Tribe*,²⁶ the Supreme Court held that assertion of criminal jurisdiction over non-Indian citizens would constitute "unwarranted intrusions on their personal liberty" and would be inconsistent with a tribe's status as a domestic dependent sovereign.²⁷ Notably, *Oliphant* involved a reservation on which Indians constituted only a small fraction of the total population.²⁸ A 1990 Supreme Court decision, *Duro v. Reina*,²⁹ took *Oliphant* another step, holding that Indian tribes lack criminal jurisdiction over nonmember Indians as well.³⁰

²⁴ Indian tribes have complete discretion to determine who shall be granted membership. However, the federal government must acknowledge the tribes before they are entitled to exercise the incidents of sovereignty and before their members are recognized as Indians. Until recent years, few cases dealt with the question whether a group is entitled to recognition as a tribe. See, e.g., *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 581-82 (1st Cir. 1979) (holding that tribe had not maintained sufficient continuity of existence to merit recognition). Since *Mashpee*, the Interior Department has promulgated rules for the acknowledgment of tribes. 25 C.F.R. § 83.7 (1991). In 1977 there were an estimated 32,000 Indians living in some 133 Indian communities recognized by neither the federal nor state governments. WILKINSON, *supra* note 5, at 137 (citing AMERICAN INDIAN POLICY REVIEW COMM'N, 94TH CONG., 1ST SESS., 1 FINAL REPORT 467 (Comm. Print 1977)).

²⁵ See *supra* note 9 (discussing small land holdings of certain tribes).

²⁶ 435 U.S. 191 (1978).

²⁷ *Id.* at 210.

²⁸ *Id.* at 193 n.1.

²⁹ 495 U.S. 676 (1990).

³⁰ Until *Duro*, the terms "nonmember" and "non-Indian" were often used indiscriminately by the Supreme Court and Circuit Courts of Appeal. In this Article, the term nonmember Indian is used to describe a person who is eligible for membership in a federally

The following year, Congress enacted Public Law 102-137.³¹ The legislation was designed to reverse the Court's decision in *Duro* by formally recognizing tribal authority to try all Indians. Many tribes view Public Law 102-137 as critical. Without it, reservations with large numbers of nonmember Indians may be severely handicapped in their ability to govern.³²

Both *Duro* and *Oliphant* rest in part on a perceived want of clear congressional intent as to the extent of tribal jurisdiction. Now Congress has spoken. Public Law 102-137 recognizes the right of tribes to prosecute nonmember Indians, but fails to recognize a similar right for tribes to try and punish non-Indians. Thus, a challenge to Public Law 102-137 is certain to place squarely before the Court the question whether the legislation denies equal protection of the law. The legislation also undermines Indian sovereignty. If the Court upholds Public Law 102-137, it could limit tribal criminal jurisdiction to those who consent through enrollment in the tribe which seeks to prosecute.

This Article examines the rights of Indians to self-determination in light of *Duro*, Public Law 102-137, current scholarship, and Indian demography. It challenges the various scholarly conceptions advanced to protect Indian self-determination as being insufficient to support congressional action such as that encompassed in Public Law 102-137. It also asks Congress to recognize a measure of sovereignty that will validly protect the rights of Indians as separate peoples without offending principles of the Constitution.

Part I examines the *Duro* opinion and the legislative fix in context of the doctrine of inherent sovereignty. This doctrine, which traces to a trilogy of opinions by John Marshall, holds that tribal Indians retain the power to act as separate sovereigns except where their power is ceded by treaty or divested by the Congress. Part II discusses scholarly approaches to preserving tribal sovereignty in order to determine whether any constitutional doctrines or theories of group rights permit tribes to as-

recognized Indian tribe, but is not a member of the tribe asserting jurisdiction. Cf. Chriss Wetherington, Note, *Criminal Jurisdiction of Tribal Courts Over Nonmember Indians: The Circuit Split*, 1989 DUKE L.J. 1053, 1055 n.13 (1989) (defining nonmember Indian).

³¹ Act of Oct. 28, 1991, Pub. L. No. 102-137, 1991 U.S.C.A.N. 105 Stat. 646 (1991).

³² See *infra* note 84 and accompanying text (discussing jurisdictional void which would occur if tribes could not prosecute nonmember Indians).

sert jurisdiction over nonmember Indians but not over non-Indians. Part III analyzes demographic trends on reservations to determine whether distinctions can be drawn which justify disparate treatment of nonmember Indians and non-Indians, or, alternatively, which justify a congressional grant of power for tribes to assert criminal jurisdiction over all persons present on their reservations.

This Article concludes that Public Law 102-137, although conceived by advocates of Indians and supported by Indians themselves, is ill-suited to its purpose, is inherently racist, and should be held unconstitutional. Indian self-determination can best be protected by overturning precedent and legislation. This Article proposes in their stead a compromise of sovereigns: a dual court system in which both the rights of Indian groups and the rights of individuals can be protected.

I. *DURO* AND THE *DURO* FIX

A. *The Doctrine of Inherent Sovereignty*

The operative provision of Public Law 102-137 contains a single sentence. It makes permanent the temporary legislation Congress passed in 1990³³ to reverse the effects of *Duro v. Reina*³⁴ and to reinstate tribal jurisdiction over nonmember Indians. The temporary legislation had amended a 1968 statute known as the Indian Civil Rights Act (ICRA)³⁵ by incorporating a congressional statement concerning the sovereign rights of tribes, and by adding a definition of Indians for purposes of criminal jurisdiction. This definition, borrowed from other legislation,³⁶ allows tribal courts to assert criminal jurisdiction over nonmember Indians on the principal basis that they are ethnic

³³ Department of Defense Appropriations Act, Pub. L. No. 101-511, 104 Stat. 1856 (1990).

³⁴ 495 U.S. 676 (1990).

³⁵ The Indian Civil Rights Act (ICRA), Pub. L. No. 90-284, Tit. II, 82 Stat. 77 (1968) (codified at 25 U.S.C. §§ 1301-03 (1988)). Public Law 101-511, the temporary legislation that Public Law 102-137 makes permanent, is denominated "an Act to prescribe penalties for certain acts of violence or intimidation, and for other purposes," and amends section 1301, paragraph (2) of ICRA. 25 U.S.C. § 1301, ¶ 2. Many commentators view ICRA itself as an assault on Indian self-determination.

³⁶ Major Crimes Act, 18 U.S.C. § 1153 (1988); *see infra* note 139 (discussing Major Crimes Act).

Indians. In contrast, *Oliphant v. Suquamish Indian Tribe*³⁷ proscribes tribes from asserting similar jurisdiction over non-Indians.

The congressional expression of intent found in the legislation that Public Law 102-137 makes permanent anticipates the obvious equal protection issue raised by the differential jurisdiction between non-Indians and nonmember Indians. The statement acknowledges the "inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."³⁸ Fundamental in this statement is the concept that Indian tribes possess inherent powers which exist outside the Constitution.³⁹ Except as ceded by treaty or limited by the Congress,⁴⁰ Indian tribes retain the essential rights of separate sovereigns and may govern their affairs without regard to the strictures of the Bill of Rights. Public Law 102-137 recognizes this inherent power. To the extent the law succeeds, tribes that try nonmember Indians may do so without violating

³⁷ 435 U.S. 191, 210 (1978).

³⁸ Department of Defense Appropriations Act, Pub. L. No. 101-511, 104 Stat. 1892 (1990).

³⁹ This is the position advanced principally by Charles F. Wilkinson. WILKINSON, *supra* note 5, at 111-13; see also COHEN, *supra* note 5. "Perhaps the most basic principle of all Indian law . . . is the principle that those powers which are lawfully vested in an Indian Tribe are not, in general, delegated powers granted by express acts of Congress." *Id.* at 122. Rather, they are "inherent powers of a limited sovereignty which has never been extinguished. . . . What is not expressly limited [by Congress] remains within the domain of tribal sovereignty." *Id.* But see Richard B. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479, 480 n.7 (1979) (suggesting that use of term, "sovereignty," is confusing because it implies full powers of separate nations). Collins reasons that Indian tribes, like states, exercise certain independent authority, but within the Constitution. *Id.*

⁴⁰ ICRA, the legislation which Public Law 102-137 permanently amends, is one congressional limitation on Indian rights as separate sovereigns. The Act requires that tribes provide due process and grant equal protection under their own laws to persons over whom tribes have jurisdiction. 25 U.S.C. § 1302(8) (1988).

the Fifth and Fourteenth Amendments,⁴¹ even though *Oliphant* deprives them of the right to try non-Indians.

The concept of inherent power and tribal sovereignty can be traced to three opinions by John Marshall: *Johnson v. McIntosh*,⁴² *Cherokee Nation v. Georgia*,⁴³ and *Worcester v. Georgia*.⁴⁴ These opinions, each of which breathes life into many Indian law decisions, impose limitations on the aboriginal rights of tribes, yet recognize and leave intact substantial inherent sovereignty. In *McIntosh*, the Court held that Indians were restricted in their ability to convey real property. In Marshall's formulation, following "discovery" by Europeans, Indians retained "title of occupancy"⁴⁵ to their lands, but absolute or "complete ultimate title"⁴⁶ was vested in the discovering sovereign.⁴⁷ A similar concept is embodied in the Nonintercourse Act,⁴⁸ which denies Indians the right to freely alienate real property held in trust to non-Indians.⁴⁹

⁴¹ See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 n.7 (1978) (observing that Bill of Rights is not necessarily applicable in civil suits against tribes); *Talton v. Mayes*, 163 U.S. 376 (1896) (holding that Fifth Amendment guarantees do not apply to tribes). Although the Fifth Amendment does not contain an equal protection clause, the Court has reverse incorporated the equal protection clause of the Fourteenth Amendment into the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). The *Bolling* Court reasoned that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Id.*

⁴² 21 U.S. (8 Wheat.) 543 (1823).

⁴³ 30 U.S. (5 Pet.) 1 (1831).

⁴⁴ 31 U.S. (6 Pet.) 515 (1832).

⁴⁵ *McIntosh*, 21 U.S. at 592.

⁴⁶ *Id.* at 603.

⁴⁷ Milner Ball writes that *McIntosh* imposed few, if any, practical limitations on the sovereignty of tribes. Ball, *supra* note 2, at 23-29. *Id.* Rather, he argues, Marshall's concept of absolute title in the discovering sovereign was a legal fiction necessary to account for the fact Europeans neither conquered the Indians nor acquired many Indian lands by purchase. *Id.* Had they done either, or had Indians accepted the protection of colonial governments, Indians would have been incorporated by such governments and would hold their lands in fee. *Id.* Because neither conquest, purchase, nor intermixing occurred, Marshall invented absolute title as a means for the discovering sovereign to prevent other foreign sovereigns from obtaining tribal lands. *Id.* Ball reasons that because any possible transactions in absolute title between discoverers had already occurred, Indians' right to convey their "titles of occupancy" subject to the sovereign's absolute title created little if any encroachment on tribal sovereignty. *Id.* A purchaser's principal risk was that the Indians would annul the grant under their own laws. Ball asserts that this is precisely what occurred to the purchaser in *McIntosh*. *Id.*

⁴⁸ 25 U.S.C. § 177 (1988).

⁴⁹ See, e.g., *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-68 (1974).

In *Cherokee Nation*, the Cherokee tribe brought an original action in the Supreme Court to enjoin the State of Georgia from enforcing its laws in tribal territory. The Court ruled that the Cherokees were not a foreign state, and could not maintain an action in the courts of the United States.⁵⁰ Writing for the majority, Marshall opined that Indian tribes are

domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile, they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.⁵¹

The concept that Indian tribes are domestic dependent nations, or wards of the government, has played in many decisions since Marshall's pronouncement, sometimes to the benefit of Indians,⁵² but more often to their detriment.⁵³ Yet Marshall's opinion in *Cherokee Nation* also contains language that terms the Cherokees a distinct political society, "uniformly treated as a state, from the settlement of our country."⁵⁴

The same acknowledgement of sovereignty figured in *Worcester*,⁵⁵ the third of Marshall's Indian law opinions. In *Worcester*, the State of Georgia imprisoned a missionary because he failed to obtain state permission before entering Cherokee lands. The state considered the tribal lands to be part of its territory. Marshall, however, ruled that the Cherokee lands were extraterritorial to Georgia, and that the state lacked jurisdiction to enforce its laws on tribal property.⁵⁶ Non-Indians had no right to enter Cherokee lands without the Cherokee's consent, "or in conformity with treaties, and with the acts of congress."⁵⁷

⁵⁰ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 19 (1831). The Constitution provides that "[t]he judicial Power shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2, cl. 1.

⁵¹ *Cherokee Nation*, 30 U.S. at 17.

⁵² See *infra* note 179 and accompanying text (discussing employment preferences for Indians).

⁵³ See *infra* note 140 and accompanying text (discussing plenary power doctrine).

⁵⁴ *Cherokee Nation*, 30 U.S. at 16.

⁵⁵ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

⁵⁶ *Id.* at 560.

⁵⁷ *Id.*

Marshall's decisions denied Indians the right to act as distinctly separate sovereigns in diplomatic and commercial relations with foreign nations.⁵⁸ Nonetheless, the decisions preserved significant inherent rights. One scholar, Philip P. Frickey, suggests that these seminal decisions were Marshall's own ingenious and partially successful attempt to mediate the tension between colonialism and constitutionalism.⁵⁹ If so, they appear to be an early appreciation of the clash between ideals and reality, and that may be why they have endured. For nearly 150 years afterwards, the principles announced in *McIntosh*, *Cherokee Nation*, and *Worcester* continued to apply. Indians administering their own laws in their own territory could do so beyond the reach of the Constitution, except where sovereignty was ceded by treaty or divested by the acts of Congress. But in 1978, in *Oliphant v. Suquamish Indian Tribe*,⁶⁰ the Court itself assumed the power to divest tribes of inherent sovereignty.

B. Judicial Limitations of Inherent Sovereignty

1. *Oliphant v. Suquamish Indian Tribe*

In *Oliphant*, the Suquamish tribe sought to prosecute a non-Indian for assaulting a tribal officer and resisting arrest. The United States District Court and the United States Court of Appeals for the Ninth Circuit both denied petitions for habeas corpus. The Supreme Court granted certiorari.⁶¹ Justice Rehnquist, writing for a divided court, developed a three-prong test to determine whether the tribe retained inherent sovereignty to prosecute non-Indians. In the first prong, the Court determined that tribes historically had not assumed criminal jurisdiction over non-Indians by treaty or custom, although the evidence was equivocal.⁶² In the second prong, the Court examined federal enactments to determine whether Congress had by action or inaction recognized such jurisdiction. Finding the record incon-

⁵⁸ *Duro v. Reina*, 495 U.S. 676, 699 (1990) (Brennan, J., dissenting).

⁵⁹ Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

⁶⁰ 435 U.S. 191 (1978).

⁶¹ *Id.*

⁶² *Id.* at 197-200, 208.

clusive, the Court expanded on a decision reached almost a century before, when congressional policies sought complete assimilation.⁶³ The Court concluded that Congress never intended to recognize or legislate the right of Indians to assert criminal jurisdiction over non-Indians.⁶⁴

In the decisive third prong, the Court turned John Marshall's decisions in *McIntosh*, *Cherokee Nation*, and *Worcester* on their heads. Justice Rehnquist reasoned that the inherent sovereignty of tribes is limited not only by treaty restrictions and congressional divestitures of power, but also when the inherent sovereignty of tribes is inconsistent with their status.⁶⁵ Upon incorporation into the territory of the United States, and in exchange for the protections afforded by it, the exercise by tribes of separate powers was constrained where it conflicted with the overriding sovereign.⁶⁶ Among their forfeitures, tribes necessarily surrendered power to try non-Indians, because of the "great solicitude [the overriding sovereign has] that its citizens be protected. . . from unwarranted intrusions on their personal liberty."⁶⁷

As Milner Ball observes, incorporation of tribes into the territory of the overriding sovereign — that for which Marshall would have required conquest or purchase — was accomplished in *Oliphant* by judicial fiat.⁶⁸ The decision has been roundly criticized on each of its prongs.⁶⁹ Not only does *Oliphant* pro-

⁶³ See *In re Mayfield*, 141 U.S. 107, 115-116 (1891).

⁶⁴ *Oliphant*, 435 U.S. at 204.

⁶⁵ *Id.* at 208.

⁶⁶ *Id.* at 209.

⁶⁷ *Id.* at 201.

⁶⁸ See Ball, *supra* note 2.

⁶⁹ See, e.g., Russel L. Barsh & James Y. Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979); Catherine B. Stetson, *Decriminalizing Tribal Codes: A Response to Oliphant*, 9 AM. INDIAN L. REV. 51 (1981); Steven M. Johnson, Note, *Jurisdiction: Criminal Jurisdiction and Enforcement Problems on Indian Reservations in the Wake of Oliphant*, 7 AM. INDIAN L. REV. 291 (1979); Paul S. Volk, Note, *The Legal Trail of Tears: Supreme Court Removal of Tribal Court Jurisdiction Over Crimes By and Against Reservation Indians*, 20 NEW ENG. L. REV. 247 (1984-85). See also Robert N. Clinton, *Reservation Specificity and Indian Adjudication: An Essay on the Importance of Limited Contextualism in Indian Law*, 8 HAMLIN L. REV. 543, 584, 589 (1985) (arguing that *Oliphant* decision should have been contextually limited to reservations with large non-Indian populations, but suggesting loss of criminal jurisdiction was appropriate on Port Madison reservation); Collins, *supra* note 39 (criticizing inaccurate and misleading use of precedents, but agreeing with Court's approach to due process, tribal dependence, and federal protection); Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character*

vide the Court a means to decide *sua sponte* when inherent sovereignty has been surrendered, it may also preclude Congress from recognizing inherent sovereignty, at least concerning tribal powers over non-Indians. Thus, *Oliphant* is likely to require an affirmative delegation, not mere recognition.⁷⁰

2. *Duro v. Reina*

The decision in *Duro v. Reina*⁷¹ continued the judicial divestiture of sovereignty begun by *Oliphant*. *Duro* denies tribes the right to try nonmember Indians. Albert Duro, an enrolled member of a band of Cahuilla Mission Indians, is a native of California who, before 1984, resided all but one year of his life outside his tribal reservation. During the spring of 1984, Duro resided on the Salt River Indian Reservation in southern Arizona, where he worked for a tribal construction company and cohabited with a tribal member. Duro was not eligible for enrollment in the Pima-Maricopa Indian Community, the reservation's governing tribe. On June 15, 1984, Duro allegedly shot and killed a fourteen year old boy. Days later, a federal indictment was filed in United States District Court, charging him with murder and aiding and abetting murder in violation of 18 U.S.C. §§ 2, 1111, and 1153.⁷² The indictment was subsequently dismissed. The tribe then took custody of Duro and charged him with unlawful discharge of a weapon, a violation of the Pima-Maricopa Code of Misdemeanors.⁷³ When the tribal court refused to dismiss

of *Federal Indian Law*, 31 ARIZ. L. REV. 203 (1989); see also *infra* note 310 and accompanying text.

⁷⁰ "Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress." *Oliphant*, 435 U.S. at 208.

⁷¹ 495 U.S. 676 (1990).

⁷² 18 U.S.C. § 1153, known as the Major Crimes Act, subjects Indians to federal jurisdiction for certain felonies committed in Indian Country. See *infra* note 139 and accompanying text (defining "Indian Country" and major crimes); see also 18 U.S.C. § 2 (1988) (defining the offense of aiding and abetting); 18 U.S.C. § 1111 (1988) (defining and proscribing the crime of homicide).

⁷³ At the time the events in *Duro* took place, the Indian Civil Rights Act, 25 U.S.C. §§ 1301-03 (1988), restricted tribal governments' ability to punish crimes to imprisonment not exceeding six months and fines not exceeding \$500.00, or both. In 1986 Congress increased the allowable punishments to imprisonment for one year and fines of up to \$5,000. Act of Oct. 27, 1985, Pub. L. No. 99-570, 1986 U.S.C.C.A.N. (100 Stat.) 3207-146.

the charge for lack of jurisdiction, Duro filed a petition for habeas corpus in the United States District Court for the District of Arizona.

The district court granted the petition and issued a writ of prohibition,⁷⁴ deciding that under provisions of the equal protection clause of ICRA,⁷⁵ the tribe could not try nonmember Indians for crimes when, under the holding in *Oliphant v. Suquamish Indian Tribe*,⁷⁶ it could not prosecute non-Indians.⁷⁷

On review, the United States Court of Appeals for the Ninth Circuit vacated in an opinion that was subsequently amended.⁷⁸ Declining to find that *Oliphant* applied, the Ninth Circuit rejected the district court conclusion. The court also rejected an opinion reached by the United States Court of Appeals for the Eighth Circuit in a case involving the same issue.⁷⁹ The Ninth

⁷⁴ See 28 U.S.C. §§ 2241(c)(1), (3) (1988) (authorizing writs of prohibition).

⁷⁵ See *supra* note 40 (discussing application of Constitution to Indian tribes).

⁷⁶ 435 U.S. 191 (1978).

⁷⁷ The district court noted that Congress may distinguish between Indians and non-Indians when the former are treated as members of quasi-sovereign tribes. *Duro v. Reina*, 12 Indian L. Rep. (Am. Indian Law. Training Program) 3003, 3004 (1985) (citing *Morton v. Mancari*, 417 U.S. 535, 555 (1974)). However, Congress may not distinguish between nonmember Indians and non-Indians for criminal jurisdiction purposes because such distinctions are solely racial. *Id.*

⁷⁸ *Duro v. Reina*, 821 F.2d 1358 (9th Cir. 1987), *modified*, 851 F.2d 1136 (9th Cir. 1988).

⁷⁹ *Greywater v. Joshua*, 846 F.2d 486 (8th Cir. 1988). In *Greywater*, three Chippewa Indians were arrested on the Devils Lake Sioux Indian Reservation and charged with possession of alcohol, public intoxication, and disorderly conduct. The tribal judge allegedly informed the defendants that they would not receive a fair trial because only Sioux would sit on the jury. Moreover, the driver of the car, a Sioux, was not arrested. *Id.* at 489. The Eighth Circuit directed that writs of habeas corpus be issued declaring that the Sioux tribe was without jurisdiction. *Id.* at 493. The court based its decision on *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1988). The Court acknowledged that *Oliphant* had by its express terms denied tribes only the right to try non-Indians in criminal proceedings. *Greywater*, 846 F.2d at 490 (citing *United States v. Wheeler*, 435 U.S. 313, 326 (1978) and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 170-3 (1982) (Stevens, J., dissenting)). However, the Eighth Circuit found that subsequent decisions clarified the Supreme Court's intent to also deny tribes the right to try nonmember Indians. *Id.* (citing *Wheeler*, 435 U.S. at 326). The court also stated that it would be unfair to try nonmember Indians when they cannot vote or otherwise participate in tribal government. *Id.* at 493. Moreover, it would be anomalous to subject nonmember Indians to criminal jurisdiction when the non-Indian majority on the reservation is exempt. *Id.* The court noted that significant racial, cultural, and legal differences divide the Chippewa and Sioux tribes, and held that *Oliphant* applied. *Id.* The Eighth Circuit thus determined that jurisdiction over nonmembers constituted an unwarranted intrusion on the personal liberties that nonmembers possess as citizens. *Id.*

Circuit observed that race alone does not determine whether one is Indian.⁸⁰ Asserting instead that criminal jurisdiction over nonmember Indians should be determined not by race but status, the court embraced a conclusion reached by Robert Clinton: "For the purpose of federal jurisdiction, Indian status is 'based on a totality of circumstances, including genealogy, group identification, and lifestyle, in which no one factor is dispositive.'"⁸¹

Using this definition, the court dispensed with the equal protection argument: When considered with his race, Albert Duro's contacts with the Pima-Maricopa Community were sufficient indicia of his status as an Indian to justify criminal jurisdiction by the tribe.⁸² By this reasoning, tribal jurisdiction could be sustained if it had only a rational basis. The court found such a basis because the differential treatment of tribal members and nonmembers would otherwise undermine the governance of tribal communities.⁸³ A contrary holding, the court observed, would create a jurisdictional void in which neither tribes, states, nor the federal government could try nonmember Indian misdemeanants.⁸⁴

⁸⁰ *Duro*, 851 F.2d at 1144 (citing *United States v. Heath*, 509 F.2d 16, 19 (9th Cir. 1974) and *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir. 1938)).

⁸¹ *Duro*, 851 F.2d at 1144 (quoting Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 518 (1976)); see also *supra* note 20 (discussing Indian ethnicity); text accompanying *infra* note 289 (discussing Indian personal identities).

⁸² *Id.* Ironically, were the circumstances in *Duro* and *Greywater* reversed, the Ninth Circuit may well have found too few contacts for the Sioux tribe to assert jurisdiction. With the benefit of Public Law 102-137, however, the Sioux tribe and the Pima-Maricopa Community could each have asserted criminal jurisdiction. Act of Oct. 28, 1991, Pub. L. No. 102-137, 1991 U.S.C.C.A.N. (105 Stat.) 646. What is curious about the Ninth Circuit opinion is not so much the nature of the court's *International Shoe*-like, contacts-counting view of jurisdiction, but that it made the effort. Footnotes to the opinion state that "[t]his case does not concern federal legislation, but rather the tribe's exercise of its retained sovereign powers." *Duro*, 851 F.2d at 1144 n.9. "Absent an express Congressional assumption of jurisdiction we feel safe in concluding that tribal courts retain criminal jurisdiction in these situations." *Id.* at 1141 n.4. But, while the court held accordingly, it also referred to the implicit equal protection requirements of the Fifth Amendment. *Id.* at 1144 n.9. Yet, if tribes retained inherent sovereignty, the court's references to the Fifth Amendment were irrelevant. Tribes could presumably determine to prosecute nonmember Indians regardless of the nature and extent of contacts, and, except as limited by the ICRA, regardless of the Constitution.

⁸³ *Duro*, 851 F.2d at 1145 (referring to Clinton, *supra* note 21, at 1015-16).

⁸⁴ *Id.* at 1145-46. See *infra* note 139 and accompanying text (discussing Major Crimes

The Supreme Court was not persuaded by the status test. In a divided opinion, the Court rejected the Ninth Circuit's contacts-based approach. The test constituted little more than implied consent, and would apply as well to non-Indians, who form the numerical majority on many reservations. Since *Oliphant v. Suquamish Tribe*⁸⁵ rejected implied consent as a basis for jurisdiction over non-Indians, the similar status of nonmember Indians required a similar result.⁸⁶ Observing that Duro was not and could not become a member of the Pima-Maricopa tribe, and therefore could neither vote, hold office, nor serve on a tribal jury, the Court determined that Duro's relations with the tribe were the same as the non-Indian's in *Oliphant*. The Court opined accordingly that the tribe's powers were subject to the same limitations.⁸⁷

Turning to the issue of inherent sovereignty, the Court decided that the autonomous powers retained by tribes are only those required for internal self-governance. This conclusion was based on language expressed in *United States v. Wheeler*,⁸⁸ a decision announced sixteen days after *Oliphant*. *Wheeler* determined that the Fifth Amendment double jeopardy clause does not bar prosecution of tribal members for the same offenses in federal and tribal courts, because tribes are separate sovereigns. The *Duro* Court observed that *Wheeler* limited sovereignty to tribal members.⁸⁹ "Had the [*Wheeler*] prosecution been a manifestation of

Act). A jurisdictional void would exist in the absence of tribal misdemeanor jurisdiction over nonmember Indians, because federal statutes have historically limited misdemeanor offenses among Indians to Indians themselves. See *infra* note 136 and accompanying text. For an argument in support of the position taken by the Ninth Circuit, see Patricia Owen, Note, *Who is an Indian?: Duro v. Reina's Examination of Tribal Sovereignty and Criminal Jurisdiction Over Nonmember Indians*, 1988 B.Y.U. L. REV. 161 (1988).

⁸⁵ 435 U.S. 191 (1978).

⁸⁶ *Duro v. Reina*, 495 U.S. 676, 695 (1990).

⁸⁷ *Id.* at 676; see also *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). Although states cannot impose sales taxes on reservation tribal members, the Court allowed imposition of such taxes upon nonmember Indians making purchases within the reservation boundaries. *Id.* at 160. The Court stated that "[f]or most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation." *Id.* at 161.

⁸⁸ 435 U.S. 313 (1978).

⁸⁹ The issue of whether tribes could prosecute nonmember Indians was not directly before the Court in *Wheeler*. In that case, the Navajo defendant was a member of the prosecuting tribe. The *Wheeler* opinion, nonetheless, stated that "[I]t is undisputed that Indian tribes have power to enforce their criminal laws against tribe members." *Wheeler*, 435 U.S. at

external relations between the tribe and outsiders, such power would have been inconsistent with the tribe's dependent status, and could only have come to the tribe by delegation from Congress, subject to the constraints of the Constitution."⁹⁰

Recall that *Oliphant* determined that tribes lost criminal jurisdiction over non-Indians because tribes surrendered sovereignty when accepting the benefits of incorporation. If tribes did in fact accept the overriding sovereignty of non-Indian government, there is no evidence of an equivalent submission to other tribes.⁹¹ Nonetheless, the *Duro* formulation extends the *Oliphant* protections from criminal prosecution at least to any citizen, and perhaps to any person who is not a tribal member.

But the *Duro* decision may have done still more to narrow the scope and meaning of inherent sovereignty. The opinion suggests that not only are tribes now sovereign over only their own members, but at least for purposes of criminal jurisdiction, the nature of sovereignty is itself diminished. Having rejected the Ninth Circuit's attempt to reconcile the equal protection rights of citizens with differential jurisdiction, the Court made the grant of citizenship itself a seeming divestiture of sovereignty: "As full citizens, Indians share in the territorial and political sovereignty of the United States. The retained sovereignty of the tribe is but a recognition of certain *additional authority* the tribes maintain over Indians who consent to be tribal members."⁹² If this language should become the new standard by which to measure tribal powers, *Duro*, in a stroke, will have profoundly altered the doctrine of inherent sovereignty. John Marshall recognized tribes as distinctly separate polities, little diminished by the Constitution; *Duro* suggests that the Constitution limits tribal powers not only over "outsiders," but over the membership itself. Citizenship, never sought by tribes, may become a means for the Court to limit sovereignty within the tribes to activity that is constitutionally conforming. This new "additional authority" test, although not *Duro's* holding, portends future decisions in which

322. Furthermore, "their right of internal self-government includes the right to prescribe laws applicable to *tribe members* and to enforce those laws by criminal sanctions." *Id.* (emphasis added).

⁹⁰ *Duro*, 495 U.S. at 676.

⁹¹ *Id.* at 698-99 (Brennan, J., dissenting).

⁹² *Id.* at 693 (emphasis supplied).

any tribal conduct inconsistent with the Constitution could be proscribed. Should that day arrive, the notion that inherent sovereignty is pre- and extraconstitutional will have vanished.⁹³

Duro, and an earlier opinion in *United States v. Antelope*,⁹⁴ suggest that the sovereign rights of tribes may now be reduced to criminal jurisdiction over formally enrolled members only.⁹⁵ In *Antelope*, an enrolled member of the Coeur D'Alene tribe was tried in federal court for felony murder under the Major Crimes Act — the same act under which federal charges were first brought, then dismissed, against Albert Duro.⁹⁶ Gabriel Antelope argued that his conviction was the product of invidious discrimination, because the Major Crimes Act only allows prosecution of Indians. Had Antelope been white, he could only have been tried in the courts of Idaho, a state which lacks a felony murder rule. To convict on a charge of first degree murder, the state would have been required to prove deliberation and premeditation. The Court declined to rule on Fifth Amendment grounds, reasoning, much as the Ninth Circuit had in *Duro*, that Antelope was subject to the Major Crimes Act not on the basis of his race, but on the basis of his status as an enrolled member of the tribe. Because the Act applies equally to all within its

⁹³ See *supra* note 39 and accompanying text (discussing tribal sovereignty).

⁹⁴ 430 U.S. 641 (1977).

⁹⁵ Voting privileges and most tribal benefits require tribal enrollment. Although most members of American Indian tribes are enrolled, many are not. Results for the 1980 census, the most recent available, indicate that as many as 13% of Indians residing on federally-recognized reservations were not enrolled in any tribe. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, AMERICAN INDIANS, ESKIMOS, AND ALEUTS ON IDENTIFIED RESERVATIONS AND IN THE HISTORIC AREAS OF OKLAHOMA (EXCLUDING URBANIZED AREAS) 16 (1985). This figure may be influenced by underreportage of enrollment in the 1980 census. It may also be influenced by tribes which do not permit members to enroll until they reach majority and elsewhere by parents who had not yet sought enrollment for their minor children. In some cases, tribal members refuse to enroll because, for them, enrollment constitutes acknowledgement of dependent status. Recent statistics from the Bureau of Indian Affairs indicate that during 1989, 1,082,439 Indians and Alaskan natives were enrolled in tribes and Alaskan Native Villages. BUREAU OF INDIAN AFFAIRS, U.S. DEPT. OF INTERIOR, ESTIMATED TRIBAL ENROLLMENT 17 (unpublished report, December, 1991). Compared with the total population of 1.9 million American Indians enumerated in the 1990 census, the BIA enrollment figure suggests that fewer than 60% of Indians are enrolled in tribes. Alternatively, the figure suggests that the 1990 Census is substantially in error. See also *infra* note 375 and accompanying text (discussing enrollment as a basis for criminal jurisdiction).

⁹⁶ 18 U.S.C. § 1153 (1988); see *supra* note 72 and accompanying text (discussing Major Crimes Act).

jurisdiction, equal protection was not denied. In a footnote, however, the Court reserved the question whether a violation of Fifth Amendment equal protection might exist were Antelope not enrolled.⁹⁷

In *Duro*, the Court affirmed the ability of Congress to legislate “with respect to *enrolled* members as a class.”⁹⁸ Taken literally, the language suggests that Public Law 102-137 may not, without violating equal protection, extend to nonmember Indians who are not enrolled in any tribe, and, conceivably, to Indians who are not enrolled in the tribe seeking to prosecute, even though they may be ethnic members of the prosecuting tribe and living on the reservation.⁹⁹

Granted, within a paragraph of announcing the “additional authority” test, the *Duro* opinion restates that tribal governments are not affected by the Bill of Rights.¹⁰⁰ But the recitation, as well as a subsequent reference to ICRA, is disparaging. The Court implies that tribes have sovereignty to regulate only those who consent to regulation because those who are regulated cannot expect full justice. According to the Court, legal methods of tribal courts may depend on “unspoken practices and norms.”¹⁰¹ The Court also reminds that civil litigants do not have recourse to federal forums to enforce tribal violations of ICRA.¹⁰²

⁹⁷ *Antelope*, 430 U.S. at 647 n.7.

⁹⁸ *Duro v. Reina*, 495 U.S. 676, 692 (1990) (emphasis added).

⁹⁹ As it did in *Oliphant*, the Court in *Duro* placed significance on the fact that persons who are not tribal members cannot participate in tribal government. The *Duro* Court found nonmember Indians and non-Indians to be equivalent for purposes of government participation. The Court may therefore find that enrollment in a tribe different from the one seeking to prosecute will be insufficient to confer jurisdiction under Public Law 102-137. Moreover, if the Court applies *Duro's* “additional authority” standard to review the legislation, enrollment may be required for a tribe to prosecute even its own members. *Duro*, 495 U.S. at 693. See also text accompanying *infra* notes 144 and 377 (discussing enrollment as a basis for criminal jurisdiction). The Court may take the less intrusive approach of limiting jurisdiction to any nonmember Indian who is enrolled in any tribe. Tribes would then still lack power to prosecute 40% or more of all Indians, if recent BIA statistics and the 1990 Census are each accurate. See *supra* note 304.

¹⁰⁰ *Duro*, 495 U.S. at 693 (citing *Talton v. Mayes*, 163 U.S. 376 (1896)).

¹⁰¹ *Duro*, 495 U.S. at 693.

¹⁰² *Id.* at 694 (referring to *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)). In *Martinez*, the Court determined that civil litigants may not enforce provisions of the Indian Civil Rights Act against tribal governments in federal courts. Many commentators have lauded *Martinez* for protecting tribal autonomy. See, e.g., Alvin J. Zions, *After Martinez: Civil*

Duro presumably leaves intact the limited ability of tribes to regulate nonmembers and non-Indians in certain civil disputes,¹⁰³ but decides that criminal jurisdiction involves a far

Rights Under Tribal Government, 12 U.C. DAVIS L. REV. 1 (1979) (discussing effect of *Martinez* on Indian Civil Rights Act). However, at least one commentator has suggested that *Martinez* would invite excuses to limit tribal jurisdiction. Robert Laurence, *Martinez*, Oliphant and Federal Court Review of Tribal Activity Under the Indian Civil Rights Act, 10 CAMPBELL L. REV. 411, 428 (1988). Laurence observes that *Martinez*, which precludes persons subject to the Indian Civil Rights Act from appealing civil judgments to federal courts, will only invite courts to diminish tribal jurisdiction in order to provide a forum. *Id.* Milner Ball criticizes *Martinez*, but from a standpoint that might invite even greater circumvention by federal courts. Ball, *supra* note 3, at 2380. He writes that *Martinez* harms Indian interests because the Court upheld the Indian Civil Rights Act, which was legislation stemming from the exercise by Congress of plenary, but extra-constitutional, power. *Id.*

¹⁰³ *Duro*, 495 U.S. at 687-88. Following the Court's decision in *Oliphant*, tribes feared that the Court would foreclose their civil regulatory powers over non-Indians, as *Oliphant* had restricted their criminal jurisdiction. Several limitations have ensued, although a complete divestiture of civil authority over nonmembers has not occurred. *See, e.g.*, *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985). A non-Indian defendant contested jurisdiction of the Crow tribe in a civil suit involving an Indian youth injured in an accident at a state-owned school within the reservation. The Court distinguished *Oliphant*, observing that its holding did not foreclose tribal civil jurisdiction over non-Indians. The Court decided that the determination of jurisdiction should be made in the first instance by the tribe itself. It therefore required the defendant to exhaust its remedies in tribal court. *Id.* at 856-57; *see also* *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (permitting stay of federal diversity action pending completion of tribal court proceeding). Although neither *National Farmers Union* nor *LaPlante* resolve the question whether tribes continue to possess civil jurisdiction over non-Indians, both decisions implicitly recognize such jurisdiction.

Tribes continue to retain jurisdiction over disputes in which non-Indians bring civil suits against Indians for matters arising in Indian country. *Williams v. Lee*, 358 U.S. 217 (1959). Presumably, tribes retain jurisdiction in such cases when the defendant is a non-Indian. However, the inherent authority to regulate nonmembers has elsewhere been reduced. In 1981 the Court forbade the Crow tribe from regulating hunting and fishing by nonmembers on reservation lands held in fee by non-Indians. *United States v. Montana*, 450 U.S. 544 (1981). The Court announced that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id.* at 564. In place of inherent sovereignty, the Court recognized the right of tribes to regulate in two situations. *Id.* at 566. First, a tribe may regulate when nonmembers consent. *Id.* Second, tribes may regulate the "conduct of non-Indians on fee lands within [the] reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* Tribes have the right to impose taxes on nonmembers who conduct business within their territories. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). Tribes may also impose severance taxes. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). However, the Court has recently cited *Montana* as a basis for imposing strict limitations on tribal regulatory powers. *See, e.g.*, *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (holding in plurality opinion that tribes cannot

more direct intrusion on personal liberties, and therefore must depend upon consent.¹⁰⁴ The Court does not clarify how tribes are to govern effectively when numerous nonconsenting persons are on their reservations. The opinion's language suggests that tribes might banish undesirables from tribal lands.¹⁰⁵ But such a solution is both repugnant and unworkable. The practice might carve as many distinctions between nonmember Indians and non-Indians as *Duro* purports to erase. For example, a tribe cannot eject holders of fee lands on allotted reservations (the majority of whom are non-Indians),¹⁰⁶ while it can eject nonmember Indians who are part of reservation families. Surveys conducted after *Duro* suggest that intermarriage occurs on the majority of reservations.¹⁰⁷ Would banishment from reservations, perhaps dividing families, be somehow less intrusive upon essential liberties than criminal prosecutions? The remedy smacks of attainder, a remedy forbidden by the Constitution for felonies and treason, much less misdemeanors.¹⁰⁸

The *Duro* opinion also suggests that reciprocal agreements might operate to give separate tribal governments jurisdiction over each other's members.¹⁰⁹ How more than 300 recognized tribes might go about making such agreements is not explained. Even if the practical difficulties of making manifold agreements could be overcome, is it certain that they would constitute con-

regulate land use in areas of reservations which are generally subject to nonmember ownership and interests); *South Dakota v. Bourland*, 113 S. Ct. 2309 (1993) (determining tribes have no right to regulate non-Indian hunting and fishing on lands acquired by Congress for limited purpose of building dams).

¹⁰⁴ *Duro*, 495 U.S. at 688.

¹⁰⁵ *Id.* at 696 (citing *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. at 422 (1990)). *But see infra* note 377 (suggesting that nonmember offenders may not be deterred by exclusion).

¹⁰⁶ *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 143 (1982) (citing *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906)).

¹⁰⁷ *Duro Survey Analysis Complete*, 55 NAT'L CONG. AM. INDIANS SENTINEL 4 (Aug. 1991). In a survey conducted by the National Congress of American Indians (NCAI), to which 65 tribes with a combined member and nonmember Indian population of 396,900 responded, 80% reported marriages between members and nonmembers. *Id.* Unfortunately, NCAI data do not indicate the numbers of such marriages. BIA statistics cited by the defendant in *Greywater v. Joshua*, 346 F.2d 486 (8th Cir. 1988) indicated that almost as many members of the Sioux tribe were married to nonmembers (154) as members (193). Brief for Appellant at 17, *Greywater v. Joshua*, 346 F.2d 486 (8th Cir. 1988) (No. 87-5233-ND).

¹⁰⁸ U.S. CONST. art. I, § 9.

¹⁰⁹ *Duro*, 495 U.S. at 697.

sent of individuals such as Albert Duro, who may never have lived on the reservation of which he is a member?¹¹⁰ The opinion also suggests that tribal police might detain offenders not otherwise subject to tribal jurisdiction.¹¹¹ If not cross-deputized, would the detentions of tribal police be *Duro*-sanctioned "citizens" arrests or false imprisonments?¹¹² What if a nonmember detainee assaulted a tribal officer? After *Duro*, the tribe could not try the detainee for assault. Failing cogent answers, the opinion leaves unresolved the fears of the Ninth Circuit that a decision adverse to tribal governments would create a void in jurisdiction.¹¹³

Given the Court's diminishment of inherent sovereignty, its statement that tribes are more than private voluntary associations rings hollow.¹¹⁴ Likewise, the Court's distinctions — drawn to conclude that Congress never intended tribes to exercise jurisdiction over nonmember Indians — are apt to draw more scorn than did similar distinctions in *Oliphant*.¹¹⁵ But, like *Oliphant*

¹¹⁰ Reciprocal agreements might also be of no avail because *Duro* divested tribes of subject matter jurisdiction over nonmember Indians.

¹¹¹ *Duro*, 495 U.S. at 697.

¹¹² In 1975, the Ninth Circuit held that tribal police could detain and deliver to proper authorities non-Indians found on reservations who had violated state and federal laws, even though tribal police were not cross-deputized. *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975). The court based its decision on the power of tribes to exclude trespassers and on a Papago tribal resolution which specifically allowed such detentions. *Id.* at 1179. It is unclear whether detention of nonmember Indians for delivery to "proper authorities" was permissible after *Duro*, because the decision created a void in which no jurisdiction could prosecute nonmember Indian offenses. See text accompanying *infra* note 139 (discussing jurisdictional void created by *Duro* holding).

¹¹³ The Court observes that any jurisdictional void created by its decision can be remedied by recourse to the Act of August 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360 (1988)). As originally enacted in 1953, during the termination period, Public Law 280 extended state civil and criminal jurisdiction over Indian country in five states and allowed other states the option to assert such jurisdiction. Tribal consent was not required. Under terms of the Indian Civil Rights Act, see *supra* note 35, states must now obtain the consent of tribes before assuming jurisdiction. The Indian Civil Rights Act also provides a mechanism to retrocede Public Law 280 jurisdiction to the federal government. 25 U.S.C. § 1323 (1988). However, states have little incentive to enforce laws for tribes because they have little power to levy taxes in Indian country. Conversely, tribes are reluctant to cede jurisdiction to states, which are their traditional enemies. See, e.g., CANBY, *supra* note 5, at 177.

¹¹⁴ See *Duro*, 495 U.S. at 688 (citing *United States v. Mazurie*, 419 U.S. 544, 557 (1975)).

¹¹⁵ Justice Brennan was first among the critics. *Duro*, 495 U.S. at 699-704 (Brennan, J., dissenting). The *Oliphant* Court pointed to various federal laws, which historically have left prosecution of non-Indians to the federal government, as an expression of Congressional

before it, there stands *Duro*. Whether Public Law 102-137 can or should undo it is another question.

C. Public Law 102-137: Recognition or Delegation

The expression of congressional intent in Public Law 102-137 does not purport to constitute a congressional delegation of authority. If the Court upholds the legislation on this basis, its appeal to tribes is obvious. The disparate ability of tribes to prosecute nonmember Indians, but not non-Indians, will not raise issues of equal protection, because the inherent rights of tribes to try nonmembers will exist outside the Constitution.

Some commentators reason that the Court must accede to a congressional recognition of inherent sovereignty. Philip S. Deloria and Nell Jessup Newton observe that the holdings in *Oliphant* and *Duro* are not rules of constitutional law, but of federal common law, adopted in the absence of express congressional intent.¹¹⁶ Because Congress retains control of Indian policy, the Court must respect any "appropriate legislation" which corrects the Court's judgment, lest it exceed its Article III authority.¹¹⁷ Public Law 102-137 is intended as just such an expression of congressional policy.

But the present Court may not be so inclined. The fate of Public Law 102-137 may turn on whether the Court accepts the law as a recognition of inherent sovereignty or, instead, views it as a delegation of authority. If the former, the Court must step

intent to divest tribes of jurisdiction over non-Indians. Brennan observed that the same laws left tribes with jurisdiction over Indians, never distinguishing between members and non-members. *Id.* Parallel logic should have required exactly the opposite result in *Duro*.

¹¹⁶ Philip S. Deloria & Nell J. Newton, *The Criminal Jurisdiction of Tribal Courts over Non-Member Indians: An Examination of the Basic Framework of Inherent Tribal Sovereignty Before and After Duro v. Reina*, 38 FED. B. NEWS & J. 70, 72 (1991).

¹¹⁷ *Id.* at 71. More recently, Newton has written a defense of the legislation in anticipation of challenges to the law. Nell Jessup Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 AM. INDIAN L. REV. 109, 115 (1992). Newton, who helped draft the legislation with Philip S. Deloria, presents a detailed history of Public Law 102-137 and its predecessor, Public Law 101-511. *Id.* at 109-18. See text accompanying *supra* note 33 (discussing Public Law 101-511). Newton writes that while Congress might have overcome *Duro* by simply delegating authority to tribes to try nonmember Indians, Congress wished to correct the Court's misunderstanding of congressional intent regarding inherent sovereignty by overturning *Duro*. Newton, *supra*, at 112. Not mentioned as a purpose in enacting Public Law 102-137 is that the legislation may escape scrutiny under the Fifth Amendment if it is adjudged to be a recognition of inherent sovereignty rather than a delegation of authority.

aside because a clear statement of congressional intent displaces federal common law. But if the latter, federal common law will be immaterial. The Court may find the legislation unconstitutional because Public Law 102-137 violates the Equal Protection Clause.

Is Public Law 102-137 a congressional recognition or a delegation of authority? To the extent the Court continues to recognize John Marshall's concept of inherent sovereignty, Congress can recognize or limit tribal rights without violating the Constitution even if it recognizes or confers fewer rights than a delegation of authority might require under the Equal Protection Clause. ICRA,¹¹⁸ for example, does not constitute a congressional grant of authority to tribes, but rather limits inherent sovereignty.¹¹⁹ Although ICRA provides fewer protections than the Bill of Rights, it does not violate the Constitution.¹²⁰ It divests inherent rights; it does not add to them. It therefore does not delegate. Public Law 102-137 both recognizes inherent sovereignty and imposes limitations. The definition in the law, which limits those susceptible to tribal jurisdiction, was almost certainly intended as a similar limitation on inherent sovereignty. The definition was not intended as a legislative grant.

Oliphant and *Duro*, however, make clear that legislative acts of recognition may not suffice to confer jurisdiction. The Court in *Oliphant* stated that "Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by the Congress."¹²¹ *Duro*, in turn, makes it doubtful that congressional recognition will restore jurisdiction over nonmember Indians.¹²² The Court's construction of *United*

¹¹⁸ Act of April 11, 1968, Pub. L. No. 90-284, 82 Stat. 77 (codified at 25 U.S.C. §§ 1301-03 (1988)).

¹¹⁹ Although expressed in dicta, *Duro* suggests that citizens otherwise subject to tribal court jurisdiction may raise constitutional objections to criminal proceedings under the Indian Civil Rights Act. *Duro*, 495 U.S. at 693-94.

¹²⁰ Most notably, ICRA does not require tribes to appoint counsel for indigent defendants. 25 U.S.C. § 1302(6) (1988). Elsewhere, ICRA protects the free exercise of religion, but, in order to recognize theocratic tribes and governments, does not prohibit the establishment of religions. 25 U.S.C. § 1302(1) (1988).

¹²¹ *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 208 (1978).

¹²² Cf. G.D. Crawford, *Looking Again at Tribal Jurisdiction: "Unwarranted Intrusions on Their Personal Liberty,"* 76 MARQ. L. REV. 401, 418 (1993) (contending that Public Law 102-137

*States v. Wheeler*¹²³ suggests that tribal jurisdiction over nonmember Indians will require affirmative delegations of power by the Congress, not expressions of recognition.¹²⁴ Moreover, the Court suggests that it will no longer respect such delegations as exercises of plenary power by the Congress,¹²⁵ subject to only casual review. Instead, the Court will scrutinize delegations of authority "subject to the constraints of the Constitution."¹²⁶ Indeed, in a recent decision, *South Dakota v. Bourland*,¹²⁷ the Court stated flatly that tribal sovereignty over nonmembers "cannot survive without express congressional delegation" and is therefore not inherent.¹²⁸

There are at least three possibilities for how the Court will analyze Public Law 102-137. First, the Court could disregard the requirements for a delegation of authority that it announced in *Oliphant* and *Duro*, and uphold Public Law 102-137 intact. This seems doubtful, given the language in these opinions and the hostility to inherent sovereignty which the Court manifested recently in *Bourland*. Second, the Court may reconstruct *United States v. Wheeler*¹²⁹ and *Duro* to determine that the latter is founded in the Constitution. After all, the Court's holding in *Duro* — that the citizenship rights of nonmember Indians and non-Indians are equivalent in instances of criminal jurisdiction — hovers near an equal protection analysis under the Fifth Amendment. If the Court determines that *Duro* has a constitu-

eradicated *Duro*).

¹²³ 435 U.S. 313 (1978).

¹²⁴ Tribal prosecution of outsiders in *Wheeler* "could only have come to the tribe by delegation from Congress, subject to the constraints of the Constitution." *Duro v. Reina*, 495 U.S. 676, 686 (1990).

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. 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.'

Id. at 692 (citations omitted).

¹²⁵ See *infra* note 140 and accompanying text (discussing plenary power doctrine).

¹²⁶ *Duro*, 495 U.S. at 686.

¹²⁷ 113 S. Ct. 2309 (1993).

¹²⁸ *Id.* at 2321 n.15 (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981)).

¹²⁹ 435 U.S. 313 (1978).

tional basis, the congressional recognition of inherent sovereignty will be of no avail, because *Duro* will have trumped the statute. Third, the Court may find that Public Law 102-137 constitutes a delegation of authority, despite Congress' apparent intendment to the contrary. If Public Law 102-137 should be so construed, then it will be measured against the Constitution.

At least one scholar opines that the Supreme Court will view Public Law 102-137 as a delegation, whether or not it should be. Alex Tallchief Skibine suggests that the Supreme Court has, through *Oliphant* and *Duro*, reserved for itself the role of determining which sovereign powers were lost upon the tribes' incorporation into the United States, and thus which powers must be granted back. He also notes that the Court has already asserted that a delegation of powers would be required to afford tribes criminal jurisdiction over nonmember Indians.¹³⁰

If considered as a legislative grant, Public Law 102-137 will be susceptible to scrutiny on the question whether it carves distinctions based on race as well as, or instead of, status. In this respect, the legislation will face the same hurdle that the Ninth Circuit failed to surmount in its *Duro* holding: at least for purposes of criminal jurisdiction, distinctions based on status — that is, political classifications — may be unpersuasive when nonmember Indians and non-Indians are similarly situated.¹³¹ Alternatively, the Court might harmonize Public Law 102-137 with its *Duro* holding by declaring that the Major Crimes Act, and therefore the definition incorporated in Public Law 102-137, extends only to enrolled members of the prosecuting tribe.¹³² But such a decision would eviscerate the legislation. It seems more probable that if Public Law 102-137 is considered in the context of the Constitution, the Court will adjudge its merits squarely under the equal protection component of the Fifth Amendment.

¹³⁰ Alex Tallchief Skibine, *Duro v. Reina and the Legislation That Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767, 783-84 (1993).

¹³¹ *Duro*, 495 U.S. at 695-96.

¹³² See *supra* note 99 (discussing implications of *Duro* holding); *infra* note 144 (discussing footnote 7 to *United States v. Antelope*, 430 U.S. 641 (1977)).

D. Applying Public Law 102-137: A Complicated Addition to an Already Complicated Area of Law

Later sections in this article discuss whether Public Law 102-137 can or should withstand judicial scrutiny, and whether the legislation can be salvaged by jurisdictional divisions based upon demography or on theories of group rights. However, even if the legislation is upheld, it may do little to uncomplicate the difficulty already faced by tribes in asserting criminal jurisdiction. It may instead diminish tribal sovereignty.

Imagine a family of four living on the federally-recognized Nez Perce reservation in Northern Idaho. Assume the father is a San Carlos Apache tribal member of one-half degree tribal blood. The mother is Nez Perce, of one-quarter blood. The Nez Perce and San Carlos reservations both require that members have at least one-quarter blood in their tribes to be enrolled.¹³³ The mother and the father are each enrolled members in their respective tribes. They have a son and daughter. The daughter is the offspring of the parents and grows up with non-Indians in Spokane. The son, a non-Indian raised by the parents, grows up on the reservation and becomes acculturated to tribal customs and traditions. At a reunion on the reservation a family argument erupts. The son assaults his sister, and the father slaps the mother. The mother responds by striking both the father and the son. The father storms out, sets the house afire, then drives to Lewiston, just off the reservation, where he is arrested for reckless driving. Who has power to try the assorted crimes? In what respect did *Duro v. Reina*¹³⁴ create a void in jurisdiction? And, what will be the effect of Public Law 102-137 should it be upheld?

Under provisions of the Federal Enclaves Act, also known as the General Crimes Act, Indians retain inherent and exclusive jurisdiction to try Indians for crimes committed in Indian country against other Indians.¹³⁵ However, ICRA limits the pun-

¹³³ BUREAU OF INDIAN AFFAIRS, U.S. DEPT. OF INTERIOR, (unpublished report), BLOOD DEGREE QUANTUMS AMONG FEDERALLY RECOGNIZED TRIBES (July 1991).

¹³⁴ 495 U.S. 676 (1990).

¹³⁵ 18 U.S.C. § 1152 (1988). The Act provides that

[e]xcept as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole

ishment for such crimes to the equivalent of misdemeanors.¹³⁶ Because the mother is a Nez Perce tribal member and her actions occurred within exterior boundaries of the reservation, the tribe has exclusive jurisdiction to try her for battery against her husband. The General Crimes Act also provides that, except where the inherent jurisdiction of tribes remains exclusive by treaty provisions, the federal government may prosecute misdemeanors committed by Indians against non-Indians. However, if tribes prosecute their members for such offenses, subsequent federal prosecution is barred.¹³⁷ The Nez Perce tribe can therefore try the mother for battery against the son, and if it does, federal courts cannot.

What about the father? There is no question that he is an Indian, although he neither is nor can become a member of the Nez Perce tribe. Prior to *Duro v. Reina*,¹³⁸ the tribe could have prosecuted him for battering his wife. But after *Duro*, no jurisdiction could. Because the father is an Indian, the General Crimes Act proscribes the State of Idaho from prosecuting. Because the crime is a misdemeanor and the victim is an Indian, the Act also proscribes federal prosecution. This is the jurisdictional void foreseen by the Ninth Circuit in its *Duro* holding, the void which Public Law 102-137 is designed to fill. However, even if upheld, the legislation will not invest the Nez

and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to Indian Country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Id. § 1152. Canby describes the General Crimes Act as having been enacted to create a buffer between non-Indian and Indian populations. CANBY, *supra* note 5, at 103-04. The Act was adopted on the assumption that states could not try crimes committed by non-Indians in Indian country, and may have been designed in part to protect Indians from the hostile conduct of non-Indian state residents. The Act nonetheless constituted a significant divestiture of tribal sovereignty over interracial crimes.

¹³⁶ 25 U.S.C. §§ 1301-02 (1988). "No Indian tribe in exercising powers of self-government shall (7) . . . impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term or one year and a fine of \$5,000, or both." *Id.* § 1302(7).

¹³⁷ See *supra* note 135 (stating provisions of General Crimes Act).

¹³⁸ 495 U.S. 676 (1990).

Perce tribe with clear authority to try the nonmember father for the act of arson. Partly because Public Law 102-137 did not enlarge the scope of tribal jurisdiction to include major crimes, this felony may go unpunished.

The Major Crimes Act gives federal courts jurisdiction to try Indians for certain enumerated major crimes, including arson, which are committed by Indians in Indian country.¹³⁹ Because the Act empowers federal courts to try offenses involving not only crimes committed by Indians against non-Indians, but also crimes involving only Indians, it operates as a significant divestiture of inherent sovereignty.¹⁴⁰ The Court has not decided

¹³⁹ 18 U.S.C. § 1153 (1988). The Major Crimes Act permits the federal government to prosecute Indians for certain crimes committed in "Indian country." The Major Crimes Act defines "Indian country" as being:

- (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government. . . . (b) all dependent Indian communities within the borders of the United States. . . . whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Id. § 1151. The Major Crimes Act includes the crimes of murder, manslaughter, kidnapping, felonious assault, arson, burglary, robbery, and certain felonies. *See* 18 U.S.C. § 2241 *et seq.* (1988) (prohibiting sexual abuse); *id.* § 661 (1988) (prohibiting theft and embezzlement). 18 U.S.C. § 1111 (1988) defines and proscribes the crime of homicide and 18 U.S.C. § 3 (1988) defines the offense of aiding and abetting.

¹⁴⁰ The Major Crimes Act, enacted originally in 1885, marked one of the first intrusions into the political autonomy of tribes to regulate their internal affairs. Prior to passage of the Act, only Indians had jurisdiction over crimes committed by Indians within Indian country. Similarly, Indians had exclusive jurisdiction over Indians who committed crimes against non-Indians, provided the offenders were punished by the local law of the tribe. This exclusive jurisdiction is embodied in the Federal Enclaves Act, 18 U.S.C. § 1152 (1988), also known as the General Crimes Act. *See supra* note 135 (stating provisions of General Crimes Act). In 1883, the Supreme Court upheld the exclusive jurisdiction of Indians to punish Indians. *Ex parte Crow Dog*, 109 U.S. 556 (1883). However, as a result, the defendant, an Indian who had been tried and convicted of murder in federal court, was freed and faced no sanctions by a tribal court since none existed. *Id.* at 572. The Major Crimes Act, passed in response to *Crow Dog*, was challenged shortly after its passage as being an unconstitutional intrusion on Indian sovereignty. *United States v. Kagama*, 118 U.S. 375 (1886). The Supreme Court discovered no constitutional basis for the statute, but instead expanded John Marshall's reference to guardianship in *Cherokee Nation* into an extra-constitutional notion that Congress has plenary power over Indians. Such power, the Court reasoned, must exist in the federal government "because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes." *Id.* at 384-85. The plenary power doctrine was sufficient to uphold the Major Crimes Act. Following *Kagama*, and until recently, this doctrine was used extensively to justify congressional control over Indian affairs.

whether tribes retain concurrent jurisdiction. However, given the limited remedies imposed on tribal courts by ICRA, and the limited financial resources available to tribal courts to fight appeals, the Nez Perce tribe may well be dissuaded from testing the limits of its jurisdiction.¹⁴¹ Whether even federal courts can assert jurisdiction over the father under the Major Crimes Act is also presently unclear. Recall that in *United States v. Antelope*,¹⁴² the Court reserved the question whether an Indian, not enrolled in the tribe on whose reservation he or she commits a crime, can resist prosecution under the Major Crimes Act on grounds of a denial of equal protection under the Fifth Amendment. Hence, even if Public Law 102-137 should be upheld as a recognition of inherent sovereignty, the Court intimates in both *Antelope* and *Duro*¹⁴³ that the father's right as a nonmember to be treated equally with non-Indians may proscribe federal prosecution under the Major Crimes Act.¹⁴⁴ If the Court should also find that the Major Crimes Act divests tribes of authority to try the offenses it enumerates, another void in jurisdiction will occur. Indeed, even if the Court should determine that tribes retain concurrent jurisdiction to try major crimes, if it construes the Major Crimes Act to limit federal prosecutions to enrolled members, the tribe will still be proscribed from prosecuting the nonmember father even if Public Law 102-137 is

¹⁴¹ See Act of Oct. 27, 1986, Pub. L. No. 99-570, § 4217 (increasing allowable punishments to imprisonment for one year and fines of up to \$5,000). The strictly limited ability of tribes to punish criminal offenses may explain why no cases have reached the Supreme Court on the issue whether tribes have concurrent jurisdiction to try crimes enumerated in the Major Crimes Act. 18 U.S.C. § 1153 (1984). The United States Courts of Appeal for the Eighth and Tenth Circuits, however, have each read the Major Crimes Act to exclude tribal jurisdiction over the crimes it enumerates. *Felicia v. United States*, 495 F.2d 353, 354 (8th Cir. 1974); *Sam v. United States*, 385 F.2d 213, 214 (10th Cir. 1967).

¹⁴² 430 U.S. 641 (1977).

¹⁴³ *Duro v. Reina*, 495 U.S. 676 (1990).

¹⁴⁴ The *Antelope* footnote, 430 U.S. at 647 n.7, suggests that jurisdiction under the Major Crimes Act might exist as long as a defendant is at least enrolled in some tribe. The father's enrollment in the San Carlos Apache tribe may therefore be sufficient to confer jurisdiction. However, it might not be. The Court reserves judgment on the issue of nonmembers because "the prosecution in this case offered proof that respondents are enrolled members of the Coeur d'Alene Tribe and thus not emancipated from tribal relations." *Id.* While the father is an enrolled member of a tribe, he is surely "emancipated" from tribal relations with the Nez Perce tribe in the same way Albert Duro was emancipated from relations with the Maricopa Community. Hence there may be no jurisdiction.

upheld.¹⁴⁵ It is also doubtful whether the State of Idaho could prosecute the father for arson. Although the father is not a member of the Nez Perce tribe, he is nonetheless an Indian. The General Crimes Act precludes state court prosecution of Indians for offenses committed in Indian country.¹⁴⁶

Now comes the tough part. How does Public Law 102-137 affect the crimes involving the brother and the sister? The law defines those susceptible to the criminal jurisdiction of tribes as being "any person who would be subject to the jurisdiction of the United States as an Indian [under provisions of the Major Crimes Act¹⁴⁷] if that person were to commit an offense listed in [that Act] in Indian country to which [that Act] applies."¹⁴⁸

In general, federal courts construing the Major Crimes Act have determined that persons subject to its provisions must be recognized as Indians by the federal government or by their tribes. But race is a decisive factor. Presumably, any prosecution by tribes will require that the defendant have at least some quantum of Indian blood. But how much, and to what extent other factors should be considered, will be difficult to assess. In *United States v. Heath*¹⁴⁹ and *St. Cloud v. United States*,¹⁵⁰ ethnic Indians were relieved from prosecution under the Major Crimes Act because their tribes had been terminated. It is anything but clear in Public Law 102-137 whether tribes must determine status upon such bases. Are tribes to be bound by decisions of the federal circuit courts, or even district courts? If so, the legislation may work a substantial divestment of inherent sovereignty. If not, might tribal courts try persons whom federal

¹⁴⁵ See Act of Oct. 28, 1991, Pub. L. No. 102-137, 1991 U.S.C.C.A.N. (105 Stat.) 646 (confining tribal jurisdiction to any person who would be subject to United States jurisdiction as an Indian under Major Crimes Act).

¹⁴⁶ See *supra* note 135 and accompanying text (discussing General Crimes Act).

¹⁴⁷ 18 U.S.C. § 1153 (1988).

¹⁴⁸ 25 U.S.C. § 1301(4) (Supp. 1994), as amended by Department of Defense Appropriations Act, Pub. L. No. 101-511 (1990) (104 Stat.) 1892; and Act of Oct. 28, 1991, Pub. L. No. 102-137, 1991 U.S.C.C.A.N. (105 Stat.) 646.

¹⁴⁹ See 509 F.2d 16, 19 (9th Cir. 1974) ("While anthropologically a Klamath Indian even after the Termination Act obviously remains an Indian, his unique status vis-a-vis the Federal Government no longer exists.").

¹⁵⁰ 702 F. Supp. 1456 (D. S.D. 1988). The effect of termination of the Ponca tribe is the legal equivalent of making enrolled members non-Indians. *Id.* at 1465.

courts would not recognize as Indians, thereby exercising jurisdiction *Oliphant*¹⁵¹ proscribes?

Consider the son. Is he to be considered an Indian because he has embraced tribal ways? Under the holding in *United States v. Rogers*,¹⁵² non-Indians who become incorporated into tribes are not thereby immune from federal prosecution. The Court determined that while a non-Indian may achieve tribal recognition as an Indian, for federal purposes, a person without Indian blood is a non-Indian.¹⁵³ Prior to Public Law 102-137, and conceivably after *Oliphant*, there may have been no converse rule. *Oliphant* proscribes tribal prosecution of those who are non-Indians, but sheds no defining light on those who are. The Nez Perce may well have considered the son to be an Indian through his adoption¹⁵⁴ of tribal customs and traditions, even though he lacked the requisite blood quantum to become an enrolled tribal member.¹⁵⁴ The tribe may as such have prosecuted him for a misdemeanor assault upon his sister. After enactment of Public Law 102-137, however, the tribe apparently no longer has such latitude. Because Congress now defines Indians for purposes of tribal jurisdiction as those whom federal courts could try for major crimes committed in Indian country, *Rogers* and its progeny seemingly preclude prosecution by the tribe.¹⁵⁵ Although the son possesses indicia of being Indian,

¹⁵¹ *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1988).

¹⁵² 45 U.S. (4 How.) 567 (1846). In *Rogers*, a case decided before enactment of the Major Crimes Act, a white resided with the Cherokee nation in Indian country, where he became a tribal member. *Id.* at 570. Federal courts did not then have jurisdiction to try offenses involving only Indians. *Id.* at 572. Rogers sought to avoid a federal prosecution on the basis that he was an Indian. *Id.* at 572. The Court decided nonetheless that Rogers was "still a white man, of the white race." *Id.* at 573.

¹⁵³ *Rogers*, 45 U.S. (4 How.) at 573.

¹⁵⁴ Should the tribe take such a position, its assertion of jurisdiction would be consistent with *McIntosh*. The *McIntosh* Court acknowledged that tribes could incorporate nonmembers, at least with respect to holding property and being subject to tribal laws. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 593 (1823). It would also be consistent with practices on reservations, such as Gila River, which provide for adoption of non-Indians as tribal members. Moreover, the Supreme Court might find it difficult to rule against assertion by a tribe of sovereignty over a non-Indian who has become fully assimilated, because to do so would be blatantly racist. *Rogers*, after all, was decided before passage of the Fourteenth Amendment.

¹⁵⁵ See *infra* note 162 (discussing vagueness challenges).

Public Law 102-137 may divest the tribe of jurisdiction, despite its affirmation of tribal sovereignty.

At least as troublesome is that Public Law 102-137 may not only determine when and whether tribes can consider non-Indians as Indians, but when and whether Indians can be treated as non-Indians. A principal purpose of the General Crimes Act, as originally enacted in 1817, was to provide a means for punishment of non-Indians for crimes committed in Indian country.¹⁵⁶ Congress invested federal courts with exclusive jurisdiction to try such crimes, whether committed by non-Indians against Indians or by non-Indians against non-Indians. The act continues to provide exclusive federal jurisdiction for the former crimes. But in the late nineteenth century, the Supreme Court held that states have exclusive jurisdiction to try crimes occurring in Indian country which involve only non-Indians.¹⁵⁷ If, because of Public Law 102-137, the son is a non-Indian, federal courts will have exclusive jurisdiction to try him for assaulting his sister, but only if she is an Indian. If she is not, only the State of Idaho can prosecute the crime.

Is the sister Indian or non-Indian? She has the racial quantum which her brother lacks, but was raised by non-Indians off the reservation. She also cannot become an enrolled member of the Nez Perce tribe, although she has more Indian blood than her Nez Perce mother. Would she be subject to the jurisdiction of the Nez Perce tribe if she were a Umatilla from Seattle who was only passing through?¹⁵⁸ How attenuated must her contacts be before she forgoes recognition as an Indian? Will embracing a culture which is not "Indian" suffice to avoid the strictures of Public Law 102-137?¹⁵⁹ If so, how close the embrace? Must the

¹⁵⁶ See generally Robert N. Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951 (1975); CANBY, *supra* note 5, at 120-28.

¹⁵⁷ *Draper v. United States*, 164 U.S. 240 (1896); *United States v. McBratney*, 104 U.S. 621 (1881).

¹⁵⁸ A similar question was posed by Senator Slade Gorton during hearings on the *Duro* legislation. Gorton, who in 1978 argued *Oliphant* to the Supreme Court as *amicus curiae* for the State of Washington, was unpersuaded that Public Law 102-137 is constitutional. He sought to impose a two-year limit on the legislation. See, e.g., Newton, *supra* note 117, at 115 (discussing *Impact of Supreme Court's Ruling in Duro v. Reina*, *Hearing Before the Select Comm. on Indian Affairs*, 102d Cong., 1st Sess., pts. 1 & 2 (1991)).

¹⁵⁹ *Nagle v. United States*, 191 F. 141 (9th Cir. 1911).

sister avoid any contact with the reservation, refuse distributions from San Carlos tribal trusts, decline federal benefits for Indians? Simply declining to enroll in a tribe may not suffice, according to the Ninth Circuit.¹⁶⁰ But enrollment and evidence of Indian blood may be enough.¹⁶¹

Conceivably, federal and state courts might each prosecute the son or daughter and determine jurisdiction differently. More likely, neither will make the effort, while the Nez Perce tribe, which has an immediate interest in preserving peace within the reservation boundaries, seemingly cannot. Public Law 102-137 promises to make ethnic gymnasts of tribal prosecutors. It invites a flood of habeas corpus petitions from tribal courts which are willing to assert the law to its fullest extent. This circumstance will be complicated by the fact that the vague definition of Indian in Public Law 102-137 may require case-by-case review.¹⁶² But among the many tribal courts which cannot afford the expense of federal review, the law may have far less utility than intended. Prosecutors may simply dismiss cases where defendants are represented and jurisdiction is in the slightest doubt.¹⁶³

¹⁶⁰ *United States v. Broncheau*, 597 F.2d 1260 (9th Cir.), *cert. denied*, 444 U.S. 859 (1979).

¹⁶¹ *United States v. Torres*, 733 F.2d 449 (7th Cir. 1984).

¹⁶² *See, e.g., Broncheau*, 597 F.2d at 1263:

It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand (citations omitted). Thus, the test is not whether the statute is vague in the abstract but whether it is vague as applied in the particular circumstances. Moreover, if judicial explication makes a statute clear so that fair notice is afforded, vagueness may not be imputed.

Broncheau, 733 F.2d at 1263. Although *Broncheau* was an enrolled member of the Nez Perce tribe, the court observed that enrollment should not be a prerequisite for jurisdiction under the Major Crimes Act. The court apparently refuted *Broncheau's* vagueness challenge because he "never suggested that he did not understand the term 'Indian,'" and the district judge who tried him "identified *Broncheau* as an Indian." *Id.* at 1263-64. The court also appeared to conclude that there has been sufficient judicial explication of the term "Indian" to disregard most vagueness challenges. The court cited several cases in support. *See United States v. Rogers*, 45 U.S. (4 How.) 567 (1845) (requiring Indian blood and tribal or governmental recognition as Indian to be considered Indian); *United States v. Dodge*, 538 F.2d 770, 786 (8th Cir. 1976) (requiring enrollment and one-fourth Indian blood), *cert. denied*, 429 U.S. 1099 (1977); *United States v. Indian Boy X*, 565 F.2d 585, 594 (9th Cir. 1977) (requiring enrollment and residence); *United States v. Lossiah*, 537 F.2d 1250, 1251 (4th Cir. 1976) (requiring enrollment and three-fourths blood); *Azure v. United States*, 248 F.2d 335, 337 (8th Cir. 1957) (requiring enrollment).

¹⁶³ For three years I supervised law students from the University of Idaho College of

There are only two offenses for which it is reasonably certain the unhappy members of this family can be tried. The father can be prosecuted for reckless driving by the State of Idaho regardless of his status as an Indian, because the offense occurred outside the exterior boundaries of the reservation.¹⁶⁴ Within the reservation, situs of all but one of the crimes outlined above, the only person the Nez Perce tribe can try with certainty is the mother.¹⁶⁵ Public Law 102-137 may restore a measure of authority to the tribe if it survives judicial scrutiny, or is upheld as a recognition of inherent sovereignty. But even if the legislation survives, tribes will still lack an effective or predictable means to impose the rule of law within their reservations.

Law in public defender programs on the Nez Perce and Coeur d'Alene reservations. I found that tribal court budgets often influenced decisions of tribal prosecutors and judges in cases where appeals were likely or were threatened. Budgets were cut so radically at the end of the Reagan administration that the Nez Perce tribal court could barely afford to incarcerate convicted offenders in a neighboring, county-operated jail. Unless tribal courts obtain sufficient funds to fully enforce their laws, legislation such as Public Law 102-137 may be of use only in circumstances where no disputed issues of jurisdiction are likely to arise. In 1993, Congress enacted the Indian Tribal Justice Act, Pub. L. No. 103-176, (107 Stat.) 2004. The Act authorizes \$50 million to support tribal justice systems over the 1994-2000 period. *Id.* § 201(b). However, the Act received no funding in 1994 and was not included in the Clinton Administration's 1995 budget. Conversation with Betty Rushing, Chief, Branch of Judicial Services and Acting Division Chief of Tribal Government Services, Bureau of Indian Affairs (November, 1994). *See also* Nell Jessup Newton, *Let a Thousand Policy-Flowers Bloom: Making Indian Policy in the Twenty-First Century*, 46 *ARK. L. REV.* 25, 38-45 (1993) (discussing history of and policy concerns about recent congressional initiatives to improve tribal justice systems).

¹⁶⁴ The jurisdictional dilemmas in the hypothetical arise because each of the crimes, save the father's reckless driving, occurred within the boundaries of the Nez Perce reservation. The reservation falls within the definition of Indian country. 18 U.S.C. § 1153 (1988). State or federal laws apply to crimes occurring outside of Indian country, regardless of the race or ethnicity of the offender. *Id.*

¹⁶⁵ In some states, tribes may lack even this limited ability to prosecute. A major exception to the foregoing jurisdictional knot is Public Law 280, which, where applicable, may entirely supplant tribal court jurisdiction. Act of August 15, 1953, Pub. L. No. 83-280 (67 Stat.) 588 (codified and amended at 18 U.S.C. § 1162 (1984)); 25 U.S.C. §§ 1321-26 (1988); 28 U.S.C. § 1360 (1988). *See supra* note 113. Note also that in the hypothetical the mother is an enrolled member of the Nez Perce tribe. The Court could restrict federal application of the Major Crimes Act to enrolled tribal members only. *See supra* notes 94, 144 (discussing *United States v. Antelope*, 403 U.S. 641 (1977)). The narrowed jurisdiction would seemingly circumscribe the jurisdiction of the tribes as well, because Congress defines Indians in Public Law 102-137 according to the Major Crimes Act. Act of Oct. 28, 1991, Pub. L. No. 102-137, 1991 U.S.C.C.A.N. (105 Stat.) 646. In such event, the Nez Perce tribe could not prosecute the mother if she were not enrolled.

Public Law 102-137 passed both houses of Congress without objection. Why such broad support for legislation which threatens to draw still tighter the Gordian knot of tribal jurisdiction? Congress could have avoided the status-seeking gyrations of Public Law 102-137 by a recognition or delegation of authority to tribes to try any persons, nonmember and non-Indian, who commit crimes within their territories. It could have overcome the result in *Oliphant* as well as *Duro*. That it chose not to raises at least an inference that the *Duro* fix is racist.

But here lies a quandary. Must tribes persuade Congress to overturn *Oliphant* before Public Law 102-137 will survive a Fifth Amendment challenge? If they must, is there a means? Non-Indians number in the majority on many reservations. It seems unlikely that Congress will act so zealously to protect Indian self-determination as to allow numerical minorities to prosecute non-Indian majorities. It is not even clear whether most tribes would seek such jurisdiction. At the time *Oliphant* was decided, of 238 reservation court systems, only thirty-three purported to extend jurisdiction to non-Indians.¹⁶⁶ It is also doubtful whether tribes would benefit if such legislation were enacted. David Williams writes that in the comparatively liberal Pacific Northwest, non-Indian resentment of treaty hunting and fishing rights has led to bumper stickers chiding "Save a Salmon, Can an Indian."¹⁶⁷ Racism in far less subtle forms would almost certainly attend a congressional fix of *Oliphant*. At least as ominous for tribes might be the strictures the Supreme Court would impose on its enforcement.

If there might be any cause to believe that *Duro* did not divest tribes of inherent sovereignty to try nonmember Indians, there is no doubt that *Oliphant* divested them of the right to prosecute non-Indians.¹⁶⁸ Indeed, the failure of Public Law 102-137 to acknowledge the inherent authority of tribes over non-Indians provides implicit congressional recognition of such a limitation on tribal authority. Any legislation which invests tribes

¹⁶⁶ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196 (1978).

¹⁶⁷ David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 759 (1991).

¹⁶⁸ See *supra* note 70.

with the ability to try non-Indians will almost certainly be viewed by the Court as a delegation of authority.

Duro, citing *Reid v. Covert*,¹⁶⁹ suggests that a delegation of authority to tribes to try non-Indians (and nonmember Indians if the Court rejects the congressional recognition of inherent sovereignty) will be ineffective unless Congress grants affected defendants the full protection of the Bill of Rights.¹⁷⁰ At the least, such a decision by the Court will require dismantling provisions of ICRA that protect tribes. Tribes that do not already provide court-appointed counsel for indigent defendants will presumably be required to do so, while others, whose courts are extensions of tribal governing councils, might be proscribed from trying crimes unless they completely overhaul their social institutions.¹⁷¹

At most, *Oliphant* and *Duro* suggest that congressional delegations of authority may be ineffective unless tribes grant nontribal defendants the right to vote and thereby participate in tribal government. Granted, the Court has never found that jurisdiction and the franchise are co-extensive.¹⁷² If the Court should find them co-extensive, however, preserving the separate cultures and political controls of reservation tribes could be difficult or impossible on reservations in which significant shares of total population are not composed of tribal members.

This parade of horrors might well occur if Congress were to delegate authority to tribal Indians, however unexpectedly, to prosecute non-Indians. But the parade may not take place if jurisdiction is limited to nonmember Indians. As long as *Oliphant* remains good law, Public Law 102-137 is virtually certain to face a Fifth Amendment challenge.

¹⁶⁹ 354 U.S. 1, 77 (1957).

¹⁷⁰ *Duro v. Reina*, 495 U.S. 676, 694 (1990).

¹⁷¹ Some Pueblo courts use tribal councils to adjudicate disputes under customary law. CANBY, *supra* note 5, at 59, 65. If judged by constitutional standards, these courts would likely run afoul of the doctrine of separation of powers.

¹⁷² See *supra* note 140 (discussing creation of plenary power doctrine to uphold Major Crimes Act).

II. CONSTITUTIONAL IMPLICATIONS OF THE *DURO* FIXA. *The Political Classification Doctrine*

Milner Ball observes that the Supreme Court has never held a congressional exercise of power over Indians, even if harmful, to be illegal, "and it probably never will."¹⁷³ Indeed, nearly one hundred years ago the Court decided in *United States v. Kagama*¹⁷⁴ that Congress has extraconstitutional, plenary power over Indians "because it has never been denied, and because it alone can enforce its laws on all the tribes."¹⁷⁵ Early in this century, the Court announced that the exercise of congressional trust responsibilities over Indians presented political questions that were nonjusticiable.¹⁷⁶ This judicial deference to Congress has meant that legislation has seldom been analyzed explicitly under the equal protection doctrine. Even if the Court declines to find that Public Law 102-137 is a recognition of inherent sovereignty, there are other means by which the Court might avoid contending with the equal protection implications of the legislation, or by which scholars might argue that the legislation can be upheld.

The Court's principal fallback in recent years has been to find that congressional actions which treat Indians differently from non-Indians do not implicate the equal protection and due process guarantees of the Fifth Amendment when they deal with Indians as different polities. It is this status-based distinction that animates the test announced by the United States Court of Appeals for the Ninth Circuit in its *Duro* holding.¹⁷⁷ The justification of political classifications as a basis for differential treatment began with the 1974 decision, *Morton v. Mancari*.¹⁷⁸

¹⁷³ Ball, *supra* note 2, at 12.

¹⁷⁴ 118 U.S. 375 (1886).

¹⁷⁵ *Id.* at 384-385. Courts have used the plenary power doctrine announced in *Kagama* to uphold a challenge to the Major Crimes Act. See *supra* note 140 and accompanying text.

¹⁷⁶ *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). In *Lone Wolf*, tribal members sought to overturn a federal statute on grounds that it was inconsistent with a prior treaty. The Court upheld the legislation because of the plenary power of Congress to regulate tribes. The Court stated that "the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." *Id.* at 564-65.

¹⁷⁷ 851 F.2d 1136 (9th Cir. 1988). See *supra* note 82 and accompanying text.

¹⁷⁸ 417 U.S. 535 (1974).

In *Mancari*, non-Indian employees of the Bureau of Indian Affairs challenged provisions of the 1934 Indian Reorganization Act¹⁷⁹ as violating the 1972 Equal Employment Opportunity Act¹⁸⁰ and the Fifth Amendment. The complainants argued that hiring preferences for Indians in positions with the Bureau of Indian Affairs, contained in the 1934 Act, constituted invidious discrimination based on race and were implicitly repealed by the later legislation. The Court held, however, that neither was the 1934 Act repealed nor did the preferences violate the Fifth Amendment.¹⁸¹ The Court reasoned that because of the unique status of Indian tribes under federal law, and because of the plenary power of Congress to legislate respecting tribes, differential treatment is permissible as long as classifications are tied to Congress' unique obligations toward Indians.¹⁸² The Court found that employment preferences in

¹⁷⁹ 25 U.S.C. § 461 (1988). The Indian Reorganization Act of 1934, also known as the Wheeler-Howard Act, accords employment preferences for qualified Indians in the Bureau of Indian Affairs. The Indian Reorganization Act marked the end of the allotment period. See *supra* note 5.

¹⁸⁰ Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 111 (codified at 42 U.S.C. § 2000e (1988)). 42 U.S.C. § 2000e-16(a) (1970 ed., Supp II), proscribes discrimination on the basis of race in most federal employment.

¹⁸¹ The Court held, among other reasons, that the employment preference provisions of the Indian Reorganization Act were not implicitly repealed because the 1964 Civil Rights Act allows preferential employment of Indians in private industry. *Mancari*, 417 U.S. at 548 (citing 42 U.S.C. §§ 2000e-(b), 2000e-2(i)).

¹⁸² *Id.* at 555. The Court observed in passing that the plenary power of Congress to regulate tribes is both explicitly and implicitly derived from the Constitution. The Court found an explicit basis in the power of Congress to "regulate Commerce . . . with Indian Tribes" and in the power of the President to make treaties with Indian tribes upon the advice and consent of Congress. *Mancari*, 417 U.S. at 551-52 (citing U.S. CONST. art. I, § 8, cl. 3 and art. II, § 2, cl. 2). The Court cited *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943) and *United States v. Kagama*, 118 U.S. 375, 383-84 (1886) to find an implicit constitutional basis.

In the exercise of the war and treaty powers, the United States overcame the Indians . . . 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

Mancari, 417 U.S. at 552. However, the cited cases do not support this constitutional basis. The *Kagama* Court, for example, considered and rejected the Indian Commerce Clause when deciding that Congress had power to impose the Major Crimes Act on tribes. Instead, it invented the plenary power doctrine with near-explicit recognition that the doctrine is

the Indian Reorganization Act do not violate due process because the classification created by the legislation is not directed toward Indians as separate races but as separate polities.¹⁸³ Because only Indians who are members of federally recognized tribes are eligible for the preference, non-Indians are situated no differently from ethnic Indians who, because their tribes lack federal recognition, receive no benefit. "If [such] laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (Title 25) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized."¹⁸⁴

Although *Mancari* was greeted by many as a victory for Indians, it was correctly foreseen by others as containing the seeds for discrimination against the tribes it purported to protect and against Indians as individuals.¹⁸⁵ *Mancari's* perfidy is that, although enunciating a congressional responsibility to tribes, it imposes no limits on the use of the political classifications it creates, thereby allowing the subterfuge of status to overcome distinctions which would otherwise be blatantly unconstitutional.¹⁸⁶

extraconstitutional. See *supra* note 140 and accompanying text. The Court determined in *Mancari* that the racial preference in the Indian Reorganization Act is not racially based. Therefore, its invocation of, and constitutional justification for, a doctrine used on other occasions to avoid judicial review of racially discriminatory legislation is anomalous. If the preferences set forth in the Indian Reorganization Act do not violate the Fifth Amendment, the Court need only have found a rational basis to uphold the legislation. Instead, invocation of the plenary power doctrine invited the risk, later fulfilled, that *Mancari* would be turned against Indians and tribes. See *infra* note 196 and accompanying text.

¹⁸³ *Mancari*, 417 U.S. at 553 n.24.

¹⁸⁴ *Id.* at 552.

¹⁸⁵ See, e.g., Clinton, *supra* note 21; Ball, *supra* note 2, at 130; Newton, *supra* note 21, at 275 (finding promise in the decision as exhibiting heightened judicial scrutiny).

¹⁸⁶ *Mancari* was announced the same day as *Geduldig v. Aiello*, 417 U.S. 484 (1974), a case which has been roundly criticized for avoiding an equal protection challenge on similar grounds. See, e.g., LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1578 (2d ed. 1988). *Geduldig* decided that a state insurance disability fund, which denied benefits to women who were temporarily unable to work following normal pregnancies, did not violate the equal protection clause of the Fourteenth Amendment. "The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes." *Geduldig*, 417 U.S. at 497 n.20.

*Washington v. Confederated Tribes of the Colville Reservation*¹⁸⁷ is among the earlier progeny of *Mancari*. In it, the Court permitted the state of Washington to impose taxes on the sale of tobacco and cigarettes to non-Indians and nonmember Indians within the Colville reservation. Absent state taxes, such sales had been an important source of revenue for the tribes, because the products could be sold inexpensively to reservation visitors. The effect of the decision, which recognized tribes as separate polities, injured both the tribes and nonmember Indians. The tribes were stripped of their source of revenue, because a combination of their own taxes and state taxes made their products more expensive than those purchased outside reservations. Although nonmember Indians were ethnically the same and might have been fully integrated into the reservation through marriage to tribal members, they were treated disparately because they fell outside the polity.

In *Fisher v. District Court*,¹⁸⁸ two members of the Northern Cheyenne tribe initiated a proceeding in a Montana state court to adopt another tribal member's child. The child's mother, who had been deprived of custody in the Cheyenne tribal court, sought to bar the state proceeding on the ground that it lacked subject matter jurisdiction. The Supreme Court held that Montana's jurisdiction had been preempted by the Indian Reorganization Act,¹⁸⁹ provisions of which empowered the tribe to adopt an ordinance conferring exclusive jurisdiction on the tribal court.¹⁹⁰ In response to a challenge that denial of access to state courts was racially discriminatory, the Court opined that

The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law. Moreover, even if a jurisdictional holding occasionally 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.¹⁹¹

¹⁸⁷ 447 U.S. 134 (1980).

¹⁸⁸ 424 U.S. 382 (1976).

¹⁸⁹ 25 U.S.C. § 476 (Supp. 1994).

¹⁹⁰ *Fisher*, 424 U.S. at 390.

¹⁹¹ *Id.* at 390-91 (citing *Morton v. Mancari*, 417 U.S. 535, 551-55 (1974)).

Where *Washington v. Confederated Tribes of the Colville Reservation* had injured the economic interests of nonmember Indians on the Colville reservation, as well as the economic interests of the tribe itself, *Fisher's* extension of *Morton v. Mancari* diminished the due process rights of individual tribal members. *Fisher*, like *Santa Clara Pueblo v. Martinez*,¹⁹² has been praised as a recognition of the group rights of tribes *vis-à-vis* their members.¹⁹³ But it took only another year before the Court turned the *Mancari* formulation against a tribal member in a matter not involving tribal rights. In *United States v. Antelope*,¹⁹⁴ discussed elsewhere,¹⁹⁵ the Coeur d'Alene tribe had no direct interest whether the defendant tribal member was tried for murder in a state or federal proceeding. The Supreme Court nonetheless employed *Mancari's* status test to uphold prosecution of Gabriel Antelope under the Major Crimes Act because of his political status, even though if based on race alone, federal prosecution would have violated the Fifth Amendment.¹⁹⁶

One scholar believes the *Duro* fix can withstand judicial scrutiny using the *Mancari* rationale. Professor Skibine contends that because Congress was acting in its capacity as trustee when it enacted Public Law 102-137, by attempting to protect tribal self-government and fill a void in jurisdiction, the *Mancari* reasoning should apply. He warns, however, that simply asserting Indians are a political class is overly simplistic and truly race-based. He would define "Indian" more narrowly, limiting the group to formally enrolled members of any recognized tribe. How tribal prosecutors would prove the enrollment status of defendants is not clear. Yet, Skibine's reasoning presumes that the nonmember Indian, haled into a foreign tribunal, is indirectly benefitted by such differential jurisdiction because his own tribe has the benefit of enhanced self-determination thanks to the *Duro* fix.

¹⁹² 436 U.S. 49 (1978); see *infra* note 240 and accompanying text.

¹⁹³ See, e.g., Newton, *supra* note 21, at 275.

¹⁹⁴ 430 U.S. 641 (1977).

¹⁹⁵ See text accompanying *supra* notes 94, 142.

¹⁹⁶ The Court also used *Mancari* to limit Indian interests. *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979). The Court held that the State of Washington's assertion of Public Law 280, based on Indian and non-Indian land tenure, did not constitute impermissible racial classification. *Id.* at 502. The Court instead found that the unique legal status of tribes allows Congress to single out tribal Indians in ways which would otherwise be constitutionally offensive. *Id.* at 501.

This presumes a lot. Indians enrolled in several of the Public Law 280 states will derive no such benefit.¹⁹⁷ Further, even among states in which Public Law 280 does not preempt tribal jurisdiction, not all tribes which are entitled to operate their own courts do so:¹⁹⁸ some may be unable to for financial reasons; others may discern no need. It is difficult to see how non-member Indians from these tribes would benefit.¹⁹⁹ Moreover, Indians are not fungible.²⁰⁰ Their tribes may have vastly different cultures from, or historical antipathy toward, the prosecuting tribe.²⁰¹ For nonmember Indians in these situations, benefits will seem attenuated indeed following arrest, prosecution without the right to appointed counsel, and exposure to consecutive sentences following conviction.²⁰²

If the *Mancari* formulation spares Public Law 102-137 from scrutiny under the Fifth Amendment, the result is apt to dismay those who support the legislation. It occurs that the only *Mancari*-based decision the Court can reach which is consistent with *Confederated Tribes of the Colville Reservation, Fisher, and Antelope*, is that tribal criminal jurisdiction must be confined to members of the prosecuting tribe, and perhaps only to tribal members who are enrolled.²⁰³

¹⁹⁷ See *supra* note 165 (discussing tribal jurisdiction in Public Law 280 states).

¹⁹⁸ See text accompanying *infra* notes 314-18.

¹⁹⁹ Skibine, *supra* note 130, at 797-99.

²⁰⁰ Brief for Appellant at 22, *Greywater v. Joshua*, 346 F.2d 486 (8th Cir. 1988) (No. 87-5233-ND). See also Newton, *supra* note 163 (presenting informative and well-reasoned discussion of problems of efficiently developing responsive federal policy in light of great diversity of tribes).

²⁰¹ *Id.* at 23 (citing WILLIAM WARREN, *HISTORY OF THE OJIBWAY PEOPLE* (1984) and GARLAND, *AMERICAN INDIAN ETHNOHISTORY SERIES, THE CHIPPEWAS, VOLS. I-VII*).

²⁰² *Id.* at 6, 7, 10-11. Cf. Newton, *supra* note 117, at 122-23. Newton contends that the right to appointed counsel in tribal court proceedings is not as fundamental as in state courts. *Id.* She observes that tribal judges and prosecutors are rarely attorneys. *Id.* She also notes that plea bargaining, with pressure on defendants to plead guilty to lesser offenses, is practically nonexistent in tribal courts. *Id.* Newton neither explains why constitutional rights are better preserved when judges and prosecutors are not attorneys nor does she provide support for her claim that plea bargaining in tribal courts is unusual. When I practiced on the Coeur d'Alene and Nez Perce reservations, plea bargaining was a common practice. The Coeur d'Alene tribal prosecutor was not only an attorney, but also a retired state judge. The Nez Perce tribe now requires that its judges be licensed attorneys. Nez Perce Tribe Law and Order Code, Title 1, Chapter 1, § 1-107 (1992). The current Nez Perce prosecutor is also an attorney.

²⁰³ But see *supra* note 165 (discussing jurisdictional problems created by Public Law 280).

Mancari and *Geduldig v. Aiello*,²⁰⁴ a decision announced the same day, imply that equal protection analysis can be avoided when members of suspect classes fall on both sides of contested legislation. In *Mancari*, many ethnic Indians could benefit from hiring preferences, but some could not. In *Geduldig*, although pregnant women could not receive disability benefits from a state-created fund, nonpregnant persons, including women, could. Public Law 102-137, however, does not lend itself as readily to similar divisions. The law benefits tribes which seek to prosecute nonmember Indians. But because nonmember Indians are not by definition members of the forum tribe, they are never members of the benefitted class. Nonmember Indians cannot fall on both sides of Public Law 102-137 because they are its very object.²⁰⁵ Because nonmember Indians are always subject to the law, distinctions between them and non-Indians who are similarly situated, but never subject to the law, are difficult to explain as being anything but racial.

A reading of *Mancari* consistent with its successors would of course controvert the announced purpose of the original opinion to protect tribal governments. However, the decision in *Duro v. Reina*²⁰⁶ suggests that the Court will not follow *Mancari* in deciding a challenge to Public Law 102-137. Recall that the Court easily dispatched the Ninth Circuit's status test because it could not justify distinctions between nonmember Indians and non-Indians when their contacts with tribes and reservations, except for race, are otherwise equivalent.²⁰⁷

²⁰⁴ 417 U.S. 484 (1974); see *supra* note 186.

²⁰⁵ *Fisher* might seem to suggest the converse, because member Indians can never obtain access to Montana state courts in adoption proceedings, while nonmembers presumably always can. However, nonmember Indians may never be entitled to become tribal members, while tribal members can always become nonmembers. *Fisher* also suggests that even tribal members can proceed in state courts when their cause of action arises outside their reservation. *Fisher*, 424 U.S. at 382. On its face, Public Law 102-137 applies equally to tribal members and nonmembers. *Fisher* thus suggests that Indians may fall on both sides of the line depending on whether they are on reservations with their own tribes. The legislation, however, is not intended to confer criminal jurisdiction on tribes over their own members, a sovereign right which has never been disputed, but to extend or at least acknowledge such jurisdiction over those who are not. As intended and applied, persons subject to Public Law 102-137 are never members of the prosecuting polity.

²⁰⁶ 495 U.S. 676 (1990).

²⁰⁷ *Id.* at 697; see *supra* note 86 and accompanying text.

But if *Mancari* may be of little use to those who support Public Law 102-137 and its implicit recognition of the rights of tribes to act as separate groups, several scholarly conceptions have been advanced that might be marshalled to save the legislation. Whether any of these formulations can or should support a right of tribal Indians to assert authority over those who are not their members is, however, doubtful.

B. *Protecting the Rights of Indians as Groups*

Among recent theories of group rights is the suggestion that the Fourteenth Amendment itself spares legislation which favors tribes from equal protection analysis. David Williams argues that the equal protection provisions of the Fifth and Fourteenth Amendments do not apply to Indians when legislation advances or conserves their rights to act as separate peoples.²⁰⁸ He observes that during debates over the Fourteenth Amendment and the Civil Rights Act of 1866,²⁰⁹ Congress expressly considered and decided that Indians should not fall within the ambit of the Amendment, unless they abandoned tribal ways or, if renegades, adopted the habits of civilized life.²¹⁰ Tribal Indians were considered neither to be within the jurisdiction of the United States, nor were they considered "citizens" or "persons" for purposes of the Equal Protection Clause.²¹¹

²⁰⁸ Williams, *supra* note 167. Williams credits Robert Clinton with also recognizing the possibility that Congress intended to exempt tribal Indians from the Fourteenth Amendment. *Id.* at 770.

²⁰⁹ Civil Rights Act, ch. 31, 14 Stat. 27 (1866), *repealed by* Act of Oct. 14, 1940, ch. 876, tit. I, subch. V, § 504, 54 Stat. 1172.

²¹⁰ Williams, *supra* note 167, at 835. Williams writes that Congress considered a grant of citizenship to all Indians except those who maintained tribal relations. *Id.* Congress rejected the proposal because of reluctance to confer citizenship on renegades, who although not maintaining tribal allegiances, had not been assimilated with non-Indians. The language of Article I of the Constitution referring to "Indians not taxed" was therefore imported into the Fourteenth Amendment to cover tribal Indians and renegades. U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2; Williams, *supra* note 167, at 835-36.

²¹¹ Williams acknowledges that the Equal Protection Clause applies to all "persons," not merely to "citizens." He reasons that Congress would not have debated whether Indians were citizens or subject to the jurisdiction of the United States if it intended to then eliminate their separate status because of the amendment's ban of racial discrimination. Williams, *supra* note 167 at 839. Williams reasons elsewhere that naturalization of all Indians in 1924 did not eliminate their separate status under the Fourteenth Amendment. *Id.* at 851.

The crux of Williams' argument is that the framers of the Fourteenth Amendment recognized tribal Indians as separate peoples, and distinguished them constitutionally from other minorities on this basis. The result that he envisions is a win-win situation. When Congress deals with Indians as separate peoples, it can create group-favoring, albeit racially-biased preferences, which could not otherwise withstand judicial scrutiny. Congress may even single out Indians off-reservation if its vision is one of tribes as separate peoples.²¹² But when Congress deals disparately with Indians as individuals, or when Indians leave the jurisdiction of the tribes, they enjoy full benefit of the Equal Protection Clause. Hence, for legislation to escape scrutiny under Williams' argument, it must either promote or at least be neutral to tribal self-determination.²¹³

Williams' concept offers alternative support for the benign elements of *Mancari* and a clever containment of its unwelcome progeny. Employment preferences for Indians can be upheld because they advance the interests of tribes as separate peoples. Subjection of Indians as individuals to differential treatment, as when Gabriel Antelope was tried for felony murder,²¹⁴ must withstand strict scrutiny.

Williams' portrayal of historical events is convincing to a point. His research persuades that the framers may well have intended to exclude tribal Indians from the benefits of citizenship that the Fourteenth Amendment extended to former slaves. There was undoubted post-war sentiment for black equality and inclusion, born in part of conscience and in part of a determination to protect blacks from vengeance in the defeated South. But there is little in the history of the times to suggest that Congress actively sought to promote the interests of Indians as separate peoples. The victors in war would shortly afterwards send their troops to fight the tribes across the plains. The debates over the 1866 Civil Rights Act that Williams describes suggest that to some members of Congress Indians may have been scarcely more than a footnote in the process of delibera-

²¹² Williams, *supra* note 167, at 845; *see infra* note 216.

²¹³ Williams, *supra* note 167, at 845.

²¹⁴ *United States v. Antelope*, 430 U.S. 641 (1977).

tion, considered at all only because many of them should not be entitled to become citizens.²¹⁵

The irony of history may be, if Williams is correct, that Indians will have become the principal, but intentionally unintended, beneficiaries of the Fourteenth Amendment. Blacks could well suffer in an era in which the Supreme Court may disdain any racial preference. But Indians might receive the benefits of legislation that creates for them group preferences, because the legislation will not be subject to an equal protection challenge.

Williams' concept is unlikely to persuade the Court.²¹⁶ Although he argues that legislation will be free of equal protection strictures to the extent it is consistent in intent and effect with tribal self-determination,²¹⁷ without more direction in the Fourteenth Amendment than "excluding Indians not taxed,"²¹⁸ there is little in the Amendment or its history to guide a Court which, at least in recent years, has exhibited frequent hostility to tribal sovereignty.

Even if the Court accepts the Amendment as a basis to prefer Indians, it is unlikely to accept Williams' deduction that legislation which singles out Indians as peoples poses no greater risk of harm to others than legislation that singles out particular nations, foreign diplomats, or aliens.²¹⁹ While foreign nations can prosecute American citizens on their soil, Congress has never granted them such power, much less given such power to diplomats or aliens. In *Duro*, the Court determined that Indians may not prosecute nonmember Indians because to do so would intrude upon their protected liberties. It is difficult to reason how Public Law 102-137, which singles out nonmember Indians,

²¹⁵ Williams, *supra* note 167, at 833-39.

²¹⁶ However, Williams argues convincingly that the rights of Indians should not be protected simply because of their loss of aboriginal lands. Such a distinction would denigrate the rights of blacks who were extracted from their lands. *Id.* at 820-21. Tribal rights, therefore, should not be land-specific. *Id.* at 845. Neither should such rights be relegated to racial Indians. Presumably, the federal government should recognize members accepted by tribes even if they are of other races. *Id.* at 849 n.283. However, this seems to open the possibility of federally recognized tribal enclaves in cities, with memberships which might be made up of few ethnic Indians.

²¹⁷ *Id.* at 867.

²¹⁸ U.S. CONST. amend. XIV, § 2.

²¹⁹ Williams, *supra* note 167, at 847.

some of whom comprise majorities on reservations, cannot be viewed, at least by them, as harmful.

Without question Public Law 102-137 is intended to benefit tribal Indians, perhaps as separate peoples. It therefore satisfies Williams' test for exemption from strict scrutiny. But unless by some stretch the legislation is interpreted to also treat nonmember Indian defendants as separate peoples, it must deal with them as individuals. If it does so, Williams would accord them full benefit of the Equal Protection Clause. As such, the law puts the group-advantaging aspect of the Fourteenth Amendment which Williams discusses squarely at odds with the protections he finds that it affords to Indians as individuals.

Others have also urged that Indians and other minorities have rights as groups which can be protected by the Constitution. Owen Fiss argues that the principle on which virtually all equal protection decisions are based, that of forbidding discrimination, disserves the intended purpose of the Fourteenth Amendment.²²⁰ He asserts that the language of the Amendment has been redacted to read "protection of equal laws."²²¹ The result is that the Amendment has become individualistic, means-focused, and symmetrical, forcing homogenous equality at the frequent expense of minorities. Fiss argues for a different mediating principle, one in which the Fourteenth Amendment is interpreted asymmetrically to protect the rights of certain groups. Although Fiss applies his group-disadvantaging principle to blacks, those whom he terms the true wards of the Equal Protection Clause,²²² the basis upon which he formulates group rights applies equally to Indians.

Fiss argues that the Equal Protection Clause should accord differential treatment to groups which form a long-enduring economic underclass. In such manner, practices that aggravate the subordinate position of protected groups should be invalidated even in the absence of state discrimination.²²³ More

²²⁰ Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

²²¹ *Id.* at 120.

²²² *Id.* at 147.

²²³ Fiss reasons, for example, that application of the group-disadvantaging principle would change the result in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). The plaintiff would not need to demonstrate discrimination in the actions of a state which granted liquor licenses to private clubs which excluded blacks. Rather, the plaintiff would

importantly, group-related preferential legislation might not only be encouraged but required.²²⁴ So interpreted, the Fourteenth Amendment is not crafted to empower whites. *Regents of the University of California v. Bakke*²²⁵ should be overturned because whites do not form disadvantaged groups. *Geduldig v. Aiello*²²⁶ should be overturned because women do, and *Mancari* should survive because Indians form a benefitted underclass.

Notwithstanding this support for the *Mancari* result, the group-disadvantaging principle may be of little benefit to Indians. The principle does not recognize the separate cultural identity of groups so much as it provides a mechanism to erase stigmatic group identities by eradicating unequal intergroup distinctions. The principle may be relatively indifferent to cultural identity, but because its purpose is not to protect groups as distinct from individuals and states, it could invite policies of cultural assimilation.²²⁷ To the extent blacks (and some Indians) desire such assimilation, the principle may work well. To the extent Indians (and some blacks) wish to retain a separate group identity, it may not. Hence, while the group-disadvantaging principle might be used to sustain the constitutionality of an all-black high school whose purpose is to give black students cultural identity as a means of overcoming a negative self-image, it might also be enlisted to erase group identities. For example, the Dawes Act was intended at least by its benign supporters to eliminate distinctions that kept Indians as an economic underclass. The 1953 concurrent resolution which announced the period of termination was couched in terms of freeing tribes from federal supervision.²²⁸ An

only need to show that the state practice conferred a scarce franchise on the club, thereby leaving a scarcity of opportunities for blacks. Fiss, *supra* note 220, at 139. The group-disadvantaging principle would also explain the result in *Shelley v. Kramer*. *Id.* at 137-38 (discussing *Shelley v. Kramer*, 344 U.S. 1 (1948)). Fiss argues that *Shelley* cannot be explained by the antidiscrimination principle because the state was willing to enforce racially restrictive covenants against whites as well as blacks. Fiss, *supra* note 220, at 137-38.

²²⁴ *Id.* at 171-72.

²²⁵ 438 U.S. 265 (1978).

²²⁶ 417 U.S. 484 (1974); see *supra* note 186.

²²⁷ Fiss styles his group-disadvantaging principle as an "ethical view against caste." Fiss, *supra* note 220, at 151.

²²⁸ H.R. Con. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1953); see text accompanying *supra* note 6 (discussing resolution).

unsuccessful 1978 proposal to abrogate treaties and eliminate federal benefits for Indians was entitled the "Native American Equal Opportunity Act."²²⁹

In the context of the group-disadvantaging principle, Public Law 102-137 would seemingly violate the Equal Protection Clause because it aggravates the subordinate position of nonmember Indians as an underclass by denying them the protections from tribal criminal prosecutions available to non-Indians.²³⁰ If the principle could be marshalled to support unequal jurisdiction, the law would be more apt to pass constitutional muster if it extended criminal jurisdiction over whites instead of Indians. As Public Law 102-137 stands, the group-disadvantaging principle pits an underclass against an underclass. The principle would require that the legislation be overturned because one protected group should not be accorded rights at the expense of another protected group.²³¹

Ronald Garet discounts theories of group rights which are only derivative from individual rights and societal norms, including the group-disadvantaging principle.²³² His thesis instead is that groups have intrinsic justification, that communality is a "structure of existence" which coexists in symmetry with sociality and personhood.²³³ He writes that

²²⁹ H.R. 13,329, 95th Cong., 2d Sess. (1978).

²³⁰ Robert Clinton, Nell Jessup Newton, and Monroe Price would apparently argue that the absence of the law would disadvantage nonmember Indians because they would be subjected to state court jurisdiction. *See infra* note 377.

²³¹ This result would follow from Fiss' concern that laws should not intensify or perpetuate the subordinate position of specially disadvantaged groups. Fiss, *supra* note 220, at 157.

²³² Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983). Garet views the group-disadvantaging principle as egalitarian, promoting equality among groups not because of the intrinsic value of their communality, but as a social ideal. Egalitarianism and social norms, however, "cannot capture the proximate moral referent" of attributes which are unique only to groups. *Id.* at 1042. Moreover, because the group-disadvantaging principle is egalitarian, it is limited to those at the bottom of the social hierarchy. It therefore neglects groups whose coherence is threatened not by inequality, but by such factors as acculturation. *Id.* at 1059.

²³³ *Id.* at 1070.

It is, I think, a more or less common intuition that communality is a structure of existence. Not only is groupness an unfathomable fact of all of our lives, but it is also an unfathomable *value*. . . . Life not subject to the call of groupness is as difficult for us to imagine as life not subject to the invalidating call of personhood or to the sociating call of sociality.

Wisconsin v. Yoder,²³⁴ which held that Amish children were exempt on First Amendment grounds from a state law that required public schooling to age sixteen, can only be explained as respecting the underlying “claiming good” of the Amish group.²³⁵ A decision that acknowledged only individual rights to free exercise of religion should have produced the opposite result, because the right of free choice should have protected the children from the religious predilections of their parents, not their parents from the state.²³⁶ Instead, the Court balanced the societal good of compulsory schooling with the intrinsic value of the group and upheld Amish communality. The group’s right (protection of its religious practices) is in turn an existentially-mandated deference to this value.²³⁷

Garet also finds an implicit recognition of communality in *Santa Clara Pueblo v. Martinez*.²³⁸ In that case, the Court declined to find that a federal forum is available to civil litigants who allege a violation of the Indian Civil Rights Act.²³⁹ The plaintiff had alleged a denial of equal protection under the act because the Santa Clara Pueblo denied membership to children of female members married to nonmembers, but granted membership to children of males married to nonmembers. Garet reasons that the result cannot be explained by the antidiscrimination principle, which would have upheld the plaintiff’s individual right to equal protection, or by the group-disadvantaging principle, which would have presumably required a similar result because the rights of groups under the principle are derivative.²⁴⁰ Similarly, the social norm of equality would

Id.

²³⁴ 406 U.S. 205 (1972).

²³⁵ Garet, *supra* note 232, at 1034-35.

²³⁶ *Id.* at 1032 (referring to the dissenting opinion by Justice Douglas).

²³⁷ *Id.* at 1074. Garet reasons that communality offers a “site for moments of celebration” between personhood and sociality, and that being is sustained in groupness. *Id.* at 1072-74. It exists between the dread of personhood (of falling from freedom to “thinghood”) and the hope of sociality (of achieving the “not yet” in the human world”). *Id.* The claiming good of communality is its existence between the retrospective pull of personhood and the prospective movement of sociality. *Id.*

²³⁸ 436 U.S. 49 (1978).

²³⁹ 25 U.S.C. §§ 1302-03 (1983).

²⁴⁰ “If group protection, as required by the group-disadvantaging principle, supports an internal control that imposes inequalities between group members, then a contradiction arises between the requirements of interpersonal equality and the requirements of in-

surely have upheld the plaintiff's claim. Therefore, a decision to uphold the tribe must necessarily have recognized its separate, intrinsic existence as a group.

For Indians, Garet's concept of groups as necessary structures of existence has a distinct advantage over theories based on derivative rights, and perhaps over the concept that the Fourteenth Amendment does not contemplate tribal groups. If tribes have symmetrical, coexisting value with individuals and the state, tribes should be able to withstand assimilative legislation even though it might benefit Indians as individuals. But it may prove difficult to divine which groups merit the benefits of protected status and which do not. Garet observes that both the fact and the value of groupness, though existent, are unfathomable.²⁴¹ So, while the group-disadvantaging principle may be underinclusive because of an egalitarian confinement to underclasses, communality as a ground of right might be overinclusive.²⁴²

Even if the intrinsic rights theory gains favor with the Court, it offers no more promise than other formulations as a means to overcome the equal protection obstacle posed by Public Law 102-137. Because the theory recognizes the existence of individual rights, it may operate to subsume these rights only when individuals are members of the protected group — as were the children in *Yoder* and the Indian mother in *Martinez* — the benefitted classes in *Fisher* parlance.²⁴³ The theory does not

tergroup equality." Garet, *supra* note 232, at 1060. Tribal internal controls which support the norm of intergroup equality by making the group better off will necessarily conflict with the norm of interpersonal equality. *Id.* at 1059-60. Applying the norm of interpersonal equality, the Santa Clara plaintiff will be worse off than other tribal individuals because of the controls. *Id.*

²⁴¹ See *supra* note 233.

²⁴² Garet himself would be unlikely to carve distinctions between deserving and undeserving groups because groups are structures of existence. He writes, for example, that

[t]he fact that both persons and society *do evil*—even, perhaps, *are evil*—does not operate to negate the intrinsic value of persons and of society in the existential sense. Just as persons deserve to be treated as persons (not things) even though they are evil or do evil, so society also deserves to be treated as society—as a claiming good, not as a *fait accompli*—despite social evils.

Garet, *supra* note 232, at 1070. To be symmetrical, groups should be treated as groups whether good or evil.

²⁴³ See *Fisher v. District Court*, 424 U.S. 382 (1976) (per curiam) (holding that denial of

readily countenance a right for the Amish to compel children of other religions to end their public educations at age fourteen, or the right of the Santa Clara tribe to assert control over non-member Indians. Instead, the theory might well support the holding reached in *Duro*.

If Ronald Garet might protect the intrinsic values of all groups, Robert Clinton has no difficulty distinguishing the rights of Indians from other groups. Clinton writes that while most minority groups have sought assimilation into the mainstream of society, the persistent failure of assimilationist legislation aimed toward Indians is evidence that "the self-identities of individual Indians emphasize the tribal community, rather than the individual, as the repository and primary planner of the social destiny of its members."²⁴⁴ Clinton conceives that a social policy of egalitarianism is better served if federal legislation strengthens rather than dismantles reservations, because Indians will thereby be given a viable choice between tribal and mainstream culture. Group separateness of tribes should therefore be maintained, and should not offend the Constitution so long as the line of separation can be crossed.²⁴⁵

If, as Clinton suggests, the identities of Indians as individuals derive from their tribes, application of the antidiscrimination principle would disserve its purpose. Legislation which purports to grant Indians equality by assimilating tribes will, instead, discriminate against Indians as individuals, because their personal identities demand maintenance of the tribes. So conceived, virtually any threat to tribal sovereignty threatens the individual rights of tribal members.

Clinton's concept of the source of personal identity among Indians is satisfying both intuitively and culturally. It suggests that doctrines such as those announced in *Morton v. Mancari*²⁴⁶ threaten tribal autonomy because they fail to account for the basis of Indian cultural identity and fail to respect the tribal power necessary to protect that identity. Hence, *Mancari's*

state court access to tribal member in custody proceeding was justified because disparate treatment benefitted class of which Indian was member); see *supra* note 188 and accompanying text.

²⁴⁴ Clinton, *supra* note 21, at 990.

²⁴⁵ *Id.* at 1053.

²⁴⁶ 417 U.S. 535 (1974).

political distinctions are not sufficient, because they threaten precisely the result announced in *Duro v. Reina*,²⁴⁷ a limitation of sovereign powers to consenting members.²⁴⁸ Clinton argues instead that legislation affecting Indians should have a broader basis, which he finds principally in the federal trust responsibility toward Indians,²⁴⁹ limited by the Indian Commerce Clause.²⁵⁰ More recently, Clinton writes that international law may provide an appropriate basis to influence Congress to protect tribes.²⁵¹

Such broad power would allow Congress, for example, to provide benefits to nontribal urban Indians who might be excluded under the *Mancari* formulation because they do not form separate polities.²⁵² Clinton argues that legislation designed to benefit Indians as individuals could withstand strict scrutiny because of Congress' compelling interest to discharge its trust responsibility.²⁵³ As applied to Public Law 102-137, one might argue that this broader power, freed of *Mancari* political classifications, could be used to justify legislation which empowers tribes to assert authority over nonmembers. Consistent with the cultural identities of Indians, it might be further argued, in the manner advocated by Skibine, that Public Law 102-137 benefits both tribal Indians and nonmember

²⁴⁷ 495 U.S. 676 (1990).

²⁴⁸ Clinton, *supra* note 21, at 1022 n.251. Clinton's article appeared several years before *Duro* and may be prescient in that Clinton judged, or perhaps conceded, that *Oliphant* barred criminal jurisdiction over non-Indians and nonmembers. He would confine the scope of *Oliphant*, *Montana*, and presumably *Duro*, because construing these cases to limit tribal jurisdiction to tribal members would make many reservations ungovernable.

²⁴⁹ Clinton, *supra* note 21, at 1001-05. Clinton writes that courts have limited the federal trust responsibility, which became an independent source of federal authority in *Kagama*, with a more expansive reading of the Indian Commerce Clause. *See id.* (discussing *United States v. Kagama*, 118 U.S. 375 (1886) and U.S. CONST. art. I, § 8, cl. 3). Clinton asserts that now the "trusteeship role may become a shield for Indian tribes rather than, as in the past, a sword to be used against them." *Id.* at 1005.

²⁵⁰ *Id.* at 1013-14. Although he expresses concern about the Court's political focus in *Mancari* and *Antelope*, Clinton reasons the cases suggest that the "Indian commerce clause constitutionally sanctions a policy of Indian autonomy and self-government." *Id.* at 1013.

²⁵¹ *See* Clinton, *supra* note 11, at 747 (asserting that Declaration of Indigenous Rights provides legal protection for group rights of tribes).

²⁵² Clinton, *supra* note 21, at 1014-15.

²⁵³ *See id.* at 1015 ("Given the federal trusteeship obligation, the government arguably has a 'compelling interest' in aiding all indigenous peoples ill-equipped to compete in an individualistic, competitive economy.").

Indians.²⁵⁴ Tribal jurisdiction over all Indians is justified because it will not only facilitate governance by the prosecuting tribe, but will also facilitate governance of the nonmember's tribe, thereby conserving the source of his or her identity. Such a construction of the Indian Commerce Clause and the federal trusteeship obligation would offer a means to enlarge the group rights of tribes, which the *Martinez* and *Fisher* holdings would otherwise almost certainly restrict to tribal members.

It seems unlikely that the Court will find such a significant group right in tribes, when the plaintiff in a challenge to Public Law 102-137 may well resist a tribal court determination that he or she is an Indian. During the interval between *Duro* and passage of predecessor legislation to Public Law 102-137, for example, several members of the Nez Perce and Coeur d'Alene tribes resisted prosecutions by their respective tribes on grounds they were not tribal members.²⁵⁵ It is hard to conceive that nonmember Indians will embrace the culture-preserving benefits of Public Law 102-137 any more readily. Indeed, tribal jurisdiction over nonmember Indians would often have no reciprocal benefits for a nonmember's tribe, because many tribes either do not have tribal courts or are subject to Public Law 280.²⁵⁶

It seems more likely that the most the Court would do to recognize the cultural identity of Indians would be to expand the concept of consent announced in *Duro*. At most, the Court would find implied reciprocal consent. Still more likely, in view of *Antelope*,²⁵⁷ and as conjectured elsewhere,²⁵⁸ is that the Court will limit such consent to tribal members who are enrolled.

The difficulty with Public Law 102-137, of course, is that it is confined to Indians. If the legislation is adjudged to be an exercise of Congress' fiduciary power to promote Indian self-determination by protecting the means of tribal governance, the legislative purpose would be better served if criminal jurisdiction

²⁵⁴ See Skibine, *supra* note 130 (discussing Public Law 102-137).

²⁵⁵ Interview with Wanda Miles, Chief Judge of the Nez Perce Tribal Court (Jan. 1992).

²⁵⁶ See *supra* notes 197-98 and accompanying text.

²⁵⁷ *United States v. Antelope*, 430 U.S. 641, 646 n.7 (1977).

²⁵⁸ See *supra* note 165 and accompanying text.

were also extended to non-Indians. That it does not do so is certain to raise a challenge which will test whether such an exercise of the trust responsibility should withstand judicial scrutiny. It is one thing to argue that laws which might prefer urban Indians over non-Indians can withstand scrutiny because these laws would fulfill a significant or compelling governmental interest. Such laws could reduce economic imbalances which have made Indians an underclass. It is quite another thing to claim compelling interest in a law that exposes members of that same underclass, but not the members of the dominant society, to tribal penal sanctions.

Consider the consequences if the legislation is upheld. If the Court decides that Public Law 102-137 is a valid exercise of Congress' trust responsibility because it recognizes cultural distinctions between Indians and non-Indians, the decision may wreak more damage on the tribes than a holding which finds the law unconstitutional. Use of the trust responsibility to uphold legislation which treats nonmember Indians differently from non-Indians, albeit to the benefit of prosecuting tribes, invites sequel decisions which harm all Indians, in the nature of those which followed *Mancari*. Moreover, if the Court upholds Public Law 102-137 despite, or because of, distinctions between nonmember Indians and non-Indians, the distinctions will almost certainly be used elsewhere to exempt non-Indians from civil jurisdiction or the regulatory authority of the tribes.²⁵⁹

Clinton might be first to concede that exercises of congressional power are limited only formalistically by the

²⁵⁹ Cf. Peter Tasso, Note, *Greywater v. Joshua and Tribal Jurisdiction Over Nonmember Indians*, 75 IOWA L. REV. 685 (1990). Tasso advocates legislation which would create racial classifications for beneficial purposes. *Id.* at 708-09. He argues that legislation such as Public Law 102-137 can and should be upheld as an appropriate exercise of congressional power under the Indian Commerce Clause. *Id.* Tasso maintains that legislation which treats Indians as a racial class should be specifically exempted from strict scrutiny because of the unique status of Indians under the Constitution. *Id.* at 709. Alternatively, he argues that racial classifications should withstand strict scrutiny because of compelling governmental interest in furthering the government's trust relationship. *Id.* at 711. Tasso does not clearly indicate whether legislation limiting tribal court jurisdiction to Indians would benefit both tribal members and nonmember Indians. He does not explain how the Court could find such legislation, intended to strengthen tribal government, to be narrowly tailored to fit a compelling governmental interest when jurisdiction is not extended to non-Indians. Moreover, Tasso does not offer standards to assure that this and other "beneficial" racial legislation will not be enacted to unjustly discriminate against Indians.

Indian Commerce Clause,²⁶⁰ and that a future Congress bent on cultural imperialism could, abetted by a deferential Court, turn a decision upholding Public Law 102-137 against the tribes. But the promise of his formulations for protecting tribal sovereignty, at least in instances where Indians are not pitted one against the other, is that they proceed from the unique constitutional relationship between Indians and the federal government. Formulations which proceed from other bases — predicating tribal rights, for example, on the First or Ninth Amendments — offer substantially less promise.²⁶¹

Kevin Worthen is among the commentators who contend that the group rights of Indians can be recognized and protected under provisions of the First Amendment.²⁶² Relying principally on *Roberts v. United States Jaycees*,²⁶³ which upheld a state law forcing a private club to admit women members because of a compelling state interest, he reasons that tribes possess the attributes of expressive, if not intimate, associations.²⁶⁴ A primary purpose of the right of expressive associations, Worthen asserts, is to protect “political and cultural” diversity.²⁶⁵ Governmental regulations which intrude upon this diversity by altering the message communicated by the group — its “philosophical

²⁶⁰ See Clinton, *supra* note 21, at 997 (noting that federal government has acted as if Indian Commerce Clause gives it authority to regulate tribes’ internal affairs); Newton, *supra* note 21, at 239 (observing same).

²⁶¹ See Clinton, *supra* note 21, at 995 n.88 (“[A]ny argument that the existence of tribal governments is protected by the first amendment is sure to fail, since western culture so clearly distinguishes between church and state.”).

²⁶² See Kevin J. Worthen, *Sword or Shield: The Past and Future Impact of Western Legal Thought on American Indian Sovereignty*, 104 HARV. L. REV. 1372 (1991) (reviewing ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* (1990)) (noting that Indians should appropriately assert right of association).

²⁶³ 468 U.S. 609 (1984).

²⁶⁴ Worthen bases his argument on *Roberts* and *Board of Directors of Rotary Int’l v. Rotary Club*, 481 U.S. 537 (1987). He argues that the Constitution limits governmental authority to regulate “intimate” and “expressive” associations. Worthen, *supra* note 262, at 1385-86. The former are limited thus far to relationships that “‘presuppose’ deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.” *Rotary Int’l*, 481 U.S. at 545 (quoting *Roberts*, 468 U.S. at 619-20). Expressive associations facilitate the exercise of speech, assembly, petition for redress of grievances, and the exercise of religion. Worthen, *supra* note 262, at 1386 (citing *Roberts*, 468 U.S. at 618).

²⁶⁵ Worthen, *supra* note 262, at 1386 (citing *Roberts*, 468 U.S. at 622).

cast”²⁶⁶ — or interfere in the internal organization and affairs of the group are therefore unconstitutional.²⁶⁷ Viewed from this perspective, congressional action to terminate several tribes during the 1950’s infringed the rights of Indians to maintain expressive associations, because terminated tribes, deprived of their lands and effective governmental authority, could not adequately communicate their cultural messages to members or nonmembers.²⁶⁸ Worthen contends that if any future efforts to terminate tribes or erode their land base are scrutinized under the First Amendment, the rights of association should enable Indians to prevail.

Less clear in Worthen’s formulation is the relationship between tribal associations and nonmembers. He writes that non-Indian regulatory authority over land use, education, and criminal law adversely affects the character and content of the messages tribes convey both internally and externally.²⁶⁹ However, he does not address or resolve the converse question: whether tribes should somehow be empowered by the First Amendment, in a way Jaycees, Shriners, and Rotarians are not, to regulate nonmembers. At most, as Worthen apparently concedes, the group rights of tribes as expressive associations can be protected under the First Amendment only when legislation directly relates to the suppression of ideas²⁷⁰ or when it is calculated “solely to eliminate ideological, cultural, and attitudinal differences between the tribes and the rest of American society.”²⁷¹ First Amendment protection may, therefore, be of little use except in obvious acts of ethnocide. Where another constitutional right conflicts, the rights of expressive associations must apparently give way. Hence, in a contest between the equal protection challenge of nonmember Indians to Public Law 102-

²⁶⁶ *Id.* at 1387 (citing *Roberts*, 468 U.S. at 627).

²⁶⁷ *Id.* (citing *Roberts*, 468 U.S. at 623, 627).

²⁶⁸ *Id.* Worthen places considerable emphasis on the tribes’ needs to possess a land base in order to preserve their right to expressive association. *Id.* at 1387-89. “Deprivation of a land base in which a full Indian community develops clearly alters the tribe’s philosophical cast and modifies the message it can and will communicate.” *Id.* at 1389. The observation flows logically from Indian culture and tradition, but not readily from the First Amendment authority on which Worthen relies.

²⁶⁹ *Id.* at 1389.

²⁷⁰ *Id.* at 1390 (citing *Roberts*, 468 U.S. at 623).

²⁷¹ *Id.* at 1392.

137 and the First Amendment rights of tribes, there can be little doubt that the Court will resolve the question in favor of nonmembers, confining tribal rights to tribal members.

The formulations advanced to protect group rights are by no means limited to Williams, Fiss, Garet, Clinton, and Worthen.²⁷² Among the commentators on Indian law, the theories offered to protect tribal self-determination are abundant, varied, compassionate, and occasionally despairing.²⁷³ Perhaps because the issue has so recently arisen, few if any suggest practicable or satisfying solutions to the dilemma posed by *Duro* and the *Duro* fix.²⁷⁴ If, as seems distinctly possible, the

²⁷² See, e.g., Straughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417 (1984) (arguing that rights should be restated in manner consistent with community founded on love and mutual respect); Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713 (1988) (advocating theory of normative pluralism); Vernon Van Dyke, *Justice as Fairness: For Groups?*, 69 AM. POL. SCI. REV. 607 (1975) (arguing that any theory of justice must concern itself with groups as well as individuals).

²⁷³ See, e.g., Williams, *supra* note 11, at 660 (advocating rejection of doctrine of discovery and equal voice for Indians among nations); Barsh & Henderson, *supra* note 69 (criticizing *Oliphant*); Collins, *supra* note 39 (concluding that *Oliphant* is not inconsistent with and therefore should not undermine other aspects of retained sovereignty, particularly in civil jurisdiction); Ball, *supra* note 2, at 139 (suggesting failure to protect tribal cultures is self-inflicted loss by non-Indians: "the greater differences we embrace, and yet be just, the stronger we are."). Elsewhere, Ball repudiates the Court's "jurispathic" acts in decisions affecting Indians. Ball, *supra* note 3, at 2300. Ball hopes, but doubts, that the American "story of origins" can be told in multiple voices, a combination of nondominating groups in which the sovereign rights of Indians are recognized, *inter alia*, by respecting the validity of treaties. *Id.*

²⁷⁴ See, e.g., Tasso, *supra* note 259 (advocating legislation which would create racial classifications for beneficial purposes); see also Deloria & Newton, *supra* note 116 (contending that Supreme Court should defer to Congressional recognition of long-standing Indian tribal power). Cf. Peter Fabish, Note, *The Decline of Tribal Sovereignty: The Journey from Dicta to Dogma in Duro v. Reina*, 66 WASH. L. REV. 567 (1991). Fabish contends that the *Duro* Court should have upheld jurisdiction on a theory of implied consent of (enrolled?) tribal members, because tribal membership involves a voluntary (intertribal?) political affiliation. *Id.* Nonmember Indians who do not wish to expose themselves to tribal court jurisdiction on foreign reservations can merely resign memberships or stay away from foreign reservations. Fabish does not account for the familial, social, economic, and cultural upheavals that resignations or expatriation would have on tribes in general and on inter-tribal families in particular. Moreover, he does not justify the disparate treatment of non-Indians on reservations, who are spared from making such elections.; Douglas B. Cubberley, Note, *Criminal Jurisdiction over Nonmember Indians: The Legal Void After Duro v. Reina*, 16 AM. INDIAN L. REV. 213 (1991). Cubberley notes that marital and community disruptions would occur if tribes excluded nonmembers. *Id.* at 246. However, Cubberley evidently advocates legislation such as Public Law 102-137, or in lieu thereof, intertribal compacts to confer reciprocal jurisdiction as a manner of obtaining implied consent. *Id.* at 245; Patricia Owen, Note, *Who is an Indian? Duro v. Reina's Examination of Tribal Sovereignty*

Court will address a challenge to the legislation squarely on the question whether the equal protection rights of nonmember Indians have been abridged, can or should Public Law 102-137 withstand judicial scrutiny, and if scrutiny there be, at what level?

*C. Scrutinizing Public Law 102-137 in Context of the
Fifth Amendment*

The Court has seldom analyzed legislation affecting Indians explicitly under the equal protection doctrine.²⁷⁵ When it has undertaken such analyses, the Court has invariably upheld legislation because only a rational basis need be found. Among the handful of cases which have been decided on Fifth Amendment grounds, *Delaware Tribal Business Commission v. Weeks*²⁷⁶ is perhaps the paradigm. The Court might be urged to use this case as a guide in resolving a challenge to Public Law 102-137.

In *Weeks*, as the result of successful litigation to redress a treaty violation, descendants of the Delaware Indians were awarded a judgment by the Indian Claims Commission. Congress divided the judgment between the Cherokee and Absentee Delawares, two of four groups remaining from the original Delaware Nation. *Weeks*, a Kansas Delaware whose tribe had forfeited federal recognition when its members elected to become citizens under provisions of an 1866 treaty, challenged the distribution on grounds that it violated the Fifth Amendment. Invoking *Lone Wolf v. Hitchcock*,²⁷⁷ the Cherokees

and Criminal Jurisdiction over Nonmember Indians, 1988 B.Y.U. L. REV. 161 (1988) (advocating criminal jurisdiction over nonmember Indians on the basis of significant contacts, as formulated in Ninth Circuit *Duro* opinion); Wetherington, *supra* note 30 (contending, before *Duro* decision, that tribes have inherent sovereignty over nonmembers, and that exercise of such sovereignty is consistent with federal interest in promoting tribal self-determination); Melanie P. Baise, Note, *A New Limitation on Indian Tribal Sovereignty: No Criminal Jurisdiction Over Nonmember Indians*, *Duro v. Reina*, 15 S. ILL. U. L.J. 623 (1991) (advocating jurisdiction as formulated in Ninth Circuit *Duro* opinion); Crawford, *supra* note 122 (contending *Duro* overturned by Public Law 102-137); Skibine, *supra* note 130 (finding support for Public Law 102-137 in congressional trust responsibility); Newton, *supra* note 116 (reasoning that Public Law 102-137 is a valid recognition of inherent sovereignty by Congress).

²⁷⁵ See *infra* note 285 and accompanying text.

²⁷⁶ 430 U.S. 73 (1977).

²⁷⁷ 187 U.S. 553 (1903); see *supra* note 176 and accompanying text.

and Absentee Delawares contended that the distribution was a nonjusticiable political question. Justice Brennan, writing for the Court, observed that

[t]he statement in *Lone Wolf* that the power of Congress "has always been deemed a political one, not subject to be controlled by the judicial department of the government," however pertinent to the question then before the Court of congressional power to abrogate treaties, has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment.²⁷⁸

Observing the broad discretion given Congress to prescribe the distribution of tribal properties,²⁷⁹ and citing *Morton v. Mancari*,²⁸⁰ Justice Brennan opined that the legislative judgment should be undisturbed "as long as the special treatment could be tied rationally to the fulfillment of Congress' unique obligation toward the Indians."²⁸¹ Because the Kansas Delawares severed tribal relations as a result of the 1866 treaty, and were entitled to a distribution of tribal assets held only at that time in trust by the United States, the congressional distribution of judgment proceeds was tied rationally to Congress' unique obligation.²⁸²

If the current Court should adopt a similar standard of review in deciding an equal protection challenge to Public Law 102-137, there can be little question that the law will be upheld. In light of unanimous congressional support and apparently unanimous tribal support, it is possible that the Court may do so.²⁸³ But *Weeks* dealt with rights to property, not the rights of minorities in contest with the dominant society. Given the Court's

²⁷⁸ See *Weeks*, 430 U.S. at 84 (quoting *Lone Wolf*, 187 U.S. at 565).

²⁷⁹ See *id.* at 84-84 (citing *Sizemore v. Brady*, 235 U.S. 441, 449 (1914)); *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976); *United States v. Jim*, 409 U.S. 80 (1972); *Simmons v. Seelatsee*, 384 U.S. 209 (1966); see also *Newton*, *supra* note 21, at 226-27, 233-36 (arguing that concept of plenary power continues to influence Indian law).

²⁸⁰ 417 U.S. 535 (1974).

²⁸¹ See *Weeks*, 430 U.S. at 85 (citing *Morton v. Mancari*, 417 U.S. 535 (1974)).

²⁸² *Id.* at 86; see *Newton*, *supra* note 21, at 235 ("[Judicial] deference [to Congress] appears in the modern cases not as a refusal to address the merits of a claim, but in the refusal to find any merit to the claim addressed.").

²⁸³ Nonmember Indians, not to mention Jaycees, Shriners, Rotarians, and law professors, have few if any lobbyists. Cf. *Newton*, *supra* note 117, at 26 (using anecdotal evidence to buttress claim that at least some nonmember Indians would support the legislation).

historical deference to legislation involving the properties of Indians, particularly when Congress is abrogating treaties,²⁸⁴ *Weeks* is significant because it establishes a standard of review.²⁸⁵ But denying a share of judgment proceeds to a few descendants of Delaware Nation tribal members, several generations removed from those whose treaty rights were abridged, surely differs fundamentally and profoundly from the present and intensely personal deprivations of liberty which Public Law 102-137 allows to be exacted upon nonmember Indians but not upon non-Indians. If it does not differ, if the standard of review for Indians themselves is no more strict than for their property, the air will have grown fetid indeed for Felix Cohen's canary²⁸⁶ and we benighted miners who trudge along behind.

Nell Jessup Newton shares Clinton's goal of finding means to protect Indian property and sovereignty, although her focus has at times been just the opposite of his. Where Clinton advocates congressional actions to protect tribes based upon the federal trust responsibility,²⁸⁷ Newton has sought limitations on congressional excesses by calling for heightened judicial scrutiny. She traces in detail the history of the plenary power doctrine and the limitations placed on it, although not uniformly, by the modern Court.²⁸⁸ In seeking to limit untoward exercises of congressional power, she advances several theories to support heightened judicial scrutiny. Among them, she contends that the personal identities of Indians are so closely connected with their tribes as to constitute a fundamental right of privacy and auton-

²⁸⁴ See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (upholding legislation inconsistent with prior treaty because the legislation falls within Congress' plenary power); see *supra* note 176.

²⁸⁵ See Newton, *supra* note 21, at 229-30. Newton observes that as long ago as 1935, the Court decided a property dispute under the takings clause of the Fifth Amendment in *United States v. Creek Nation*, 295 U.S. 103 (1935). However, she cautions that the case might not have marked a significant departure from the plenary power doctrine because Congress permitted the Fifth Amendment claim by enacting special jurisdictional laws. Newton, *supra* note 21, at 229-30.

²⁸⁶ "[L]ike a miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith . . ." Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 *YALE L.J.* 348, 390 (1953).

²⁸⁷ Clinton, *supra* note 21, at 984.

²⁸⁸ Newton, *supra* note 21, at 228-36.

omy.²⁸⁹ Governmental actions undermining tribalism may violate the personhood rights of Indians by impermissibly dictating the kinds of lives they lead.²⁹⁰ She suggests, as well, that heightened scrutiny may be justified in reviewing due process claims under the Fifth Amendment, because of the “morality of promise keeping [and] value of cultural diversity.”²⁹¹ Newton also urges heightened scrutiny of legislation affecting Indians because of their vulnerability as racial and cultural minorities in the face of the majoritarian process,²⁹² a claim she bases on the “history of purposeful unequal treatment” experienced by tribes²⁹³ and discriminatory stereotyping of Indians.²⁹⁴

A tension, however, exists between the fundamental rights which Newton identifies for Indians as groups and the equal protection rights she would protect for them as individuals. She cautions tribal advocates to analyze legislation lest it classify “in terms of Indian and non-Indian, rather than in terms of tribal Indian and others.”²⁹⁵ Statutes based on the former classifications are “race-based, and courts must at least be presented with that understanding.”²⁹⁶ It should follow that when legislation treats Indians and non-Indians disparately, although conceivably

²⁸⁹ *Id.* at 244-45.

²⁹⁰ *See id.* (citing *TRIBE*, *supra* note 186, at 886-990, and *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

²⁹¹ *Id.* at 265. Newton refers to Justice Black’s statement that “[g]reat nations, like great men, should keep their word.” *Id.* (citing *Federal Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting)). Newton also discusses two other Supreme Court cases. *See id.* (discussing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and *Meyer v. Nebraska*, 262 U.S. 390 (1923) (suggesting constitutional basis for protecting cultural diversity)).

²⁹² Newton, *supra* note 21, at 270. Newton notes that heightened judicial scrutiny may be justified where statutes may prejudice the rights of “discrete and insular minorities.” *Id.* (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)).

²⁹³ *Id.* at 246 (quoting *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976)).

²⁹⁴ *Id.* at 247 (citing *Murgia*, 427 U.S. at 313, and *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 289-90 (1955)).

²⁹⁵ *Id.* at 286.

²⁹⁶ *Id.*

facilitating tribal government, the Court should adopt at least intermediate scrutiny, if not strict scrutiny, to decide whether sufficient governmental interest exists to uphold discriminatory laws. Recently, however, Newton and Phillip S. Deloria have advocated judicial support for legislation which affirms disparate treatment of Indians and non-Indians.²⁹⁷

In an article reviewing the 1990 statute which Public Law 102-137 makes permanent,²⁹⁸ Newton and Deloria contend that the legislation sends to the Court "a clear signal that Congress is in charge of the scope of its power over Indians,"²⁹⁹ and should be upheld, among other reasons, because by tying the definition of Indians to the Major Crimes Act, "Congress has shown due deference to the judiciary's role of protecting the individual from being arbitrarily labeled an Indian *purely* on racial grounds."³⁰⁰ Unaccountably, there is no call for heightened scrutiny for the legislation, even though the distinction between many Indians who can be tried pursuant to the law and non-Indians who cannot is essentially racial.³⁰¹

²⁹⁷ Deloria & Newton, *supra* note 116, at 71; *see also* Newton, *supra* note 117.

²⁹⁸ *See* Deloria & Newton, *supra* note 116, at 71 (referring to criminal jurisdiction of tribal courts over non-member Indians).

²⁹⁹ *Id.* at 74. However, Newton and Deloria elsewhere contend that the legislation "does not purport to create new law," but rather attempts to recognize and affirm that tribal criminal jurisdiction is within the scope of *tribal power*. *Id.* at 73 (emphasis supplied).

³⁰⁰ *Id.* at 74 (emphasis added). Presumably, the authors mean congressional deference to the federal judiciary. However, their meaning is unclear. If they mean that Congress intends the determination of Indian status to repose in federal courts, then federal decisions will apparently bind the tribes. However, the legislation does not state this. If they mean that past federal decisions establish guidelines for tribal courts to follow, then there is only congressional recognition of existing federal decisions, not congressional deference.

³⁰¹ *See* Newton, *supra* note 21. Newton observes in discussing *Antelope* that if the Major Crimes Act were interpreted to classify Indians because of their race, a "thorny constitutional question" of whether the legislation should withstand strict scrutiny would arise. *Id.* at 280. Confinement of Public Law 102-137 to Indians who can be politically classified as such, however, may not avoid the constitutional test which Newton describes. Nonmember Indians and non-Indians who are similarly situated may not be distinguishable in many instances, save for race.

Surely Indians should be entitled to the same constitutional protections as whites and blacks. Surely if Public Law 102-137 is not upheld as a recognition of inherent sovereignty, but a delegation of authority subject to the Constitution, it should be examined with at least heightened scrutiny. In such an examination, how can the Court find a substantial or compelling governmental interest in protecting the right of tribal governments to prosecute nonmember Indians when Congress has failed to "recognize" an equivalent tribal power to try and punish whites?³⁰² How is the legislation nonneutral?³⁰³ How, if the rights of Indians as groups should lack support within the Court, as they likely will, is the current literature upholding tribal self-determination, try as it will to untie the knots of sovereignty and jurisdiction, doing more than pushing strings? It deserves not only reason, the charge of Congress, and the principles of scholarship, but the Constitution to conceive that Public Law 102-137 is anything but racist. Group rights of tribes should not be advocated at this cost.

³⁰² Fiss, *supra* note 220, at 114-15. Fiss writes of defensive doctrines which have been invoked to validate laws which would not otherwise withstand strict scrutiny. *Id.* Among these is the doctrine which permits a governmental regulation to take "one step at a time." *Id.* at 115. However, this doctrine requires that the reach of the law be "confined by *administrative* considerations (for example, additional complications would be introduced) as opposed to *political* considerations (for example, the sponsors could not muster enough votes for extending the law to others)." *Id.* There is no evidence that Congress did not acknowledge the right of tribes to try non-Indians because of administrative considerations. More likely, the proponents of Public Law 102-137 could not have collected the necessary votes.

³⁰³ *Cf.* *Washington v. Davis*, 426 U.S. 229 (1976) (holding that neutral law does not violate the Equal Protection Clause solely because it results in racially disproportionate impact); *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1976) (upholding zoning decision that perpetuated racially segregated housing patterns because results followed from application of constitutionally neutral zoning policy); *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1976) (holding that gender-based consequences resulting from neutral veterans' preference legislation do not violate due process because petitioner failed to show discriminatory purpose). In *Feeney*, the court observed that the veterans' preference statute was neutral, in part because veteran status is not uniquely male. *Feeney*, 442 U.S. at 275. However, the status of being a nonmember of a tribe is not uniquely Indian. Public Law 102-137 nonetheless affects only non-tribal members who are Indians. Non-Indians are not placed at a similar disadvantage by the law.

III. CRIMINAL JURISDICTION AND DEMOGRAPHY

A. *Variable Case for Jurisdiction Based on Demographic Patterns*³⁰⁴

If Public Law 102-137 fails to overcome a Fifth Amendment challenge, changing political and demographic circumstances among Indians argue that if tribal governments are to achieve a meaningful level of self-determination, some other means must be found to enforce criminal laws fairly against persons who commit crimes on reservations. The following discussion considers whether current patterns in Indian demography create distinctions which might persuade the Congress to delegate power to some tribes to try non-Indians, or whether other distinctions might justify tribal jurisdiction over nonmember Indians alone.

At least one commentator argues that the protections of ICRA are sufficient for Congress to grant criminal jurisdiction over non-Indians.³⁰⁵ But proponents of expanded criminal

³⁰⁴ The principal source from which tribal enrollment, land ownership, and tribal court information was obtained in the development of this article is the Bureau of Indian Affairs, U.S. Department of Interior. Population and other demographic information is derived, in general, from 1980 and 1990 Census data from the U.S. Department of Commerce. There are differences in the manner in which these sources collect data, and direct comparisons can therefore be misleading. Demographic information assembled by the Bureau of Indian Affairs is based on enrollment data reported by the several tribes. The 1980 and 1990 Census counts, however, are based on self-identification. In 1980, heads of households were asked to classify themselves and members of their households within various racial and ethnic categories, although the word "race" did not appear on the Census form. CHARACTERS OF AMERICAN INDIANS BY TRIBES AND SELECTED AREAS: 1980, PC80-2-1C, Appendix E-8 (1989). See also *supra* note 17. Those who identified themselves or household members as Indians were also asked to identify their tribe. *Id.* In 1990, similar questions were again asked in a category entitled "race." 1990 CENSUS OF POPULATION AND HOUSING, SUMMARY TAPE FILE 1, Appendix E-6. Those identifying themselves or household members as Indians were asked to designate their "enrolled or principal tribe." *Id.*

At least in part because of self-identification, Census estimates of the Indian population in the nation as a whole may be higher than if estimates were based strictly on enrollment. But Census figures may nonetheless undercount the number of persons residing on reservations. The Onondaga and Tuscarora Nations did not allow census takers to complete enumerations. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, AMERICAN AND ALASKA NATIVE AREAS: 1990, 9 nn. 4 & 8 (1991). In telephone conversations during November, 1991, representatives of the Rosebud Sioux, Blackfeet, and Puyallup tribes, among others, indicated substantial undercounts in the 1990 census. If tribal estimates are correct, tribal members on the three reservations were undercounted during 1990 by 60%, 53%, and 48%, respectively.

Recent demographic data collected by the Bureau of Indian Affairs indicate that during 1989, 955,307 Indians were residing in identified Indian areas, including reservations,

jurisdiction must weigh their efforts against the late twentieth-century repercussions of colonization. The process is likely to require what Philip Frickey sees in early decisions of John Marshall and asks of current courts and scholars. Frickey argues that courts should address issues involving Indian law with practical reasoning and contextual awareness, a process involving a "fusion of horizons" and a critical evaluation of colonial "preunderstandings."³⁰⁶ Frickey cautions that proponents of Indian rights, prompted perhaps by sympathy or guilt, too often defend tribal sovereignty on vague or abstract bases. When balanced against the familiar and concrete — the equal protection rights of individuals, among others — these bases are often insufficient to sustain the tribal causes which are championed. Frickey urges that a heightened contextual awareness of tribes is necessary if tribal interests are to be protected.³⁰⁷ But he also warns that the contemporary consequences of colonization must be taken into account. "[P]ractical reasoning in federal Indian law is *not* . . . blind acceptance of the Indian position in a case."³⁰⁸ He quotes, for example, Vine Deloria, Jr. to suggest that contextual circumstances in *Oliphant v. Suquamish Tribe*³⁰⁹ may have justified the result. Deloria observed that only fifty Suquamish Indians, or less than 2% of the reservation population, resided on the Port Madison reservation at the time they sought to assert criminal jurisdiction over the reservation's 3000 non-Indians.

The doctrine of Indian sovereignty, perhaps relevant for a large reservation such as the Navajo with millions of acres of land and over 100,000 residents, was expected [by tribal attor-

Alaskan Native Villages, and historic areas of Oklahoma. BUREAU OF INDIAN AFFAIRS, U.S. DEPT. OF INTERIOR, SUMMARY BY AREA OF ESTIMATED TRIBAL ENROLLMENT 17 (1991). If the figure is correct, the 1990 census enumeration for the same areas, which counted 685,464 Indians, is substantially in error. See *infra* Table 1. Unfortunately, because the Bureau of Indian Affairs administers very few programs which affect urban Indians, there are no BIA estimates of the Indian population in the nation as a whole.

³⁰⁵ Laurence, *supra* note 102, at 422.

³⁰⁶ Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1219-31 (1990); see also Robert N. Clinton, *Reservation Specificity and Indian Adjudication: An Essay on the Importance of Limited Contextualism in Indian Law*, 8 HAMLIN L. REV. 543 (1985).

³⁰⁷ Frickey, *supra* note 306, at 1220-21.

³⁰⁸ *Id.* at 1237.

³⁰⁹ 435 U.S. 191 (1978).

neys] to control the Court's thinking in defiance of the actual facts. . . . When attorneys and scholars come to believe that doctrines have a greater reality than the data from which they are derived, all aspects of the judicial process suffer accordingly.³¹⁰

Practical reasoning and contextual awareness suggest, at the least, that efforts to strengthen tribal criminal jurisdiction must take account of the current circumstances of Indians and tribal governments.³¹¹ As Table 1 indicates, despite significant Indian population gains over the 1980-90 period, only one-fifth of those who identify themselves as Native Americans remain on reservations. Two-thirds now live in areas which are not identified for census purposes as being Indian. Moreover, the number of Indians residing on reservations grew over the 1980-1990 period at only one-third the rate of increase among Indians residing away from traditional Indian areas.

As noted in the Introduction, recent changes in the population of American Indians may be more the product of a growing tendency among Indians to disclose ethnicity than a function of natural increase.³¹²

³¹⁰ Frickey, *supra* note 306, at 1237-38 n.466 (quoting Deloria, *supra* note 69, at 215).

³¹¹ See *id.* at 1237-38 (suggesting that federal Indian law is matter of practical contextual reasoning). But see Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993) (proposing return to purer, older understanding of tribal sovereignty). Frickey argues that more rigid application of the doctrine of retained inherent sovereignty could provide the Supreme Court with the "practical virtue" of a "structural lodestar" for guidance in the complexities that are Indian law. *Id.* at 438. But he also acknowledges that "situations in which congressional actions have radically eroded the Indian social context would still prove particularly troublesome." *Id.* at 428. Though the problem is not addressed in the article, it resurfaces in a number of footnotes. *Id.* nn. 161, 162, 163, 183, & 193. Frickey contends that in some of those instances "non-Indians have developed a strong, reasonable reliance interest in freedom from tribal regulation." *Id.* at 426 n.183. He therefore suggests case by case inquiries with "any inroads into tribal sovereignty . . . clearly attributable to Congress, not to unilateral colonial conclusions by the Court." *Id.*

This approach has appeal in that it would surely safeguard residual tribal sovereignty. Such an approach would also recognize that tribes are separate polities, each with its own history. However, it does not address the *Duro* problem. It is also possible that such an approach might invite broad congressional legislation which would be much more harmful to tribes.

³¹² See *supra* notes 16-19 and accompanying text (discussing Indian demographics).

Table 1. Distribution of American Indians Inside and Outside Census-Enumerated Indian Areas, 1980-1990.

Population	1980 Census ¹	1990 Census ²	1980-1990 % Change
Total U.S. Population	226,646,000	248,709,873	9.7 %
American Indians	1,366,676	1,959,234	43.4
On Reservations and trust lands	370,125	437,431	18.2
Historic Areas of Oklahoma ³	116,359	200,789	72.6
Alaska Native Villages ⁴	39,301	47,244	20.2
Subtotal in Identified Indian Areas	525,785	685,464	30.4
Remainder of U.S.	840,891	1,273,770	51.5 %

1. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, AMERICAN INDIAN AND ALASKA NATIVE VILLAGES: 1980, Supplementary Report (1984).

2. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, AMERICAN INDIAN AND ALASKA NATIVE AREAS: 1990, (1991).

3. 1990 figures are based on Tribal Jurisdiction Statistical Areas (TJSAs). TJSAs include areas over which tribal governments assert jurisdiction and in which the population is predominated by Indians in federally-recognized tribes, but exclude Indians residing on reservations. The TJSAs replace the 1980 census category, "Historic Areas of Oklahoma (excluding urbanized areas)", but may not be coterminous. Population comparisons should therefore be made with caution.

4. 1990 population figures are based on Alaska Native Village Statistical Area (ANVSAs), which replace the census category of Alaska Native Villages (ANVs) used in 1980. ANVSA boundaries may not be coterminous with ANV boundaries.

SOURCE: TABLE COMPILED FROM BUREAU OF THE CENSUS DATA, U.S. DEPT. OF COMMERCE, 1984, 1991.

It is likewise probable that substantially fewer reservation Indians have heretofore concealed their racial ties than have Indians residing in non-Indian communities. Recent relative gains among the latter are therefore apt to be misleading. But for purposes of tribal sovereignty, the reason for the demographic changes is less important than the consequence: Indians living in tribes which claim rights to exercise inherent sovereignty number in

the minority even among their own peoples. Indeed, as Table 2 indicates, even within census-enumerated Indian areas, Indians account for less than one quarter of total population.³¹³

Table 2. Indian and Non-Indian Population in Census-Enumerated Indian Areas, 1990.

Area	Total		Percent	
	Population	Non-Indian	Indian	Indian
Reservations	808,163	370,732	437,431	54.1
Historic Areas of Oklahoma ¹	2,082,377	1,881,588	200,789	9.6
Alaska Native Villages ²	77,700	30,456	47,244	60.8
Subtotal in Identified Indian Areas	2,968,240	2,282,776	685,464	23.1
Remainder of U.S.	245,741,633	244,467,824	1,273,770	0.5
TOTAL	248,709,873	246,750,638	1,959,234	0.8 %

1. Tribal Jurisdiction Statistical Areas (TJSAs). *See supra* note 3 to Table 1.

2. Alaska Native Village Statistical Areas (ANVSAs). *See supra* note 4 to Table 1.

SOURCE: TABLE COMPILED FROM BUREAU OF THE CENSUS DATA, U.S. DEPT. OF COMMERCE, AMERICAN INDIAN AND ALASKA NATIVE AREAS: 1990 (1991).

³¹³ This circumstance occurs in part because of Indian emigration, and in part because of the effects of the Dawes Act. Reservations which were heavily allotted have large numbers of non-Indians. The percentage of Indians in "Identified Indian Areas" in Table 2 is also heavily influenced by the non-Indian population in Oklahoma. If Oklahoma is excluded, Indians in the remaining areas average 54% of the total population.

The 1990 census enumerated 310 reservations in the forty-eight contiguous states.³¹⁴ As of 1992, 125 of these reservations had active tribal courts.³¹⁵ Another ten reservations were served by Courts of Indian Offenses, commonly known as CFR courts because they are formed pursuant to the Code of Federal Regulations.³¹⁶ In 1990, tribal courts served a population of 390,000 Indians, or 89% of all Indians residing on reservations, while CFR courts served another 11,300.³¹⁷ The balance of reservation Indians were subject, for the most part, to state court jurisdiction under provisions of Public Law 280.³¹⁸

B. Demography and Tribal Courts

If tribal courts operated only on reservations in which Indians comprised the vast majority of total population, there might be little difficulty in persuading Congress to delegate the same authority to them to prosecute non-Indians as Public Law 102-137 acknowledges for nonmember Indians. Among the 124 tribal courts operating in 1990, ninety-three were in fact located on reservations in which Indians comprised the majority of reservation population. Moreover, among these, forty-five courts were located on reservations in which Indians comprised 90% or more of the total population.³¹⁹

³¹⁴ BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, AMERICAN INDIAN AND ALASKA NATIVE AREAS: 1990 (1991).

³¹⁵ BUREAU OF INDIAN AFFAIRS, U.S. DEPT. OF INTERIOR, LISTING OF TRIBAL COURTS, JUDGES AND CFR COURTS (1991). The Navajo tribe has a supreme court and nine district courts. These are counted as a single court in the above number.

³¹⁶ See 25 C.F.R. §§ 11.1-11.32c (1991) (establishing Courts of Indian Offenses pursuant to regulations promulgated by the Bureau of Indian Affairs). The Courts are to provide "adequate machinery of law enforcement for those Indian tribes in which traditional agencies for the enforcement of tribal law and custom have broken down or for which no adequate substitute has been provided under Federal or State law." *Id.* § 11.1(b); see *infra* note 402 and accompanying text.

³¹⁷ In 1991, the Bureau of Indian Affairs reported that eleven tribal courts and thirteen CFR courts were operating in the Historic Areas of Oklahoma. Save for the Metlakatia Magistrate Court in Metlakatia, Alaska, the BIA Division of Judicial Services does not maintain records of tribal courts in Alaska Native Villages.

³¹⁸ See *supra* note 165.

³¹⁹ Largely because of the 145,000-member Navajo tribe, these 45 courts served nearly 60 percent of all reservation Indians during 1990. In contrast, fewer than 11,000 non-Indians resided on these reservations. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, AMERICAN INDIAN AND ALASKA NATIVE AREAS: 1990, Table 1 (1991); BUREAU OF INDIAN AFFAIRS, U.S. DEPT. OF INTERIOR, LISTING OF TRIBAL COURTS, JUDGES AND CFR COURTS

Of course, tribal courts do not exist only on reservations in which Indians predominate. Table 3 ranks reservations in ascending order, beginning with those in which Indians figure as the lowest percentage of total population. As the table indicates, among thirty-one reservations on which tribal courts were operating during 1990, Indians numbered in a distinct minority. Fully 78% of all non-Indian inhabitants on reservations with tribal courts resided in these same areas. At the extreme, Indians on the Puyallup reservation numbered less than 3% of total population.³²⁰

(1991). Figures are derived from a comparison of 1990 Indian and non-Indian populations on American Indian and Trust Lands with 1991 Bureau of Indian Affairs listings of tribal courts.

³²⁰ In 1992, these 31 courts were joined by the Osage tribal court. Osage tribal members numbered 6,000 in 1990, while non-Indians on the Osage reservation numbered more than 35,000. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, AMERICAN INDIAN AND ALASKA NATIVE AREAS: 1990, 5 (1991).

Table 3. Indian and Non-Indian Population on Reservations with Active Tribal Court Systems, 1990.

Indians As Percent of Total Population	Reservations	Total Population	Non- Indian	Indian
10% or Less	Puyallup, WA	32,406	31,469	937
	Isabella, MI	22,944	22,149	795
	Pojoaque Pueblo, NM	2,556	2,379	177
	Port Madison, WA	4,834	4,446	388
	Picuris Pueblo, NM	1,882	1,735	147
11-20%	Allegany, NY	7,315	6,253	1,062
	Coeur D'Alene, ID	5,802	5,053	749
	Nez Perce, ID	16,160	14,297	1,863
	Santa Clara Pueblo, NM	10,193	8,947	1,246
	Southern Ute, CO	7,804	6,760	1,044
	Unitah & Ouray, UT	17,224	14,574	2,650
	Tulalip, WA	7,103	5,899	1,204
21-30%	Muckleshoot, WA	3,841	2,977	864
	Nambe Pueblo, NM	1,402	1,073	329
	Flathead, MT	21,259	16,129	5,130
	San Ildefonso Pueblo, NM	1,499	1,152	347
	Yakima, WA	27,668	21,361	6,307
	San Juan Pueblo, NM	5,209	3,933	1,276
	Colorado River, AZ-CA	7,865	5,520	2,345
	Taos Pueblo, NM	4,745	3,533	1,212
	Swinomish, WA	2,282	1,697	585
	Wind River, WY	21,851	16,175	5,676
	31-40%	Tesuque Pueblo, NM	697	465
White Earth, MN		8,727	5,968	2,759
Yankton, SD		6,269	4,275	1,994
Fond du Lac, MN		3,229	2,123	1,106
Omaha, IA-NE		5,227	3,319	1,908
Leech Lake, MN		8,669	5,279	3,390
41-50%		Umatilla, WA	2,502	1,473
	Washoe, NV	157	92	65
	Winnebago, NE	2,341	1,185	1,156
	SUBTOTAL	271,662	221,690	49,972
51-100%	Remainder of Reservations with Courts	388,664	49,107	339,557
TOTAL	Reservations with Tribal Courts	660,326	270,797	389,529

SOURCE: TABLE COMPILED FROM BUREAU OF THE CENSUS DATA, U.S. DEPT. OF COMMERCE, AMERICAN INDIAN AND ALASKA NATIVE AREAS: 1990 (1991); BUREAU OF INDIAN AFFAIRS, U.S. DEPT. OF INTERIOR, LISTING OF TRIBAL COURTS, JUDGES AND CFR COURTS (1991)

If the Supreme Court should reject Public Law 102-137 because it treats nonmember Indians differently from non-Indians, and if Congress is unlikely to delegate authority to tribes to try non-Indians at least where Indians number in a minority on their reservations, can some reservations be restored full sovereignty over all offenders within their boundaries, while others are left, post-*Duro*, with jurisdiction to try consenting members only? If so, what should be the basis of the choice?

C. Land Dominance as a Basis for Jurisdiction

In an opinion and concurrence in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*,³²¹ Justice Stevens, joined by Justice O'Connor, crafted a division in tribal regulatory power in an issue involving zoning and land use. Along with twenty other reservations listed in Table 3, the Yakima reservation contains substantial acreage in fee ownership because of allotments made pursuant to the Dawes Act.³²² Based upon historic rights of tribes to exclude nonmembers,³²³ Justice Stevens reasoned that where reservation lands remain largely unaffected by non-Indian interests, tribal rights to regulate non-Indian lands exist in the nature of equitable servitudes. But where non-Indian interests have become substantial, the servitudes become unenforceable.³²⁴ Justice Stevens observed that "just as Congress could not possibly have intended in enacting the Dawes Act that tribes would maintain the power to exclude bona fide purchasers of reservation land from that property, it could not have intended that tribes would lose control over the character of their reservations upon the sale of a few, relatively small parcels of land."³²⁵ The Yakima Indian Nation could, therefore, impose land-use controls on that portion of its reservation, which was historically closed to non-

³²¹ 492 U.S. 408 (1989); see *supra* note 103.

³²² See *supra* note 5 and accompanying text (discussing Dawes Act).

³²³ *Brendale*, 492 U.S. at 434 (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983)). "A tribe's power to exclude nonmembers entirely or to condition their presence on the reservation . . . is well established." *Mescalero Apache Tribe*, 462 U.S. at 333.

³²⁴ *Brendale*, 492 U.S. at 442.

³²⁵ *Id.* at 441.

Indians, but could not regulate open areas in which tribal members constituted only 20% of total population.³²⁶

Justice Stevens acknowledged that his opinion created no bright lines. "The primary responsibility for line drawing, however, is vested in the legislature. Moreover, line-drawing is inherent in the continuum that exists between those reservations that still maintain their status as distinct social structures and those that have become integrated in other local polities."³²⁷

How might Justice Stevens' approach operate were Congress to draw lines for the assertion of criminal jurisdiction, carving distinctions not within, but among reservations? The Dawes Act, as observed in *Brendale*, created checkerboard land ownership patterns on reservations subject to allotment. It seems likely that reservations in which non-Indians number in the majority are those in which the Dawes Act took the heaviest toll on tribal lands. Might jurisdictional divisions be made depending on whether tribes continue to control the majority of land on their reservations? In *Brendale*, such control was equated with the power to exclude, a more invasive power, it seemed to Justice Stevens, than the power to zone. Surely the power to exclude is also more invasive than the power to punish misdemeanors.

Among the reservations listed in Table 3, a land-dominance basis for allocating criminal jurisdiction would certainly produce the same result for the Suquamish as did *Oliphant*. In 1985, the Suquamish tribe owned only eighty-six acres on the Port Madison reservation, an amount equal to less than 2% of tribal land.³²⁸ Surely the distinction which Vine Deloria, Jr. draws between the vast Navajo reservation and the Suquamish reservation justifies a differential approach to jurisdiction.³²⁹ The

³²⁶ *Id.*

³²⁷ *Id.* at 447.

³²⁸ REPORT OF INDIAN LANDS, *supra* note 5, at 27; HOUSING CHARACTERISTICS, *supra* note 5, at Table 10.

³²⁹ See *supra* note 310 and accompanying text. See also Clinton, *supra* note 69, at 545, 584 (criticizing Court for leading movement toward treatment of Indian law as body of principles which have universal application). Clinton urges contextual sensitivity to marked distinctions among the different tribes and reservations. *Id.* at 544. He thus criticizes the Court's universalist approach in *Oliphant*, which stripped all tribes of power to try non-Indians. *Id.* at 584. However, Clinton concedes that "the Court's conclusion that the Suquamish tribe should not be allowed to exercise criminal jurisdiction over two non-Indian residents of the reservation somehow rings true in the context of the Port Madison

same distinction might be used to limit jurisdiction of the recently-formed Osage Tribal Court.³³⁰ But where to draw the line? In 1990, the Pojoaque Pueblo in New Mexico had a lower ratio of Indians to non-Indians than did the Suquamish tribe, but as of 1985, the vast majority of the pueblo lands remained in tribal ownership.³³¹ Indeed, among six of the reservations listed in Table 3, tribes retained ownership of more than 90% of all lands in 1985.³³²

If tribal control of reservation lands determined jurisdiction, many of the reservations listed in Table 3 should qualify to assert the fullest measure of jurisdiction Congress might provide. But, in many instances, tribal members would number in decided minorities. The converse situation also occasionally occurs. There are reservations in which tribes control only a fraction of the reservation land mass, but dominate the reservation population. Indians on the Crow Creek reservation in South Dakota, for example, accounted for 87% of total population in 1990,³³³ but only 24% of the land was held in tribal ownership.³³⁴ On the Fallon reservation in Nevada, tribal property accounted for only 42% of total lands in 1985,³³⁵ while in 1990, Indians accounted for more than 90% of total population.³³⁶

Reservation." Id.

³³⁰ The Osage tribe, which occupies the only separate reservation in Oklahoma, owned only 675 acres in 1985. REPORT OF INDIAN LANDS, *supra* note 5, at 17; HOUSING CHARACTERISTICS, *supra* note 5, at Table 10. The 675 acres comprised less than 0.1 percent of the 1.4 million acres contained within the reservation. REPORT OF INDIAN LANDS, *supra* note 5, at 17; HOUSING CHARACTERISTICS, *supra* note 5, at Table 10.

³³¹ REPORT OF INDIAN LANDS, *supra* note 5, at 17; HOUSING CHARACTERISTICS, *supra* note 5, at Table 10. Pueblo lands are held pursuant to Spanish grants.

³³² The six reservations that retained 90% ownership include the Nambe, Santa Clara, San Ildefonso, and Taos pueblos, as well as the Colorado River and Washoe reservations. REPORT OF INDIAN LANDS, *supra* note 5, at 7, 21-22, 24; HOUSING CHARACTERISTICS, *supra* note 5, at Table 10.

³³³ REPORT OF INDIAN LANDS, *supra* note 5, at 5; HOUSING CHARACTERISTICS, *supra* note 5, at Table 10.

³³⁴ REPORT OF INDIAN LANDS, *supra* note 5, at 23; HOUSING CHARACTERISTICS, *supra* note 5, at Table 10.

³³⁵ REPORT OF INDIAN LANDS, *supra* note 5, at 23; HOUSING CHARACTERISTICS, *supra* note 5, at Table 10.

³³⁶ BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, AMERICAN INDIAN AND ALASKA NATIVE AREAS: 1990 TABLE 1 (1990).

If Congress should be persuaded to selectively empower tribes to assert criminal jurisdiction over non-Indians and nonmembers, it is apparent from the foregoing that *Brendale*-like divisions based on tribal ownership and control would be unfair in some cases to Indians, and in many other cases to non-Indians. Moreover, such divisions would be unjust if reservations which suffered most because of the Dawes Act were now penalized with the least extensive jurisdiction.³³⁷

*D. Jurisdiction Based on Relative Populations of Indians
and Non-Indians*

Dividing jurisdiction among reservations according to relative numbers of Indians and non-Indians is equally problematic. On such a basis, the Fallon reservation might be given broad criminal jurisdiction to try non-Indians and nonmember Indians. But in 1990, the reservation contained fewer than 600 people, scarcely enough to form a jury pool.³³⁸

³³⁷ See also Clinton, *supra* note 69, at 589 (contending that *Oliphant* decision should have been confined to "heavily-allotted, predominantly non-Indian reservations").

³³⁸ BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, AMERICAN INDIAN AND ALASKA NATIVE AREAS: 1990 TABLE 1 (1990). The Census counted 381 persons on the Fallon reservation in 1990, and 165 in the Fallon Colony. *Id.* Both reservations are home to the same Paiute-Shoshone tribe, and are therefore treated as one in the text.

Table 4. Indian and Non-Indian Population in Ten Most Populous Reservations with Tribal Court Systems: 1990-1992.¹

Reservation	Total		Percent	
	Population	Non-Indian	Indian	Indian
Navajo, AZ-NM-UT	148,451	5,046	143,405	96.6 %
Osage, OK	41,645	35,484	6,161	14.8
Puyallup, WA	32,406	31,469	937	2.9
Yakima, WA	27,668	21,361	6,307	22.8
Isabella, MI	22,944	22,149	795	3.5
Wind River, WY ²	21,851	16,175	5,676	26.0
Flathead, MT	21,259	16,129	5,130	24.1
Unitah, UT	17,224	14,574	2,650	15.4
Nez Perce, ID	16,160	14,297	1,863	11.5
Fort Peck, MT	10,595	4,813	5,782	54.6
TOTAL	360,203	181,497	178,706	49.6%

1. Population totals are taken from the 1990 census. At that time, each of the listed reservations, except the Osage, maintained tribal courts. The Osage tribal court was scheduled to begin operating in early 1992. If based on population alone, the Agua Caliente reservation in Palm Springs, California, and the Western Oneida reservation in Wisconsin would rank in the table as eighth and ninth among the most populous reservations. Indians on the former reservation numbered less than 1% of total reservation population in 1990, and on the latter 13.6%. Neither reservation contains a tribal court, however, as California and Wisconsin are Public Law 280 states.

2. Figures include the Arapaho and Shosone tribes, both of which operate tribal courts within the reservation.

SOURCE: TABLE COMPILED FROM BUREAU OF THE CENSUS DATA, U.S. DEPT. OF COMMERCE, AMERICAN INDIAN AND ALASKA NATIVE AREAS: 1990 (1991).

On two other Nevada reservations, Ely Colony and Summit Lake, Indians comprised almost as large a share of total population in 1990 as did Indians residing on the Fallon reservation. But the census counted only fifty-two Indians at Ely Colony³³⁹ and only six at Summit Lake.³⁴⁰ Although BIA statistics indicate that

³³⁹ *Id.*

³⁴⁰ *Id.* at 2, Table 1. The 1990 census may contain inaccurate counts for several tribes. See *supra* note 304. As of 1989, the Bureau of Indian Affairs counted an Indian population of 758 within the Fallon Reservation and Fallon Colony, 225 within the Ely Colony, and 16

each of these three reservations maintains a tribal court, it may be doubted whether any of them can afford to provide nonmember and non-Indian defendants the constitutional protections the Court is likely to require.³⁴¹ Even if they can, the tribes may no longer exist as separate and distinct peoples. Two of them are not much larger than extended families.³⁴²

Would jurisdictional divisions be practical if based upon the size of reservation populations, so that only the largest would have jurisdiction over nonmembers and non-Indians? The reservations listed in Table 3, after all, contained fewer than 14% of tribal Indians counted in the 1990 Census. But as Table 4 indicates, among the ten most populous reservations with tribal courts, tribal Indians accounted for only half of total population. If the Navajo reservation is excluded, tribal members on the nation's most populous reservations averaged less than 17% of total population during 1990. Only the Navajo and Fort Peck reservations contained more Indians than non-Indians.

Table 4 suggests that any congressional delegation of authority to tribes to assert criminal jurisdiction over nonmembers and non-Indians is as unlikely to be based on total reservation population as it is on tribal ownership of land. Even populous reservations generally have a distinct minority of Indian residents. Might full criminal jurisdiction be granted instead to reservations in which there are comparatively large numbers of Indians and in which Indians predominate in the total population? Table 5 illustrates this possibility.

on the Summit Lake Reservation. At the same time, the Bureau counted 810, 236, and 111 enrolled members of these tribes, respectively. BUREAU OF INDIAN AFFAIRS, U.S. DEPT. OF INTERIOR, ESTIMATED TRIBAL ENROLLMENT 1987 AND 1989, 10-11 (Unpublished Report, 1991). The Census counts at Summit Lake may have been low because, until recently, the reservation lacked electricity. Interview with Ronald E. Johnny, Program Attorney for the National Judicial College (April, 1994) (hereafter Interview with Johnny). Few tribal members lived on the reservation during winter months. *Id.* Johnny reported that 98 tribal members were enrolled in 1994. *Id.*

³⁴¹ The Summit Lake Band of the Northern Paiutes does not maintain a formal tribal court, but the tribal council engages in traditional alternative dispute resolution. Interview with Johnny, *supra* note 340.

³⁴² During 1989, among California's rancherias, the Indian population totaled 20 or fewer on 13 reservations and ten or fewer on seven reservations. BUREAU OF INDIAN AFFAIRS, U.S. DEPT. OF INTERIOR, ESTIMATED TRIBAL ENROLLMENT, 1987 AND 1989, 14-16 (1991). However, because California is a Public Law 280 state, none of the rancherias contains a tribal court.

*E. Jurisdiction Based on Predominance of Indians in Total
Reservation Population*

At first glance, the table suggests that there are reservations in which Indians are present in sufficient numbers to operate comprehensive judicial systems and in which the assertion of criminal jurisdiction over all residents would affect only a relative handful of non-Indians. But while half of all Indians residing on reservations in 1990 lived in these ten areas, basing a jurisdictional division on the tribes appearing in the table would work to exclude 97% of the nation's tribes from asserting equivalent jurisdiction.³⁴³ If the line were drawn at a point where Indians living on reservations numbered one thousand or more and comprised 80% or more of total population, only twenty-two additional tribes with existing court systems could be added to the list in Table 5.³⁴⁴ Three-quarters of the remaining tribal courts and 30% of remaining Indians on reservations with such courts would fall outside the line.

³⁴³ See *supra* note 315 and accompanying text.

³⁴⁴ BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, AMERICAN INDIAN AND ALASKA NATIVE AREAS: 1990, Table 1 (1991); BUREAU OF INDIAN AFFAIRS, U.S. DEPT. OF INTERIOR, LISTING OF TRIBAL COURTS, JUDGES AND CFR COURTS (1991). These 22 reservations had a total Indian population of 56,773 in 1990, or an average of 2,580 each. Only the Turtle Mountain reservation had an Indian population of more than 6,000. More than a third of the reservations contained Indian populations of under 2,000.

Table 5. Population Characteristics Among Reservations with Largest Indian Populations, 1990.

Reservation	Total Population	Non-Indian	Indian	Percent Indian
Navajo, AZ-NM-UT	148,451	5,046	143,405	96.6%
Pine Ridge, NE-SD	12,215	1,033	11,182	91.5
Fort Apache, AZ	10,394	569	9,825	94.5
Gila River, AZ	9,540	424	9,116	95.6
Papago, AZ	8,730	250	8,480	97.1
Rosebud, SD	9,696	1,653	8,043	83.0
San Carlos, AZ	7,294	184	7,110	97.5
Zuni Pueblo, AZ-NM	7,412	339	7,073	95.4
Hopi, AZ	7,360	299	7,061	95.9
Blackfeet, MT	8,549	1,524	7,025	82.2
TOTAL	229,641	11,321	218,320	95.1 %

SOURCE: TABLE COMPILED FROM BUREAU OF THE CENSUS DATA, U.S. DEPT. OF COMMERCE, AMERICAN INDIAN AND ALASKA NATIVE AREAS: 1990 (1991).

Even if *Brendale* lines could be drawn in a manner that might make it fair for some tribes to assert criminal jurisdiction over nonmember Indians and non-Indians, it is difficult to conceive that the divisions would be either workable or effective to achieve their intended purpose. First, the need to assert broad-based jurisdiction may function inversely with the relative concentration of Indian residents on a given reservation. The Navajo tribe, easily the best able to provide an adequate judicial system for nonmembers, may have the least need for enlarged jurisdiction, because the reservation contains few non-Indians and nonmember Indians. *Oliphant* and *Duro*, while affronting Navajo tribal sovereignty, might have little practical impact on the tribe. Conversely, reservations with large populations of non-Indians and nonmembers may have substantial need to exercise expansive jurisdiction, but will invariably fall outside the line because tribal members comprise minorities. Second, even if lines could be drawn to comport with tribal needs, numerical or percentage thresholds would erect barriers between Indians and non-Indians, forcing tribes which sought to retain broad criminal jurisdiction to forego cultural contacts and change.

Frank Pommersheim writes that “[s]overeignty and freedom have no meaning apart from the ability to make choices and exercise informed options.”³⁴⁵ To Pommersheim, the ability of tribes to make choices and to transform social, economic, and political conditions is essential if they are to achieve “meaningful and flourishing” futures.³⁴⁶ But just as *Brendale* forces tribes which seek zoning powers to use their lands in ways that remain somehow quaintly “Indian,” line-drawing as a basis for obtaining broadened criminal jurisdiction will also inevitably force affected tribes into ethnic stagnation by constraining them from exercising choice.

Yet if distinctions cannot or should not be drawn between tribes, it is difficult to conceive that Congress will roll back *Oliphant* and allow all tribes, including those which number as few members as Ely Colony, Nevada, to try non-Indians. But if it does not, do any demographic distinctions justify the differential jurisdiction over nonmember Indians such as those now recognized in Public Law 102-137?

F. Distribution of Member and Nonmember Indians on Reservations

Census data for Indians are often published years after counts are taken. Although the 1990 Census contains information which may facilitate comparisons of tribal and nonmember Indians on enumerated reservations, the information had not been published in late 1994. Tables 6 and 7, therefore, list member and non-member statistics based on 1980 census data.

During 1980, 691,000 persons resided on reservations within the forty-eight contiguous states.³⁴⁷ Some 340,000, or 49%, described themselves as Indians.³⁴⁸ Of this number, 293,000 were enrolled members of Indian tribes,³⁴⁹ suggesting that upwards

³⁴⁵ Pommersheim, *supra* note 5, at 248.

³⁴⁶ *Id.* at 249.

³⁴⁷ BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, AMERICAN INDIAN AREAS AND ALASKA NATIVE VILLAGES: 1980, 16 (1984).

³⁴⁸ *Id.*

³⁴⁹ BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, AMERICAN INDIANS, ESKIMOS, AND ALEUTS ON IDENTIFIED RESERVATIONS AND IN THE HISTORIC AREAS OF OKLAHOMA (EXCLUDING URBANIZED AREAS): 1980, 16 (1985). Enrollment data for the 1980 Census was gathered through a “Supplementary Questionnaire for American Indians,” sent to reservation households where at least one person identified himself or herself as American

of 87% may have been members of the tribes on whose reservations they resided. However, the figures are dramatically influenced by the Navajo tribe, whose members accounted for 28% of all Indians residing on reservations in 1980,³⁵⁰ and, in Table 6, for more than four-fifths of Indians living on the ten most populous reservations. If the Navajos are excluded in the table, it is evident that, on average, fully 36.5% of the Indians on the remaining nine reservations were not members of the reservation tribe. On both the Puyallup and Isabella reservations, tribal members comprised only one-fifth of Indian residents. If Congress will not delegate authority to tribes to try non-Indians when they are present on reservations in significant numbers, there is little if anything in Table 6 to suggest why nonmember Indians should be treated differently.

Indian on the Census form. *See supra* note 304. The Bureau of the Census estimates that 75% of Indians residing on reservations responded to the supplemental survey. *Id.* at D1, E1. Unfortunately, the Bureau issued no supplementary questionnaires following the 1990 Census. Conversation with Jane Cowles, Office of Racial Statistics, Bureau of the Census (September, 1994). The 1990 Census form requested heads of households who identified themselves as Indians to indicate either their "enrolled or principal tribe." 1990 CENSUS OF POPULATION AND HOUSING, SUMMARY TAPE FILE E1, Appendix E-6. *See also supra* note 95; *infra* note 375.

³⁵⁰ BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, AMERICAN INDIANS, ESKIMOS, AND ALEUTS ON IDENTIFIED RESERVATIONS AND IN THE HISTORIC AREAS OF OKLAHOMA (EXCLUDING URBANIZED AREAS): 1980, 23 (1985).

Table 6. Population and Tribal Affiliation Characteristics Among Ten Most Populous Reservations, 1980.

	Total Population	Total Indians	Tribal Members	Total Non- Members	Non-Member	
					Status Unknown	Not Enrolled
Navajo	110,443	104,509	95,674	8,835	6,740	175
Osage	39,327	4,701	1,679	3,022	176	1,439
Yakima	25,363	4,947	3,762	1,185	107	204
Puyallup	25,188	850	183	667	39	207
Isabella	23,373	509	109	400	8	62
Wind River	23,166	4,147	3,453	694	223	110
Flathead	19,628	3,622	2,490	1,132	353	184
Nez Perce	17,806	1,499	1,173	326	35	59
Unitah & Ouray	16,909	2,189	1,654	535	260	55
Sisseton	13,586	2,589	1,403	1,186	120	77
TOTAL	314,789	129,562	111,580	17,982	8,061	2,572
PERCENT	100.0%	41.2%	35.4%	5.7%	2.6%	0.8%
TOTAL w/o						
Navajo Tribe	204,346	25,053	15,906	9,147	1,321	2,397
PERCENT	100.0%	12.3%	7.8%	4.5%	0.6%	1.2%

SOURCE: TABLE COMPILED FROM BUREAU OF THE CENSUS DATA, U.S. DEPT. OF COMMERCE, AMERICAN INDIANS, ESKIMOS, AND ALEUTS ON IDENTIFIED RESERVATIONS AND IN THE HISTORIC AREAS OF OKLAHOMA (EXCLUDING URBANIZED AREAS), 1980 (1985); AMERICAN INDIAN AREAS AND ALASKA NATIVE VILLAGES: 1980 (1984).

In general, the reservations listed in Table 6 — all but one of which were subject to allotment — have larger shares of nonmember Indians than reservations in which tribal lands remain intact.³⁵¹ To this extent, there is merit in an

³⁵¹ Eight of the reservations listed in Table 6 were subject to allotment under provisions of the Dawes Act, with losses ranging from 19% to more than 99% of tribal lands. These reservations include the Flathead (53.1% loss), Nez Perce (95.3% loss), Osage (99.9% loss), Puyallup (96.0% loss), Sisseton (98.1% loss), Unitah and Ouray (76.7% loss), Wind River (19.3% loss), and Yakima (33.9% loss). REPORT OF INDIAN LANDS, *supra* note 5, at 4-5, 15-17, 26, 28; HOUSING CHARACTERISTICS, *supra* note 5, at Table 10. The Isabella reservation in

observation by the Ninth Circuit that dislocations such as those caused by the Dawes Act created the need for tribes to assert criminal jurisdiction over nonmembers.³⁵² Nonetheless, a definitive difference in the percentages of nonmember Indians cannot be drawn by simply distinguishing between reservations which were heavily allotted and those which were less drastically affected. The Flathead tribe, for example, retains 47% of the reservation's 1.2 million acres, but 31% of the Indian population on the reservation during 1980 consisted of nonmembers.

Table 6 suggests a fundamental difference between non-Indians and nonmember Indians on reservations. Many if not most of the non-Indians may simply occupy reservation lands as present-day beneficiaries of non-Indian opportunists during the allotment period. Many of the nonmember Indians may be culturally assimilated with the reservation tribe. Table 7 illustrates the latter possibility in a comparison of membership and enrollment data for the ten reservations which during 1980 had the largest population of Indian residents.

Among all ten reservations listed in the table, member Indians surpassed nonmember residents by approximately the same margin as in Table 6. But excluding the Navajo tribe, nonmembers averaged more than 19% of total Indian population during 1980 on the remaining reservations. Moreover, on the Fort Apache and Hopi reservations, neither of

Michigan was subject to allotment under treaty rather than under the Dawes Act. REPORT OF INDIAN LANDS, *supra* note 5, at 4-5, 15-17, 26, 28; HOUSING CHARACTERISTICS, *supra* note 5, at Table 10. The impact of allotment on the reservation was nonetheless the same: In 1985, the Sagenaw-Chippewa tribe owned only 583 acres, or 0.4%, of the Isabella reservation. REPORT OF INDIAN LANDS, *supra* note 5, at 4-5, 15-17, 26, 28; HOUSING CHARACTERISTICS, *supra* note 5, at Table 10. By comparison, of the 15.6 million acres comprising the Navajo reservation and off-reservation lands, 94%, or 14.7 million acres, remains in tribal ownership. REPORT OF INDIAN LANDS, *supra* note 5, at 4-5, 15-17, 26, 28; HOUSING CHARACTERISTICS, *supra* note 5, at Table 10. The Community and Economic Development Director for the Sagenaw-Chippewa tribe indicated that the tribe's successful gambling enterprises have enabled the tribe to begin reacquiring acreage in the Isabella reservation. Conversation with William Mrdeza, Community and Economic Development Director for the Sagenaw-Chippewa tribe (October, 1994).

³⁵² See *Duro v. Reina*, 851 F.2d 1136, 1139 (9th Cir. 1988) (observing, *inter alia*, that circumstances leading to *Duro* litigation resulted from displacement of many Indian tribes and resulting heterogeneity of reservation populations); see also Clinton, *supra* note 69, at 554-59 (discussing radical alteration in population base and demography of reservations because of federal allotment policy).

which was subject to division by the Dawes Act,³⁵³ nonmember Indians averaged 44% and 47%, respectively, of total Indian population.³⁵⁴ The table suggests that the presence of nonmember Indians on reservations may not be a function of allotment, but of culture.³⁵⁵ If so, at least some aboriginal patterns may be continuing.

Table 7. Population and Tribal Affiliation Characteristics Among Ten Reservations with Largest Population of Indian Residents, 1980

	Total Population	Total Indians	Tribal Members	Non-Member Indians		
				Total Non- Members	Status Unknown	Not Enrolled
Navajo	110,443	104,509	95,674	8,835	6,740	175
Pine Ridge	13,229	11,867	10,078	1,789	290	119
Gila River	7,380	6,903	6,264	639	58	106
Fort Apache	7,774	6,868	3,860	3,008	419	93
Papago	7,203	6,772	6,452	320	59	35
Hopi	6,896	6,592	3,515	3,077	744	99
Zuni	6,291	5,973	5,770	203	37	23
San Carlos	6,104	5,795	4,725	1,070	490	38
Rosebud	7,328	5,643	4,614	1,029	203	137
Blackfeet	6,660	5,525	4,853	672	229	148
TOTAL	179,308	166,447	145,805	20,642	9,269	973
PERCENT	100.0%	92.8%	81.3%	11.5%	5.2%	0.5%

SOURCE: TABLE COMPILED FROM BUREAU OF THE CENSUS DATA, U.S. DEPT. OF COMMERCE, AMERICAN INDIANS, ESKIMOS, AND ALEUTS ON IDENTIFIED RESERVATIONS AND IN THE HISTORIC AREAS OF OKLAHOMA (EXCLUDING URBANIZED AREAS), 1980 (1985); AMERICAN INDIAN AREAS AND ALASKA NATIVE VILLAGES: 1980 (1984).

³⁵³ As of 1985, the 1.7 million-acre Fort Apache reservation contained only tribal-owned lands. Of 1.6 million acres comprising the Hopi reservation, the tribe owned all but 220 acres. REPORT OF INDIAN LANDS, *supra* note 5, at 21.

³⁵⁴ In comparison, the non-Indian population among the ten reservations listed in Table 7 totaled only 12,753 in 1980. By 1990, non-Indians decreased in number to 11,321 despite overall gains of 28% in total population. Compare Table 5 and Table 7.

³⁵⁵ While cultural affinity may explain the presence of nonmember Indians on many reservations, cultural differences may explain their absence on others. On two of the reservations listed in Table 7 in which tribes remain in exclusive possession of their lands, nonmember Indians numbered in decided minorities during 1980. Nonmember Indians on the Papago reservation comprised only 4.7% of the total Indian population during the year, while on the Zuni reservation, nonmembers comprised an even smaller 3.5%.

Historically, many Indian settlements consisted of tribal members and nonmembers. The Paiute Indians of Southern Utah and Nevada, for example, were traditionally exogamous and endogamous: Male members married other Pauites, but only in different Paiute tribes. Among the Northern Paiutes of Idaho, young men often went among different bands in order to find unrelated, acceptable spouses. The resulting marriages were generally matrilineal,³⁵⁶ as were those among the Kootenai Indians of Northern Idaho and Montana.³⁵⁷ On the Nez Perce reservation, members could not marry even distant relatives, and so would move among different bands.³⁵⁸ As a result, bands consisted of both members and nonmembers. Many tribes also took slaves in wars with other Indians, some of whom later married tribal members, and whose children were no longer considered slaves.³⁵⁹

It is not surprising, in view of these and similar experiences and customs among tribes in other regions of the country, that nonmember Indians play a role in Indian society which is often different from that played by non-Indians. Indeed, there is at present a conflict between Indians who wish to broadly integrate nonmember Indians with reservation tribes and those who believe nonmember "Indians of convenience" jeopardize the future of tribes.³⁶⁰

In my experience on the Nez Perce and Coeur d'Alene reservations, nonmember Indians were often integral to tribal life, while non-Indians were not. The Coeur d'Alene tribal

³⁵⁶ DEWARD E. WALKER, JR., *INDIANS OF IDAHO* 155 (1982).

³⁵⁷ *Id.* at 114.

³⁵⁸ *Id.* at 136.

³⁵⁹ *Id.* According to Walker, several slaves rose to positions of influence in the Nez Perce tribe. *Id.* Children of slaves were not regarded as slaves. *Id.* Slaves were also taken by Idaho's Shoshone-Bannock tribe through trade or conquest. *Id.* at 145.

³⁶⁰ Compare Jamake Highwater, *Second Class Indians*, 6 AM. INDIAN J. 6 (1980) with Ronald Andrade, *Are Tribes Too Exclusive?*, 6 AM. INDIAN J. 12 (1980). Highwater, an Indian raised largely in a non-Indian society, sought personal recognition as an Indian from other Indians. Highwater, *supra*, at 9. Observing that traditional Indian culture was inclusive and open, he concludes that a current movement toward exclusivity, that he perceives, is a manifestation of self-contempt. *Id.* at 7-8. Andrade, on the other hand, argues that tribes must become more exclusive. Andrade, *supra*, at 13. He contends that lax membership criteria attract rootless people who seek tribal acceptance in order to possess a culture. *Id.* Unless they have experience with tribal life, simply possessing some Indian blood should not qualify them as Indians. *Id.*

judge, for example, was a member of the Spokane tribe. The tribal prosecutor was a Seneca. Although most criminal defendants in the tribal court were tribal members, several defendants in those pre-*Duro* days came from other tribes. In 1980, only 61% of the Indians residing on the reservation were Coeur d'Alenes.³⁶¹ On the Nez Perce reservation, members of the Umatilla, Warm Springs, and Yakima tribes were often present, many of them married to members of the Nez Perce tribe. During 1980, nonmembers comprised more than one-fifth of all Indians residing on the reservation.³⁶² By comparison, although non-Indians vastly outnumbered Indians on these heavily allotted reservations,³⁶³ their populations were concentrated in incorporated towns. Non-Indians generally operated the establishments where tribal members traded, and were often complainants in criminal actions involving Indians. Otherwise, there was little evidence of interaction.

To the extent cultural practices distinguish nonmember Indians from non-Indians on reservations, the practices suggest that a basis might exist upon which to allocate criminal jurisdiction differentially. But it is a suggestion which should be resisted. One of my frequently returning clients on the Coeur d'Alene reservation was an alcoholic and a member of the tribe. She lived with a male non-Indian whose own excesses often caused my client's drunken bouts and led to her arrests. He was as fully assimilated in the tribe as she was and far more culpable, but because of *Oliphant* he could not be prosecuted.³⁶⁴ On the other hand, a Chippewa driving through the reservation was arrested, plead guilty, and was sentenced to several months in jail for passing a \$25 bad check which he

³⁶¹ BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, AMERICAN INDIANS, ESKIMOS, AND ALEUTS ON IDENTIFIED RESERVATIONS AND IN THE HISTORIC AREAS OF OKLAHOMA (EXCLUDING URBANIZED AREAS) 1980, 18 (1985).

³⁶² *Id.* at 24.

³⁶³ In 1990, the 749 Indians residing on the Coeur d'Alene reservation totaled only 13% of total population. On the Nez Perce reservation, Indians comprised only 11.5% of the reservation's total population of 16,160. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, AMERICAN INDIAN AND ALASKA NATIVE AREAS: 1990, 2, 5 (1991).

³⁶⁴ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). During one of the trials in which students of the University of Idaho College of Law represented the tribal-member defendant, the tribal judge became indignant because she believed she could not hold me, their obstreperous non-Indian supervisor, in contempt. *But see* CANBY, *supra* note 5, at 139.

had, before arrest, made good with cash.³⁶⁵ The tribal judge, so far as I could tell, exhibited none of the animus toward Chippewas which a Sioux judge had allegedly intimated in *Greywater v. Joshua*.³⁶⁶ But a transcript of the defendant's plea made it plain that he was completely unaware of his rights in tribal court.

Between the two, the Chippewa was almost as much a stranger to the Coeur d'Alenes as was Crow Dog when he was prosecuted for murder in a federal court one hundred years before.³⁶⁷ The non-Indian, acculturated in the Coeur d'Alene society, and over whom the tribe sorely needed to assert jurisdiction, was of course immune from prosecution.³⁶⁸ Yet the non-Indian's relations with the Coeur d'Alenes should have made him, if anything, more Indian than the Chippewa.

Public Law 102-137 continues the distinction between the two, and does so with the untoward consequence that if the Chippewa maintains relations with his own tribe, his status with the Coeur d'Alenes is somehow different from and more significant than the resident non-Indian. But the difference is not status. It is race.

The point is not that jurisdiction should somehow be inverted, excusing visitors of whatever race and allowing prosecution of non-Indians and nonmembers who reside within reservation boundaries. Such an approach would only be an egalitarian variant on the Ninth Circuit's contacts-counting test for jurisdiction. Transient misdemeanants could commit crimes with impunity.³⁶⁹ Nor is the point that strangers to tribal courts will receive unfair treatment. In my experience, although misbegotten pleas sometimes occurred,³⁷⁰ tribal courts operated

³⁶⁵ At this time, the Ninth Circuit had only recently decided that tribal jurisdiction was appropriate. *Duro v. Reina*, 851 F.2d 1136 (9th Cir. 1988). Fortunately or not, the Coeur d'Alene tribe could not afford to contest a federal habeas corpus petition, and was therefore persuaded to vacate the sentence.

³⁶⁶ 846 F.2d 486 (8th Cir. 1988). In *Greywater*, a tribal judge had evidently implied that the Chippewa defendant would not receive a fair trial before a Sioux jury. See *supra* note 79 (discussing *Greywater*).

³⁶⁷ *Ex parte Crow Dog*, 109 U.S. 556 (1883). See *supra* note 140 and accompanying text (discussing *Crow Dog*).

³⁶⁸ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

³⁶⁹ See *infra* note 377.

³⁷⁰ However, misbegotten pleas do occur before magistrates in Idaho's state courts. One

with consistent respect for defendants' rights.³⁷¹ Others suggest similar experiences in other tribes and tribal courts.³⁷²

The point, rather, is that jurisdictional distinctions based on status will benefit neither tribes nor the Constitution. In general, as we have seen, non-Indians number in the majority on reservations, but not always. In general, nonmember Indians number in minorities on reservations, but not always. In general, nonmember Indians exhibit a cultural affinity for member Indians, but not always. In general, non-Indians do not exhibit such affinity, but not always. But always, tribal courts need like any other jurisdiction to enforce their penal laws. The distinctions drawn by Public Law 102-137 are palliatives which in time will only work to compromise the Constitution, tribal sovereignty, and Indians as individuals.

G. Enrollment as a Basis for Asserting Criminal Jurisdiction

The Court has never overturned an act of Congress which regulates the affairs of Indians.³⁷³ If there is a means to square

magistrate, refreshingly more avuncular than arrogant, advised the first alleged murderer to appear before him that he should consider his plea with care: "This is the biggy, son. If you plead guilty, you could be sentenced to life, death, or both."

³⁷¹ The Coeur d'Alene and Nez Perce courts were sensitive to preservation of their tribal cultures. The courts rarely imprisoned defendants, most of whom were alcoholics, even for repeat offenses. The courts did not emphasize retribution, a luxury the tribes could ill-afford, but rehabilitation of miscreants as productive tribal members. Far more misdemeanants received sentences to treatment centers than to jails. As a result, some offenders received sentences so slight as to be undeterred. I recall a member of the Nez Perce tribe, brilliant by any stretch, who was frequently arrested as he staggered, sotted, down the centerline of Lapwai's main street shouting epithets at whites and reciting, with great and grueling accuracy, each and every treaty violation. He was never tricked into exchanging the escape of alcohol for the sobering discomfiture of reservation squalor. But more than a few offenders did take the cure. More took the cure, at least, than I observed in the state court system. With rare exception, those who broke the tribal rules willingly took penance to stay within their tribes. Even university students who came with curled lips to the Coeur d'Alene and Nez Perce courts often left thinking that if they were ever tried and found guilty, they would prefer the sentencing and understanding of the tribal courts.

³⁷² *E.g.*, Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M. L. REV. 49 (1988). *But cf.* SAMUEL J. BRAKEL, *AMERICAN INDIAN TRIBAL COURTS: THE COST OF SEPARATE JUSTICE*, 99-103, (1978) (arguing that tribal courts are little more than pale copies of white system and should be replaced through integration of tribes with state and county judicial systems.)

³⁷³ Ball, *supra* note 2, at 12.

Public Law 102-137 with the language of *Duro v. Reina*,³⁷⁴ it may well involve an interpretation of the law which confines the scope of extra-tribal criminal jurisdiction to enrolled members of the prosecuting tribe. Enrollment might be construed as being equivalent to consent, the talisman of the Court's most recent formulation of remaining tribal sovereignty.³⁷⁵ Enrollment might also be viewed as a political classification under the *Mancari* doctrine, thereby enabling Public Law 102-137 to avoid heightened judicial scrutiny.³⁷⁶ But there is little reason to advocate such a reading of the legislation.

Tables 6 and 7 divide nonmember Indians on the listed reservations according to their enrollment status. Although most of the nonmember Indians in each table were enrolled in their own tribes during 1980, significant numbers of them were not. Excluding the Navajo tribe, among nonmember Indians on the next nine most heavily populated reservations in Table 6, more than 15% were not enrolled in any tribe. On the Osage reservation, there were almost as many unenrolled nonmember Indians present during 1980 as tribal members. On the Puyallup reservation, unenrolled nonmember Indians surpassed the population of tribal members.

In Table 7, which lists the ten reservations with the largest populations of Indian residents during 1980, the percentage of unenrolled nonmember Indians is substantially lower than in

³⁷⁴ 495 U.S. 676 (1990).

³⁷⁵ See *supra* note 95 (discussing *Duro* decision). Census data indicate that upwards of 87% of Indians residing on reservations were enrolled in federally recognized Indian tribes during 1980. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, AMERICAN INDIANS, ESKIMOS, AND ALEUTS ON IDENTIFIED RESERVATIONS AND IN THE HISTORIC AREAS OF OKLAHOMA (EXCLUDING URBANIZED AREAS): 1980 16 (1985). The actual percentage may have been higher because of underreportage of enrollment. Enrollment statistics may also have been influenced by tribes that do not permit members to enroll until they reach majority, and in other tribes by parents who had not yet sought enrollment for their minor children. In some cases, tribal members refuse to enroll because, for them, enrollment constitutes acknowledgment of dependent status. Recent statistics from the Bureau of Indian Affairs indicate that during 1989, 1,082,439 Indians and Alaskan natives were enrolled in tribes and Alaskan Native Villages. BUREAU OF INDIAN AFFAIRS, U.S. DEPT. OF INTERIOR, ESTIMATED TRIBAL ENROLLMENT 17 (unpublished report, December, 1991). Compared with the total population of 1.9 million American Indians enumerated in the 1990 census, the BIA enrollment figure suggests that only 60% of Indians are enrolled in tribes. But comparisons between BIA and Census data may be misleading. See, e.g., *supra* note 304.

³⁷⁶ See text accompanying *supra* note 203.

Table 6. Nonetheless, again excluding the Navajo reservation, 6.8% of the nonmember Indians on the remaining nine reservations were not enrolled in any tribes during 1980. If most of those who did not report their enrollment status in the census were not in fact enrolled, the percentage would climb to as high as 28%.

Confining the scope of Public Law 102-137 or successor legislation to enrolled Indians might enable a *Duro* fix to function as a rough corollary of consent, but Tables 6 and 7 make it apparent that such a construction would strip tribes of jurisdiction over many reservation residents. Moreover, the void in jurisdiction which Public Law 102-137 seeks to fill could still exist for Indians not enrolled in any tribe.³⁷⁷ Whether the Court would even accept enrollment as the equivalent of consent is also doubtful in circumstances where enrolled

³⁷⁷ See *supra* note 144 and accompanying text. But see ROBERT N. CLINTON, NELL J. NEWTON & MONROE E. PRICE, *AMERICAN INDIAN LAW, CASES AND MATERIALS* 294-95 (3d ed. 1991). The authors observe that if the Court restricts federal criminal jurisdiction to enrolled members of Indian tribes, nonmember Indians will be subject to jurisdiction in state courts. *Id.* at 295. Their concern conjures images of *Crow Dog*, in which nonmember Indians will be tried in strange and hostile courts. However, this prospect may not follow as either a legal or practical matter. While the Court could well determine that the Major Crimes Act applies only to enrolled Indians, thus directly limiting federal jurisdiction under the act and indirectly limiting tribal misdemeanor jurisdiction under Public Law 102-137, such a decision might not otherwise alter the status of unenrolled nonmembers as federally recognized Indians. To the extent the General Crimes Act precludes states from prosecuting crimes by Indians committed in Indian country, nonmember Indians will almost certainly be immune from prosecution for misdemeanors, and quite possibly from prosecution for major crimes. But if Clinton, Newton, and Price are right in arguing that states will be able to prosecute unenrolled nonmember Indians, at least for misdemeanors, they provide no evidence that states will rush to do so.

Following the Court's decision in *Duro*, the Nez Perce tribal court dismissed charges against all nonmember Indians, representing from 20 to 30% of the court's caseload. Interview with Wanda Miles, then Chief Judge of the Nez Perce Tribal Court (1992). Many of these Indians were subsequently cited for civil infractions and excluded from the reservation. *Id.* However, many returned to commit other crimes, fearing prosecution neither by the tribe nor the state of Idaho. *Id.*

To be sure, the jurisdictional void created by *Duro* made the exercise of state court jurisdiction at least doubtful at the time. The Court may decide that Indians who cannot be tried under the Major Crimes Act are not Indians for purposes of criminal jurisdiction in either federal, state, or tribal courts. However, no evidence demonstrates that states will vindicate tribal interests. Judge Miles, for example, indicated that the State of Idaho rarely prosecutes non-Indians for crimes committed on the Nez Perce reservation, even though the state has jurisdiction over crimes committed in Indian country which involve only non-Indians. *E.g.*, *United States v. McBratney*, 104 U.S. 621 (1881).

defendants, such as the Chippewa passing through the Coeur d'Alene reservation, have little or no established relationship with the forum.³⁷⁸

The knot of tribal criminal jurisdiction strains to be untied. In its place we must find a construct which allows tribes to preserve their identities as separate peoples, but which protects as well the rights of individuals. The repercussions of colonization, as evidenced in current demography, suggest that few if any tribes, save perhaps the Navajos, continue as sufficiently large and discrete polities that legislation to protect their self-determination will not conflict with the rights of numerous unaffiliated individuals. Formulations to preserve tribal sovereignty with expansions of criminal jurisdiction must therefore inevitably confront the limitations of the Constitution. If a meaningful solution to the dilemma posed by *Duro* is to be found, it is likely to involve concessions by the Congress and tribes — a compromise of sovereigns.

CONCLUSION

A. *Demography, Precedent, and Scholarship Fail to Provide an Adequate Basis for Jurisdiction*

The drive into Lapwai, Idaho, is puzzling for a first-time public defender in the Nez Perce Tribal Court, who wonders "Have we arrived?" But conviction that we are among a separate people slowly comes. The Nez Perce are not the souvenirs of conquest. They are separate peoples not for our sake, but because they choose to be, for their reasons, not for ours. Their culture lives through values they, and they alone, divine.

"Yes, we are there." We are among a separate people. And yes, "the greater differences we embrace, and yet be just, the stronger we are."³⁷⁹ But the protection of tribal sovereignty, if

³⁷⁸ The *Antelope* Court refers to enrolled members of "an" official tribe. *United States v. Antelope*, 430 U.S. 641, 646 n.7 (1977). The Court implies, however, that the Indian must have lived on the reservation in which the alleged crime occurred and must have maintained relations with the reservation's tribal members. *Id.* (citing *Ex parte Pero*, 99 F.2d 28, 30 (7th Cir. 1938)); see *supra* note 144 and accompanying text.

³⁷⁹ Ball, *supra* note 2, at 139.

important for “our” reasons, is worth protecting principally for theirs. That should be enough.

Yet, if the first-time defender is skeptical, what about the Congress? Without appropriate jurisdiction to enforce their penal laws, tribes may lose what little sovereignty remains. These many pages are a seeming heresy, concluding as they do that the single piece of legislation which returns jurisdiction divested by a hostile Court should be ruled unconstitutional. Tribes, after all, supported Public Law 102-137 because they needed to win back whatever jurisdiction they could get. If their ability to prosecute must be limited to Indians, so be it. Without doubt, tribes understood full well that a skeptical Congress would be unwilling to give them more.

The dilemma, therefore, remains. Without Public Law 102-137, tribes will lack the necessary power to govern their reservations. But without a congressional override of *Oliphant v. Suquamish Indian Tribe*,³⁸⁰ Public Law 102-137 may either be stricken or rendered meaningless through a judicial limitation of tribal jurisdiction to enrolled members of the prosecuting tribe. The dilemma is ironic, because some tribes may have little interest in acquiring the power to try non-Indians.³⁸¹ The dilemma is compounded by the likelihood that Congress will either refuse to override *Oliphant*, or, if it can be persuaded to do so, the likelihood that an override will invite a racial backlash. It is complicated by the probability that the Court may require that all nontribal defendants receive full benefit of the Bill of Rights, a requirement that could compel some tribes to dismantle cultural institutions.³⁸²

These pages consider demography, precedent, and scholarship as a means to uphold the law. None suffice. The first casualty may be the inherent sovereignty of tribes to prosecute nontribal members, divested by the Court in *Oliphant* and then in *Duro*. Given *Duro*'s possible reduction of sovereignty to an “additional authority” of tribes to govern consenting members, there is little

³⁸⁰ 435 U.S. 191 (1978).

³⁸¹ See *supra* note 166 and accompanying text.

³⁸² See *supra* note 171 and accompanying text.

reason to expect that the Court will reverse itself and revest tribes with the inherent sovereignty contemplated by the legislation.³⁸³

Consideration is also given in these pages to precedents by which nonmember Indians might be distinguished from non-Indians on the basis of political classifications instead of race. But *Duro* makes clear that when nonmember Indians and non-Indians are similarly situated on reservations, any jurisdictional distinctions which might be carved between them would be racial.³⁸⁴ Unless the Court finds that enrollment is the equivalent of consent, the disparity in jurisdiction based on race is surely impermissible.

Theories of group rights also do not provide a satisfying means to uphold the legislation. None of the concepts discussed in these pages offers clear support for criminal jurisdiction by groups over nonmember individuals. Given the posture of the current Court, in any equal protection contest between the rights of individuals and tribal groups, individuals will almost certainly prevail. Indeed, tribes could well be placed in greater jeopardy if Public Law 102-137 is upheld. If distinctions between nonmember Indians and non-Indians can be used to justify disparate treatment in criminal jurisdiction, even though of present benefit to tribes, there can be little confidence that a future Court or Congress would not by similar distinctions divest tribes of all authority over non-Indians.³⁸⁵

Indian demography offers even less reason to uphold Public Law 102-137 than conceptions of group rights. As we have seen, fewer than one-fifth of Indians continue to reside on reservations.³⁸⁶ Within reservations, neither ownership patterns nor population characteristics suggest a reasonable means to justify a grant of broad criminal jurisdiction to some tribes, while denying it to others.³⁸⁷ Such line drawing could mean that only large tribes on reservations with few nonmember

³⁸³ See text accompanying *supra* note 117.

³⁸⁴ See *supra* note 87 and accompanying text.

³⁸⁵ See *supra* note 186 and accompanying text.

³⁸⁶ See text accompanying *supra* note 312.

³⁸⁷ See generally text accompanying *supra* notes 314-352.

Indians and non-Indians would be accorded full criminal jurisdiction. Indeed, line drawing might force these tribes to become ethnic enclaves in order to protect their jurisdiction.³⁸⁸

However uncomfortable the thought for advocates of Indians, the demographic characteristics of American Indians in the late twentieth century also suggest that had *Oliphant* or *Duro* never been decided, in time even the most benign of Courts might consider the underlying issues and arrive at similar results, if for different reasons. Culture and history indicate that few Indians have accepted assimilation willingly, but the peculiarly American phenomenon of acculturation has had an irreversible effect. What the first-time defender sees upon arriving on the Nez Perce reservation is the impact of acculturation, manifest and permanent. Group separateness of the Nez Perce tribe continues, but it does so juxtaposed beside the pervasive consequences of assimilation. It is as useless to deny that Indians number in the minority on most reservations as it is to deny that many tribal members, measured by blood alone, are more non-Indian than Indian.

How then can laws be drafted which will protect tribal self-determination in light of the profound consequences of assimilation? Is there still another theory under yet another provision of the Constitution which can or should be urged to rescue Public Law 102-137, or which can otherwise be marshalled to confer on tribes the right to prosecute nonconsenting Indians but not whites? I discover none. Instead, if the knot of criminal jurisdiction in Indian country is to be untied, it is far less likely to involve searches among the clauses of the Constitution than it is to involve a process of political and cultural compromise. The resolution will likely turn on the nature of tribal courts, themselves.

In *Santa Clara Pueblo v. Martinez*,³⁸⁹ the Court determined that a federal cause of action does not exist to enforce ICRA against tribes in civil matters.³⁹⁰ Some commentators argue that the best means to insure fairness in the tribal courts, and perhaps open the way to broader jurisdiction, is to expand the

³⁸⁸ See text accompanying *supra* note 345.

³⁸⁹ 436 U.S. 49 (1978).

³⁹⁰ *Id.* at 59.

scope of federal review. Charles Wilkinson is among them.³⁹¹ He suggests that federal courts should be empowered to review tribal court decisions when the ICRA rights of individuals are abridged. Such review, he reasons, will insure that non-Indians (and presumably nonmember Indians) are treated squarely in the tribal courts. However, Wilkinson proposes that federal review be limited. He distinguishes sharply between substance and procedure. "Courts should play a prudential role and recognize broad tribal authority over non-Indians as a necessary predicate for achieving the measured separatism promised in treaties and treaty substitutes."³⁹² Federal courts should be required to respect tribal traditions, overturning tribal actions only on an elevated standard of review and only after tribal remedies are exhausted.³⁹³

Wilkinson's proposal for limited federal review is based on civil jurisdiction under ICRA. The remedy of habeas corpus for criminal prosecutions is already provided in the Act. This is the remedy which Albert Duro sought and obtained, and the consequences of which form the principal basis of this Article. Other scholars, Robert Laurence among them, argue that the right of habeas corpus provides sufficient protection for non-Indians by itself that the Congress should legislatively overrule *Oliphant*.³⁹⁴

Wilkinson and Laurence both recognize that the risk implicit in expanded federal review of tribal court decisions is that Anglo-American legal concepts may displace the customary laws of tribes. Perhaps for this reason, Robert Clinton would limit review of civil judgments to certiorari to the Supreme Court.³⁹⁵

³⁹¹ WILKINSON, *supra* note 5, at 113-19.

³⁹² *Id.* at 113.

³⁹³ *Id.* at 115.

³⁹⁴ Laurence, *supra* note 102, at 422. Elsewhere, Laurence proposes limited federal review in civil matters. Much like Wilkinson, Laurence would require that appellants exhaust tribal court remedies before seeking federal review. He would require an "amount-in-controversy," at least in matters not involving declaratory or injunctive relief, before a tribal judgment could be appealed. *Id.* at 432-33. In any event, Laurence would preclude recovery of money damages from tribes. *Id.* at 433-34.

³⁹⁵ See *id.* at 431 n.88 (referring to testimony by Robert Clinton before the United States Commission on Civil Rights). Michael Blum and Michael Cadigan would eliminate appellate review by the Supreme Court altogether. See *The Indian Court of Appeals: A Modest Proposal to Eliminate Supreme Court Jurisdiction Over Indian Cases*, 46 ARK. L. REV. 203 (1993) (advocating use of the Article III Exceptions Clause, U.S. CONST., art. III, § 2, cl. 2, to

As a means to enlarge tribal jurisdiction, federal review therefore creates an unwelcome tension: Congress is unlikely to broaden jurisdiction without expansive federal review, but such review may entail a concomitant loss of tribal sovereignty.

Some commentators suggest that the dilemma of tribal jurisdiction may remain insoluble unless tribes cede jurisdiction to the states. Samuel Brakel contends that it is only a matter of time before reservations and tribal courts disappear.³⁹⁶ He reasons that the only justification for tribal courts is local control, and that this justification is insufficient to support courts which are "little more than pale copies of the white system."³⁹⁷ Brakel would, therefore, terminate tribal courts and subject tribes to state and county jurisdiction. Another commentator reasons that states might even be persuaded to grant concessions to tribes in exchange for a grant of criminal jurisdiction.³⁹⁸

In *Duro*, the Court itself suggested that tribes might cede jurisdiction to states under provisions of Public Law 280.³⁹⁹ But there has been no rush to do so. The Court also made reference to the fact that the jurisdiction at stake in its decision involved "relatively minor crime," suggesting that misdemeanor jurisdiction is of little consequence. But Brakel and the Court miss the point. It is the fact of localized control which allows a court system to maintain the peace within its jurisdiction. And, as any practicing attorney knows, most criminal offenses involve misdemeanors, not felonies. If tribes are to have meaningful ju-

preclude Supreme Court review of Indian law decisions). In place of such review, the authors argue that Congress should establish an Indian Court of Appeals, whose members would have Article III powers to review cases decided by the circuit courts.

³⁹⁶ BRAKEL, *supra* note 372, at 99-103.

³⁹⁷ *Id.* at 100.

³⁹⁸ K. Bliss Adams, Note, *Order in the Courts: Resolution of Tribal/State Criminal Jurisdictional Disputes*, 24 TULSA L.J. 89 (1988). Adams proposes that tribes should enter into compacts with states, ceding criminal jurisdiction in exchange for state concessions. She suggests, for example, that states might be willing to exempt non-Indian businesses on reservations from state taxation in exchange for a grant of jurisdiction. *Id.* at 113-14. However, she does not explain why states would have an interest in making concessions to tribes, especially in view of the costs associated with the exercise of jurisdiction.

³⁹⁹ *Duro v. Reina*, 495 U.S. 676, 697 (1990); *see also supra* note 113 and accompanying text.

risdiction, resolution of the dilemma caused by *Duro* and the *Duro* fix must be found in localized control within the reservations and at the trial court level.

*B. Proposed Solution of Political and Cultural Compromise:
A Dual Court System*

How is it possible to grant tribes the power to try nonmember Indians and non-Indians without inviting a companion loss of sovereignty because of constitutional constraints? The dilemma cannot be solved by expanded federal review of tribal court proceedings. Even if the scope of such review were circumscribed, as Wilkinson and Laurence propose, few misdemeanants appeal convictions. A skeptical Congress would be unlikely to enlarge a grant of criminal jurisdiction to the tribes even if comprehensive federal review were made available. The dilemma also cannot be solved within existing tribal courts, at least for tribes whose cultural or religious institutions would be threatened by constitutional intrusions. Nor is it likely that the dilemma will be solved by an expanded federal presence within the reservations.⁴⁰⁰ For most tribes wishing to assert expanded jurisdiction, the solution may require the establishment of a dual court system.

In the late nineteenth century, Congress authorized the Commissioner of Indian Affairs to establish Courts of Indian

⁴⁰⁰ As one commentator testified:

The Federal System has not been a resource to the Tribe in law enforcement as far back as I can remember and I have been in the law enforcement field since 1962. . . . The U.S. Attorneys Office, the F.B.I., the U.S. Marshals Office, Federal Magistrate courts, all have different priorities with regards to felony crimes committed on Indian reservations. Even the most serious crimes are declined in favor of local prosecution under a misdemeanor charge or multiple charges being filed in Tribal Court.

Hearings Before the Select Senate Comm. on Indian Affairs, (1991) (statement of Jeff Sanders, General Manager of Public Safety for the Confederated Tribes of the Warm Springs Reservation of Oregon).

In the three years I represented defendants before the Nez Perce and Coeur d'Alene tribal courts, only one offense provoked an inquiry by the Federal Bureau of Investigation. Not a single federal charge was filed, even though evidence indicated that one offender had committed a crime involving murder and necrophilia, and another had so severely beaten his spouse that she required multiple operations and a colostomy. The tribes prosecuted offenses such as these as misdemeanors for the simple reason that the crimes would otherwise go unpunished.

Offenses among the several reservations.⁴⁰¹ These "CFR" courts⁴⁰² were often resented by the tribes because they were used as federal instrumentalities to "civilize" the Indians.⁴⁰³ Distrust continues among tribes which consider CFR courts to be a threat to tribal sovereignty.⁴⁰⁴ As a result, the number of such courts has been declining.⁴⁰⁵ Nonetheless, if operated in conjunction with existing tribal courts, CFR courts offer a solution of political and cultural compromise to the problems posed by *Duro* and the *Duro* fix.

Because CFR courts operate under an express grant of congressional authority, their jurisdiction over nonmember Indians does not depend upon inherent sovereignty.⁴⁰⁶ CFR

⁴⁰¹ See 25 U.S.C. § 2 (1983) (R.S. § 463) ("The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.").

⁴⁰² Courts of Indian Offenses are commonly referred to as CFR courts because they are established by the Bureau of Indian Affairs through authority promulgated in the Code of Federal Regulations. See *supra* note 316.

⁴⁰³ In 1888, an Oregon District Court stated that the Courts of Indian Offenses are:

mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian. In fact, the reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.

United States v. Clapox, 35 F. 575, 577 (D. Or. 1888).

⁴⁰⁴ See, e.g., Jerry Gardner, *Tribal Leaders Struggle to Cope with Impact of Duro Decision*, TRIBAL COURT RECORD 3 (1990).

⁴⁰⁵ With the approval of the Assistant Secretary, tribes can enact ordinances enforceable in the Courts of Indian Offenses. 25 C.F.R. § 11.1(d) (1991). While the number of CFR courts has gradually declined, several tribes which have established tribal courts have reverted to CFR courts when funding for the former proved to be insufficient. Interview with Leland Pond, Judicial Branch of the Bureau of Indian Affairs (Jan. 1991). Tribal courts are funded (or underfunded) by tribal councils from general appropriations of the Bureau of Indian Affairs. CFR courts are funded directly by the Bureau. See also *supra* note 163 (discussing lack of funding for Indian Tribal Justice Act).

⁴⁰⁶ Relatively few federal court opinions address the constitutional constraints on CFR courts. However, the Eighth Circuit denied a Fifth Amendment challenge to the exercise of jurisdiction by a CFR court on the apparent basis that such courts derive from the sovereign powers of tribes. *Iron Crow v. Ogallala Sioux Tribe of Pine Ridge Reservation*, 231 F.2d 89 (8th Cir. 1956). The opinion suggests that federal regulations by which CFR courts are created constitute little more than an addendum to inherent sovereignty. *Id.* at 94; cf. *Colliflower v. Garland*, 342 F.2d 369, 378-79 (9th Cir. 1965) (holding that federal habeas corpus relief is available from CFR courts because, *inter alia*, "[i]t is pure fiction to

courts were, therefore, unaffected by the result announced in *Duro*. Indeed, following *Duro* and the earlier Eighth Circuit decision in *Greywater v. Joshua*,⁴⁰⁷ the Bureau of Indian Affairs encouraged their establishment. Despite historical antipathy, some tribes did.⁴⁰⁸

As a compromise among sovereigns, these or similar courts deserve a closer look. Under current regulations, CFR courts are no longer vehicles for assimilation by an overweening federal government. Although CFR judges are appointed by the Commissioner of Indian Affairs, judges must be members of the tribe under a CFR court's jurisdiction, and they must be confirmed by a two-thirds vote of the reservation's tribal council.⁴⁰⁹ Judges are also subject to removal for cause upon recommendation of the tribal council.⁴¹⁰ Moreover, while the Code of Federal Regulations defines a number of statutory offenses, many of them arcane or exacting only minor penalties,⁴¹¹ tribes can adopt their own ordinances. Upon approval by the Commissioner, tribal ordinances replace federal regulations.⁴¹² As a result of the substantial, although by no means complete, tribal control over CFR courts, they can and do serve as operational equivalents of tribal courts. Indeed, CFR courts have been equated directly with tribal courts in federal decisions.⁴¹³ Tribes which may turn to these courts as a source

say that the [CFR] courts . . . are not in part, at least, arms of the federal government.”).

⁴⁰⁷ 846 F.2d 486 (8th Cir. 1988).

⁴⁰⁸ Clinton, Newton, and Price indicate that the Bureau of Indian Affairs appointed existing tribal courts to function as CFR courts following *Greywater*, but observe that tribes were not enthusiastic when a similar solution was proposed following *Duro*. CLINTON, NEWTON & PRICE, *supra* note 377 at 414. The Uintah and Ouray reservation and the Coeur d'Alene reservation were among those which did form CFR courts following *Duro*. The Nez Perce tribe considered a resolution to establish a dual court system, but abandoned the effort when the predecessor to Public Law 102-137 was enacted.

⁴⁰⁹ 25 C.F.R. § 11.4(b)(d) (1991).

⁴¹⁰ *Id.* § 11.4 (1991).

⁴¹¹ For example, CFR regulations proscribe illicit cohabitation and possession of alcoholic beverages. 25 C.F.R. §§ 11.55, 11.61 (1991). Maximum sentences in CFR courts do not exceed six months. Conversely, tribal courts, using provisions of the Indian Civil Rights Act, may sentence criminal offenders to imprisonment for one year.

⁴¹² 25 C.F.R. § 11.1(e) (1991).

⁴¹³ See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64, 64 n.17 (1978) (rejecting causes of action that undermine tribal forum's authority); *Tillet v. Lujan*, 931 F.2d 636, 640 (10th Cir. 1991) (stating that federal courts should not exercise jurisdiction over cases that are also subject to tribal jurisdiction).

of criminal jurisdiction may, therefore, retain significant authority.

CFR courts are not by themselves, however, a solution to the *Duro* quandary. First, because CFR courts operate through a congressional delegation of authority, they presumably require full application of the Bill of Rights.⁴¹⁴ For Indian judges, this circumstance can create divided loyalties.⁴¹⁵ For tribes, it may inextricably complicate religious and customary practices with the Constitution, creating a contest in which tribes will surely fail.⁴¹⁶ Second, a successful Fifth Amendment challenge to Public Law 102-137 must have a derivative impact on CFR courts as well. The current Code of Federal Regulations extends the jurisdiction of CFR courts to "any person of Indian descent who is a member of any recognized tribe now under Federal jurisdiction."⁴¹⁷ If Public Law 102-137 is overturned on Fifth Amendment grounds or confined to enrolled Indians, CFR courts will offer no advantages. Presumably, because these courts derive their power from Congress, the scope of their jurisdiction will turn directly on a decision by the Court to limit or overturn the legislation.

Consider, however, the possibility of a dual court system in which Congress expands the criminal jurisdiction of CFR courts to encompass nonmember Indians and non-Indians, while tribal courts continue to assert inherent jurisdiction over tribal members. On a given reservation, such a system would allow

⁴¹⁴ The Bureau of Indian Affairs appears to have acknowledged constitutional strictures only recently. The Acting Deputy Assistant Secretary wrote in a November 12, 1985, memorandum to area directors that "[i]t has come to our attention that courts of Indian offenses may be violating mandates set forth in the Constitution of the United States. . . . Courts of Indian offenses are federal instrumentalities that are required to comply with federal statutes as well as the Constitution of the United States." Memorandum of Nov. 12, 1985 from Acting Deputy Assistant Secretary, Bureau of Indian Affairs. Among other requirements set forth in the memorandum was appointment of court-appointed attorneys for indigent defendants facing imprisonment. *Id.*

⁴¹⁵ A typical oath of magistrates in Courts of Indian Offenses illustrates the concern:

I do solemnly swear (or affirm) that I will administer justice. . . . agreeably to the Constitution and laws of the United States, and to the Constitution and laws of the tribes served by this Court, so help me God.

Oath of Magistrate, Court of Indian Offenses, Western Oklahoma.

⁴¹⁶ See *supra* note 171 and accompanying text.

⁴¹⁷ 25 C.F.R. §§ 11.100(c), 11.102(a) (1994).

tribal courts to base decisions on customary law, or to operate as arms of theocratic governments, without fear of more than limited federal review.⁴¹⁸ Nonmember Indians and non-Indians, however, would receive the full protection of the Bill of Rights.⁴¹⁹

Because CFR courts can be staffed with tribal members, in many instances the same personnel can operate both systems, thereby fostering efficiency.⁴²⁰ The principal advantage of a dual court system, however, is that tribes could assert full criminal jurisdiction within their reservations. With an appropriate grant of congressional authority to the Commissioner of Indian Affairs, tribes could try any criminal offenders. Except when prosecuting tribal members in the tribal courts, tribes would no longer be constrained to prosecute only those of Indian ethnic status. Indeed, a congressional delegation of authority might empower tribes to try offenses involving major crimes, or crimes involving only whites. By such means, the knot of criminal jurisdiction could be untied.

To be certain, a dual court system will involve substantial compromise. Implicit in the proposed solution is an acknowledgement that, at least in matters involving criminal offenses, tribal courts lack jurisdiction over all save tribal members. To this extent, the solution offers tribes nothing more than *Oliphant* or *Duro*. On the other hand, a congressional

⁴¹⁸ A dual court system, in which tribal courts retain criminal jurisdiction over tribal members only, would strengthen the position of those who argue for rescission of ICRA. Because membership is elective, Congress might find that the Act's constitutional protections are less important than the divestiture of sovereignty which the Act entails.

⁴¹⁹ CFR courts would presumably meet the Court's objection to the "manifestation of external relations between [tribes] and outsiders," as expressed in *Duro*, 495 U.S. at 676. See *supra* note 90 and accompanying text.

⁴²⁰ In its proposed resolution to establish a CFR court following *Duro*, the Nez Perce tribe sought to designate its tribal judge a CFR judge. Court clerks, prosecutors, and police would also have operated in both courts. Communications by the Bureau of Indian Affairs to the tribe, however, stressed requirements that funds and records be strictly segregated. Letter to Chairman of Nez Perce Tribal Executive Committee from Acting Superintendent, Northern Idaho Agency, Bureau of Indian Affairs, August 10, 1990. Despite economies achieved by shared facilities and personnel, the Nez Perce CFR court's proposed budget required substantially more funds than the Nez Perce tribal court. More than 45% of the CFR court budget was devoted to expenditures not required by the tribal court, including a public defender, jury fees, and witness fees. Proposed Budget for Nez Perce CFR Court, 1990.

delegation of authority to tribes to prosecute all offenders, albeit subject to federal regulation and the Constitution, would allow tribes to assert far more comprehensive and coherent jurisdiction than will Public Law 102-137, even if upheld.

The proposed solution also involves congressional compromise, because the Fifth Amendment would require a grant of jurisdiction for tribes to prosecute non-Indians.⁴²¹ But the compromise need not raise the specter that whites will face, as did an Indian in *Crow Dog*, alien tribunals.⁴²² The congressional grant may authorize the Commissioner of Indian Affairs or some other agency to impose strict standards on CFR courts. Federal rules of evidence and procedure might be required, as well as rigorous training for tribal judges. Defendants might also be accorded the right to federal appeals and full federal review, including full application of Anglo-American law, because federal decisions would not affect the dealings of a tribe with its own members.⁴²³ Moreover, the congressional grant could be selective, delimiting the crimes for which nonmembers and non-Indians could be tried, or circumscribing punishments. Such limitations might overcome

⁴²¹ The congressional authority presently delegated to the Commissioner of Indian Affairs may encompass the creation of legislative courts with jurisdiction over non-Indians. 25 U.S.C. § 2 (1988). The Commissioner has power to manage "all matters arising out of Indian relations." *Id.* However, if Congress empowers CFR courts to try any offense on a reservation, it should clearly express its intent to grant CFR court jurisdiction to try non-Indians, and Indians under the Major Crimes Act. Moreover, the Code of Federal Regulations presently permits CFR courts to assert criminal jurisdiction only over Indians. 25 C.F.R. § 11.102(a) (1994).

⁴²² The Court has stated that non-Indians should not be subject to criminal jurisdiction in the tribal courts. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (citing *Ex parte Crow Dog*, 109 U.S. 556 (1883)).

[In *Crow Dog*, the] United States was seeking to extend United States "law . . . over aliens and strangers . . . [judging] them by a standard made by others and not for them . . . according to the law of a social state of which they have an imperfect conception." These considerations, applied here to the non-Indian rather than Indian offender, 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.

435 U.S. at 210-11 (quoting *Crow Dog*, 109 U.S. at 571).

⁴²³ Courts formed pursuant to the Code of Federal Regulations are required to have appellate divisions. 25 C.F.R. § 11.200. Appeals are heard by a panel of three magistrates, but are presently not subject to further review by the Bureau of Indian Affairs. *Id.*

concerns of nonmember Indians and non-Indians on reservations where tribal members number in minorities.

As with any solution involving substantial compromise, a dual court system will require careful and considered study to achieve a fair balance between tribal self-determination and the Constitution. Moreover, even if constructed with the utmost care, such a system will not be free from difficulties. Tribal court judges who are also CFR magistrates might find their decisions in one court being unduly influenced in order to gain reappointment in the other. A hostile Supreme Court might also find that CFR courts, so empowered, violate the Constitution.⁴²⁴

⁴²⁴ CFR courts are "legislative" courts, a term coined by John Marshall. *American Ins. Co. v. 356 Bales of Cotton (Canter)*, 26 U.S. (1 Pet.) 511, 546 (1828). In that case, the Court upheld the constitutionality of territorial courts, distinguishing between Article III "constitutional courts," and those created by Congress. *Id.* In Article III "constitutional courts," judges receive life tenure. *Id.* Courts created by Congress under Articles I and IV are "in virtue of that general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States." *Id.* A strict reading of Article III might require the conclusion that Congress cannot create courts in which judges lack life tenure. However, Marshall's opinion validated the creation of legislative courts in which judges may be appointed for a term of years, acknowledging that the Article III requirement of life tenure is not always practical. In *Canter*, for example, territorial judges adjudicated both federal and local law. *Id.* at 542-43. When territories gained admission as states, judicial responsibilities were divided between state and federal courts, thereby requiring few federal judges to replace many territorial appointees.

The Court has also upheld the constitutionality of military tribunals and administrative law courts as legislative courts. *See Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1858) (upholding military tribunals); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856) (upholding administrative law courts). However, legislative courts have been found unconstitutional when they exercise powers which are "inherently judicial." In particular, legislative courts which are empowered to consider criminal matters are generally constrained to act only when their adjudicative process takes place under the control and jurisdiction of an Article III court. *See United States v. Raddatz*, 447 U.S. 667, 681 (1980) (stating that magistrate's finding is subject to district court's discretion). As such, the powers of federal magistrates are strictly limited. While magistrates may hear dispositive pretrial motions in criminal proceedings, a federal court must have the power to make a de novo determination of a magistrate's decision. *Id.* at 681-82.

The status of CFR courts is unclear. The *Clapox* court construed courts of Indian offenses not to be "the constitutional courts provided for in section 1, art. 3, Const., which congress only has the power to 'ordain and establish,' but mere educational and disciplinary instrumentalities." *United States v. Clapox*, 35 F. 57, 577 (D. Or. 1888). CFR courts nonetheless pronounce criminal sentences without federal court review. The Supreme Court might determine that CFR courts require trials de novo in federal district courts, or that Indian judges must otherwise be appointed with life tenure. If the Court so decides, Congress will almost certainly not invest these courts with the authority to resolve the *Duro* problem.

Neither is a dual court system the only means by which the dilemma caused by *Duro* and Public Law 102-137 could be resolved. Several tribes currently guarantee substantially all of the protections of the Bill of Rights to defendants in their courts.⁴²⁵ Little reason exists why some of these should not be allowed to assert broad criminal jurisdiction free from additional federal intrusion. The Navajo Nation comes readily to mind. Still other tribes may have no need for expanded jurisdiction, suggesting that dual systems or other solutions should be considered tribe-by-tribe, and should be optional.

Justice White proposed a possible solution in a dissenting opinion. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 51, 92-118 (1982) (White, J., dissenting). He reasoned that if legislative courts are relegated to issues of little interest to political branches, they should not be overturned as an aggrandizement of congressional power. *Id.* at 115. Since *Northern Pipeline*, the balancing test proposed by Justice White has become a judicial norm: legislative courts will be upheld where their benefits outweigh adverse impacts on constitutional requirements for separation of powers. *E.g.*, *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583-93 (1985); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 847 (1986). Nonetheless, CFR courts are neither military tribunals nor presumably are they territorial. *See, e.g.*, *Balzac v. Puerto Rico*, 258 U.S. 298 (1922) (holding that constitutional right to trial by jury depends on whether territory has been incorporated into Union). Although the Court might find authority for CFR legislative courts in the Indian Commerce Clause or the Treaty Clause, it could as easily conclude that the criminal jurisdiction of these courts is unconstitutional.

⁴²⁵ *See* Elmer R. Rusco, *Civil Liberties Guarantees Under Tribal Law: A Survey of Civil Rights Provisions in Tribal Constitutions*, 14 AM. INDIAN L. REV. 269, 291 (1989) (determining after examining tribal constitutions that a large number of them conferred the same rights against the tribal government as those provided in the United States Constitution against non-tribal governments).

Where there is a need for broad-based jurisdiction, however, a dual court system can offer significant new authority to tribal governments while protecting the constitutional rights of individuals. The solution does require compromise. But the compromise is nothing more than a recognition of reality. Or perhaps two realities. Five hundred years have passed since discovery by the Europeans. Despite the ravages of war, disease, and forced assimilation, Indians and their separate cultures do survive, and are even now robust. But five hundred years have also brought profound and lasting change. The first-time defender on the Nez Perce reservation confronts that which once was here and still would be, and that which never was, but is. The defender struggles for a reconciliation between opposing cultures. There is none save for compromise.

