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# United States v. Lara, Indian Tribes, and the Dialectic of Incorporation

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# *UNITED STATES V. LARA*, INDIAN TRIBES, AND THE DIALECTIC OF INCORPORATION

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The United States Supreme Court in *United States v. Lara*[1] upheld the power of Congress to reaffirm and recognize the inherent power of Indian tribes to prosecute non-member Indians. Congressional action in this area became necessary after the Supreme Court in *Duro v. Reina*[2] held that Indian tribes had been implicitly divested of the inherent power to prosecute Indians who were not also members of the prosecuting tribe. The Court in *Duro* applied what had become known as the implicit divestiture doctrine, the foundation of which had first been laid down by the Court in 1978 in *Oliphant v. Suquamish Indian Tribe*.[3] Although the Court in *Oliphant* had spoken in terms of "inherent limitations on tribal powers that stem from their incorporation into the United States,"[4] and had stated that Indian tribes are prohibited from exercising those powers that are "*inconsistent with their status*,"[5] it is in a case decided the same term, *United States v. Wheeler*,[6] that the Court first used the term "implicit divestiture." Thus, after stating that the tribes' "incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised,"[7] the *Wheeler* Court stated:

> [T]he sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such *implicit divestiture* of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.[8]

In the legislation which was the subject of the Court's decision in *Lara*, which I will hereinafter refer to as the *Duro* fix, Congress amended the Indian

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1. 124 S. Ct. 1628 (2004).
2. 495 U.S. 676.(1990).
3. 435 U.S. 191.
4. *Id.* at 209.
5. *Id.* at 208 (emphasis in original).
6. 435 U.S. 313 (1978).
7. *Id.* at 323.
8. *Id.* at 326 (emphasis added).

Civil Rights Act of 1968 to provide that the term "powers of self-government" includes "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."[9] To me, the importance of *Lara* lies in what it contributes to the dialectic of incorporating Indian tribes into the political and legal system of the United States. The dialectic I am referring to here is the on going dialogue between the Supreme Court and Congress concerning the status of Indian tribes within the United States and who, as between the Court and Congress, should have the primary role in determining that status.

In 1778, the United States began entering into treaties with Indian nations.[10] Treaties are international documents signed between two or more sovereign nations. Indian nations were at first treated as full international sovereigns by the United States. Just over fifty years later, however, the Supreme Court declared that Indian tribes were not foreign nations under the Constitution but had become, instead, domestic dependent nations.[11] Nevertheless, the United States continued signing treaties with Indian tribes for another forty years. In 1871, Congress enacted a statute purporting to prevent the President, with the concurrence of two-thirds of the Senate, from signing any more treaties with Indian nations.[12] This Act states that Indian nations should no longer be recognized as "independent nations" with whom the United States may contract by treaty.[13]

The fact that Indian tribes were no longer considered independent nations by the political branches of the federal government and the fact that the Court had assigned them the status of domestic dependent nations forty years earlier did not say much about what this status entailed. As a result, there has been a debate about the true status of Indian tribes within the United States political system. One source of the problem is the fact the United States Constitution only mentions Indian tribes for the purpose of declaring that Congress has the power to regulate commerce with them.[14] While this reference seems to acknowledge a certain degree of independent sovereignty and at least elevates tribes above individuals, social clubs, or political entities deriving their sovereignty from another sovereign, such as counties and municipalities, it does not truly define the status of tribes within our constitutional system.

Absent any clear foundation in the Constitution, it has been left to the Supreme Court and the political branches of the federal government to further define the status of tribes within our political system. Not surprisingly, the lack of constitutional foundation has meant that the status of tribes may have "evolved." In other words, it is a moving target influenced by the changing political winds affecting Congress and the development of new judicial doctrines. These changing

9. 25 U.S.C. § 1301(2) (2000).
10. *See Treaty with Delawares* (Sept. 17, 1778), 7 Stat. 13.
11. *See Cherokee Nation v. Ga.*, 30 U.S. 1 (1831).
12. 25 U.S.C. § 71 (2000).
13. *Id.*
14. U.S. Const. art. I, § 8, cl. 3.

circumstances have given birth to an on going dialogue between the Court and the political branches concerning their respective roles in further defining the status of Indian tribes.

Recently, there has been a debate within the academy on whether Indian tribes have been, or should be, "incorporated" within the federal system.[15] Some scholars are in favor of incorporation and have been talking about a type of "treaty-federalism,"[16] or a Tri-federalism,[17] or even a constitutional amendment cementing the sovereign status of Indian tribes within our constitutional system.[18] Others are vigorously opposed to incorporation and think Indian tribes should be completely independent from the federal system.[19] Still other scholars have given up on United States domestic law and believe that it is only through international law that the rights of Indian tribes will be respected.[20]

My own view on this issue is that Professor Milner Ball was probably right when he asserted in 1987 that tribal "incorporation" was a judicial invention.[21] In effect, there is no single act of Congress that can be said to have officially "incorporated" tribes within the political system of the United States. This does not mean, however, that "incorporation" has not occurred. If it did occur, it can only have been done incrementally as a result of a series of congressional legislation and court decisions. Right or wrong, the Supreme Court has not only declared that Indian tribes have been incorporated into the United States but has used this finding as the foundation for its implicit divestiture doctrine.[22] Although I agree with Professor Robert Porter's warning about too readily accepting illegitimate Supreme Court doctrines detrimental to tribal interests,[23] my interest here is in trying to bring coherence to the various doctrines in a fashion that is supportive of tribal sovereignty. Taking the Supreme Court at its word, this article attempts to use "incorporation" to the benefit of Indian tribes by demonstrating that under the Court's own precedents, one cannot have tribal "incorporation" and congressional "plenary power" at the same time.

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15. *See generally* Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 Am. B. Found. Research J. 1, 21-46 (1987) (arguing that tribes were never officially incorporated into the political system of the United States).

16. *See* Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. Toledo L. Rev. 617, 631 (1994).

17. Carol Tebben, *An American Trifederalism Based Upon the Constitutional Status of Tribal Nations*, 5 U. Pa. J. Const. L. 318 (2003).

18. *See* Frank Pommersheim, *Is There a (Little or Not So Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay*, 5 U. Pa. J. Const. L. 271 (2003).

19. *See* Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 Ariz. St. L.J. 75 (2002).

20. *See generally* Natsu Taylor Saito, *Asserting Plenary Power Over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 Yale L. & Policy Rev. 427 (2000); *see also* Student Author, *Note: International Law as an Interpretive Force in Federal Indian Law*, 116 Harv. L. Rev. 1751 (2003).

21. Professor Ball stated: "Justice Rehnquist employs the phrase 'upon incorporation.' The phrase is a performative utterance. The only evidence of the incorporation of Indian nations known to me is to be located in those words. I can discover no incorporating event or series of events outside them." *See* Ball, *supra* n. 15, at 34-42.

22. *See Oliphant*, 435 U.S. at 210; *see also infra* nn. 40-44 and accompanying text.

23. *See* Porter, *supra* n. 19, at 97-100.

Professor Ball once observed that "[i]n the event of systemic accommodation of permanent tribes, federalism might offer to tribal government the same structural, procedural, political protection that it offers state and national government."[24] However, he also found that "the creative potential of *Worcester* for federalism has been replaced by a Court-administered federalism that assaults tribal government,"[25] and concluded that "[f]ederalism including Indian nations has not so far been the outcome. Instead tribes find themselves in a state-national vise."[26] I agree that as long as "Our Federalism" remains a dual federalism, Indian tribes as sovereign political entities are bound to remain on the losing end of the federalism stick.[27] Under such a "dual" system, any power not delegated to the federal government is reserved to the states.[28] One might say that under the hydraulics of dual federalism, powers lost by the Congress flow directly to the states. Such a view was essential to the development of congressional plenary power over Indian tribes. Thus, in the first case which started the plenary power era, *United States v. Kagama*,[29] the Court stated:

> But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two.[30]

My objective here is to come up with a theory under which the status of tribes as sovereigns can enjoy an enduring respect within our legal system. Such respect cannot be assured as long as the Court refuses to integrate Indian tribes into "Our Federalism" and continues to recognize that Congress has the plenary power to divest tribes of any and all of their inherent sovereignty. In upholding the power of Congress to reaffirm such "inherent" tribal power, *Lara* represents an important milestone in the dialectic of incorporating tribes as third sovereigns within the federal system. To my knowledge, it was the first time that Congress has explicitly recognized and used the term "inherent power" in describing the governmental authority of Indian tribes. Hopefully, the official demise of congressional plenary power over Indian tribes cannot be far behind.

Part I of this article examines the more important themes raised by *Lara* and discusses how the decision clarified, or perhaps further complicated, the dialectic of incorporation. Part II explores the questions left unanswered by *Lara*: whether a tribal prosecution undertaken pursuant to the *Duro* fix denies due process and

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24. Ball, *supra* n. 15, at 69.

25. *Id.* at 76.

26. *Id.* at 69. *See also* Alex Tallchief Skibine, *The Court's Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country*, 36 Tulsa L. Rev. 267 (2000).

27. *See* Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 Tex. Forum Civ. Liberties & Civ. Rights 1, 2-3 (2003).

28. *See* Tebben, *supra* n. 17, at 323 (making the argument that the language of the Tenth Amendment reserving some rights not delegated "to the people" leaves some room for tribal sovereignty).

29. 118 U.S. 375 (1886).

30. *Id.* at 379.

equal protection to these non-member Indians. In the process, Part II attempts to explain why the incorporation of tribes as third sovereigns within the federal system should mean the end of congressional plenary power.

## I. THE *LARA* DECISION

### *A. Breyer's Majority Opinion*

The issue in *Lara* was whether the United States could proceed with the federal prosecution of Billy Jo Lara, an enrolled member of the Turtle Mountain Band of Chippewa Indians. Because he had already been prosecuted for the same crime by the Spirit Lake Indian Tribe, Lara argued that the Double Jeopardy Clause of the United States Constitution prevented a subsequent federal prosecution. The Spirit Lake Indian Tribe had prosecuted Lara pursuant to the *Duro* fix legislation, which had been enacted to allow tribes to prosecute non-member Indians in spite of the Supreme Court's decision in *Duro*. Lara argued that Congress could not "re-affirm" such inherent power after the Court had already ruled that such power had been divested as a consequence of the tribes' status as domestic dependent nations. According to Lara, such tribal authority could only come from "delegated" federal authority. However, if the tribal prosecution of Lara had been undertaken pursuant to delegated federal authority, the Double Jeopardy Clause would forbid a subsequent federal prosecution. On the other hand, if the tribal prosecution was undertaken pursuant to the tribe's inherent sovereign authority, the Double Jeopardy Clause would not be applicable.

In a 7 to 2 ruling, the Court held that Congress could and did reaffirm the inherent right of tribes to prosecute non-member Indians. Thus, the Double Jeopardy Clause could not spare Lara from a subsequent federal prosecution. The majority opinion, penned by Justice Breyer and joined by Justices Rehnquist, Stevens, O'Connor, and Ginsburg, is remarkably simple in its logic and reasoning. After stating that the *Duro* fix statute "relaxes the restrictions, recognized in *Duro*, that the political branches had imposed on the tribes' exercise of inherent prosecutorial power,"[31] the Court concluded that "Congress does possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians."[32] Having stated its conclusion, the Court proceeded to enumerate six reasons supporting its conclusion. These reasons can be fairly summarized as follows: the Constitution gives broad power over Indian tribes to Congress and both the Court and Congress have in the past interpreted this power as broad enough to allow Congress to both recognize and modify the inherent sovereign powers of Indian tribes.[33]

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

32. *Id.*

33. More specifically, the six reasons are: (1) the Constitution gives broad powers to legislate in respect to Indian tribes to Congress; (2) Congress has interpreted the Constitution as giving it power to both restrict and relax such restrictions on tribal sovereignty; (3) the *Duro* fix goal to modify the

It is important to keep in mind that in Part II of its opinion, the Court emphasized that its decision was limited to holding that, because Congress could re-affirm the existence of such inherent tribal power, the tribal prosecution of Lara was not conducted pursuant to delegated federal authority. What was not part of the holding was whether such tribal prosecutions had denied Lara either the due process of law or equal protection under the law. The Court did not have to rule on these issues because resolution of these issues could not impact the validity of his federal prosecution. Thus, even if Lara was successful on these issues, it would only show that the tribal prosecution might have been invalid. But this would not have any impact on the subsequent federal prosecution. As Justice Kennedy emphasized in his concurring opinion, Lara should have raised these arguments during his prosecution in tribal court.[34] The Breyer opinion left undecided whether subjecting Lara to a prosecution not affording him all the protections of the Bill of Rights amounted to a denial of due process. Also left undecided was whether subjecting Lara, a non-member Indian, to tribal prosecution while not subjecting non-Indians to such prosecution amounted to a denial of equal protection.

Nevertheless, the Breyer opinion made some important points. Most of all, the opinion may represent a certain willingness by the Court to let Congress assume the lead in defining the status of Indian tribes. In other words, the Court recognized that Congress has the primary authority in defining the terms under which Indian tribes are being incorporated into the United States political and legal system. This is not a minor point and represents a major milepost in the dialectic between Congress and the Court on the status of Indian tribes. The Breyer opinion also contained the following three important and controversial points:

First, it characterized the holding of *Duro*, as well as the precedent on which it was based, *Oliphant*, as having been based on the fact that tribes had been implicitly divested of their prosecutorial powers over non-Indians by the actions of the political branches of the government.[35] That characterization was strongly criticized by Justice Souter in his dissent. As further explained in the next section, the dissent may very well have had the better argument. However, because the Breyer opinion represents the majority view, it may amount to an important reformulation of the implicit divestiture doctrine on which both *Oliphant* and *Duro* were based.

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sovereignty of a dependent sovereign is not an unusual legislative objective; (4) nothing in the Constitution limits the power of Congress to modify sovereignty; (5) the change in the sovereign status of tribes at issue here is a limited one; (6) the conclusion that Congress can do this is consistent with the Court's precedents. *Id.* at 1633-36.

34. *Id.* at 1639.

35. *Id.* at 1633.

Second, the opinion relied heavily on the plenary authority of Congress in the field of Indian affairs.[36] The existence of such power, as well as its necessity to the result reached in *Lara*, is questionable. As further explained below, the concurring opinion filed by Justice Thomas in *Lara* raised some important points on this issue.[37]

Third, the Court threw an important caveat on the "plenary" aspect of congressional power over Indian affairs when it stated:

> [T]he change at issue here is a limited one. . . . In large part it concerns a tribe's authority to control events that occur upon the tribe's own land. . . . Consequently, we are not now faced with a question dealing with potential constitutional limits on congressional efforts to legislate far more radical changes in tribal status. In particular, this case involves no interference with the power or authority of any State. Nor do we now consider the question whether the Constitution's Due Process or Equal Protection Clauses prohibit tribes from prosecuting a nonmember citizen of the United States.[38]

This caveat raises the question that perhaps the plenary power of Congress is not so plenary after all. This in turn suggests some limits on the Court's willingness to follow the lead of Congress in determining the status of tribes within the political system of the United States. This Article will now discuss these three controversial points in detail.

### B. *The Recharacterization of the* Duro v. Reina *Rationale, Souter's Dissent and Kennedy's Concurrence*

Justice Breyer's assertion that the *Duro* fix statute "relaxes the restrictions, recognized in *Duro*, that the political branches had imposed on the tribes' exercise of inherent prosecutorial power,"[39] is controversial. The dissent, authored by Justice Souter and joined by Justice Scalia, pointed out that the Court in *Oliphant* had stated that "even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress. . . . Indian tribes are prohibited from exercising . . . powers . . . '*inconsistent with their status*.'"[40] The dissent concluded that both *Oliphant* and *Duro* reflect a "previous understanding of the jurisdictional implications of dependent sovereignty [which] was constitutional in nature."[41]

Contrary to the dissent's assertion, this does not *per se* make the *Oliphant* and *Duro* decisions constitutional in nature. The *Oliphant* Court stated:

> Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of

36. *Lara*, 124 S. Ct. at 1633. The Court started its analysis by stating "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'" *Id.*

37. *See infra* pt. I(D).

38. *Lara*, 124 S. Ct. at 1636.

39. *Id.* at 1633.

40. *Id.* at 1651 n. 2 (emphasis in original).

41. *Id.* at 1650.

> separate power is constrained so as not to conflict with the interests of this overriding sovereignty.[42]

It is perfectly conceivable that the Court could have determined that a conflict with this "overriding sovereignty" existed from an analysis of acts of Congress. Congress, after all, should be the one determining what the overriding national interests are. The problem for the *Lara* majority is that this finding is directly contradicted by the *Oliphant* Court's conclusion that assertion of tribal criminal jurisdiction over non-Indians was in conflict with the overriding sovereignty of the United States because:

> [F]rom the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizen be protected by the United States from unwarranted intrusions on their personal liberty. . . . By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.[43]

This implicit divestiture did not occur as a result of congressional policies but took place at the time the Bill of Rights was enacted or whenever a given tribe "submitted" itself to the overriding sovereignty of the United States, whichever occurred later. It seems that for the *Oliphant* Court, "submitting" oneself to the overriding sovereignty of the United States is the same as becoming "incorporated" into the United States. Thus while it is true that Congress usually determined when this incorporation took place, the Court in *Oliphant* relied on interests derived from values contained in the Constitution to hold that tribal criminal jurisdiction was in conflict with overriding federal interests.

If "incorporation" is the key date, the *Lara* Court must have concluded that the Court in *Oliphant* and *Duro* used federal common law to decide that at some ill-defined point in time, the cumulative policies of Congress had operated to "incorporate" tribes into the United States, thereby divesting them of such inconsistent inherent power. This flows from the facts that there never was a specific act of Congress that expressly took away that inherent sovereign right, and that there does not seem to be a specific act that "incorporated" all tribes into the United States.

*Oliphant* and *Duro* just held that because tribal prosecution could expose non-tribal members who are United States citizens to unwarranted intrusion into their personal liberty, Indian tribes "upon their incorporation into the United States" could no longer prosecute such citizens without congressional authorization. The question the *Lara* Court should have answered was: does the fact that Indian tribes were divested of such inherent prosecutorial power upon the passage of the Bill of Rights or upon becoming incorporated into the United States (whichever occurred last) somehow make the *Oliphant* and *Duro* opinions "constitutional in nature"?

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42. 435 U.S. at 209.
43. *Id.* at 210.

The answer to this question depends on why Indian nations, upon incorporation, became "domestic dependent nations." An analysis of *Cherokee Nation v. Georgia*,[44] where the term was first used, reveals that in describing Indian nations as "domestic dependent nations," Chief Justice Marshall relied partly on the finding that Indian territory was admitted to be part of the United States,[45] and partly on the fact that the tribes in their treaties had acknowledged themselves to be under the sole protection of the United States.[46] These considerations influenced Marshall to conclude that the United States did not relate to tribes as foreign nations but that the tribe's "relation to the United States resembles that of a ward to his guardian."[47] Marshall also relied on the language of the Commerce Clause, which seems to make a distinction between "Indian tribes" and "foreign nations."

So it seems that while the position of the tribes within the constitutional structure furnished "considerable aid"[48] to Marshall in arriving at his conclusion that tribes were not foreign nations, it was by no means the only factor. Furthermore, the fact that tribes are not "foreign nations" under the Constitution says nothing about what tribes are. Therefore, Marshall's reliance in part on the position of tribes within the Constitutional structure to derive the status of tribes does not transform *Oliphant* and *Duro* into constitutional decisions.

Thus, while I believe that the *Lara* dissent was wrong, the majority was also somewhat mistaken. It was the policies of Congress that resulted in incorporation of tribes as "domestic dependent nations," and not the policies of Congress *after* incorporation, that resulted in the implicit divestiture of some of the sovereign tribal powers. It is perhaps because he disagreed with the Court on these issues that Justice Kennedy, the author of the *Duro* opinion, filed his concurring opinion in *Lara*. Kennedy's point was that the Court did not need to go beyond simply stating that because Congress intended to reaffirm the inherent authority of tribes, the first tribal prosecution of Lara could not have been conducted pursuant to delegated federal power. The Double Jeopardy Clause was therefore not applicable. As stated by Justice Kennedy, "[t]hat is all we need say to resolve this case."[49] The rest of Kennedy's opinion indicates that were he to decide the issue, he probably would hold that Congress does not have the power to extend the inherent power of tribes to cover criminal prosecutions over non-member citizens of the United States, at least not without also imposing all the protections of the Bill of Rights. That is because Kennedy undoubtedly has problems accepting that Congress might have incorporated the tribes as third sovereigns within the federal

44. 30 U.S. 1 (1831).

45. *Id.* at 17. The Court also stated that "[t]hey occupy a territory to which we assert a title independent of their will." *Id.*

46. *Id.* The Court also stated that "[t]hey and their county are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States." *Id.*

47. *Cherokee Nation*, 30 U.S. at 17.

48. *Id.* at 18.

49. *Lara*, 124 S. Ct. at 1640.

system. Thus, having first described the Court's reasoning as "most doubtful," he stated:

> To hold that Congress can subject [Lara], within our domestic borders, to a sovereignty outside the basic structure of the Constitution is a serious step. The Constitution is based on a theory of original, and continuing, consent of the governed. Their consent depends on the understanding that the Constitution has established the federal structure, which grants the citizen the protection of two governments, the Nation and the State. . . . Here, contrary to this design, the National Government seeks to subject a citizen to the criminal jurisdiction of a third entity.[50]

### C. *Implications of the Recharacterization for Cases Dealing with Tribal Civil Jurisdiction*

Tribal advocates could legitimately ask whether this recharacterization of *Oliphant* and *Duro* as being based on the actions of the political branches of the government has any implications for the exercise of tribal civil jurisdiction over non-members. Thus one would think that the question in these civil cases should become: what actions or policies of the political branches of the government have restricted the civil regulatory powers of the tribes?

The *Oliphant* implicit divestiture doctrine was first extended to tribal civil regulatory power over non-members in *United States v. Montana*,[51] where the Court stated, "[t]hough *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[52]

The *Montana* Court never really explained how and why *Oliphant,* which held that tribal prosecutions of non-members was inconsistent with tribal status because it exposed non-members to prosecution without the protections of the Bill of Rights, could be extended to support "the general proposition" that tribes have also lost jurisdiction over of the activities of non-members of the tribe. After quoting from a previous case for the proposition that limitations on tribal powers "rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations*,"[53] the *Montana* Court concluded "[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."[54]

Perhaps the *Lara* majority lacked judicial diligence when, failing to acknowledge that *Montana* gave a different explanation than *Oliphant*, it never

50. *Id.*
51. 450 U.S. 544 (1981).
52. *Id.* at 565 (footnote omitted).
53. *Id.* at 564 (quoting *Wheeler*, 435 U.S. at 326 (emphasis in original)).
54. *Id.* at 564.

attempted to reconcile *Montana* with *Lara*. Thus, it is not surprising that only Justice Souter in his *Lara* dissent acknowledged that "we have given ostensibly alternating explanations for this conclusion" that tribes have been divested of some inherent powers.[55] To Justice Souter, this was "of no moment"[56] because "[w]hat should also be clear, and what I would hold today, is that our previous understanding of the jurisdictional implications of dependent sovereignty was constitutional in nature."[57] According to Justice Souter, the congressional policies were just "an independent elaboration by the political branches of the fine details of the tribes' dependent position, which strips the tribes of any power to exercise criminal jurisdiction over those outside their memberships."[58]

The *Montana* Court did not identify any congressional statutes that directly restricted the civil regulatory power of Indian tribes over non-members,[59] because it correctly understood *Oliphant* as holding that it was upon "incorporation" as domestic dependent nations that tribes were divested of any jurisdiction inconsistent with their status. In *Montana*, tribes were divested of civil jurisdiction over non-members not necessary to tribal self-government. *Montana*, therefore, is consistent with the principle that the loss of tribal sovereignty occurred upon incorporation and flows directly from the status of tribes as domestic dependent nations. This does not mean, however, that the *Montana* Court believed the "incorporation" doctrine to be constitutional. As explained earlier, Chief Justice Marshall in *Cherokee Nation* did not derive this status from the Constitution.

Will the recharacterization of *Oliphant* as having been based on the actions of the political branches have any implication for tribal civil jurisdiction cases? Perhaps it should, but I have a feeling that just like the *Lara* Court found the prosecutorial powers of the tribes to have been "restricted" by the political branches' actions without ever listing such actions, it seems that the Court will continue to claim that such general actions by the political branches have also restricted the civil jurisdiction of the tribes without ever specifically listing what such political actions were. However, considering the implications for civil jurisdiction cases might force the Court to refocus its analysis and recognize that it is upon "incorporation" that the tribes lost such inherent powers. This might in turn lead the Court to undertake a deeper analysis of what this "incorporation" status should mean for congressional plenary power and the integration of tribes as third sovereigns within "Our Federalism."

55. *Lara*, 124 S. Ct. at 1649.
56. *Id.*
57. *Id.* at 1650.
58. *Id.*
59. 450 U.S. at 565 (noting the only statutes potentially applicable were the statutes which allowed non-members to acquire fee lands within the reservation).

### D. *The Reaffirmation of Congressional Plenary Power, Thomas's Concurrence, and Breyer's Caveat*

Justice Breyer's *Lara* majority opinion put a heavy emphasis on the existence of congressional plenary power, proving that contrary to what some may want to imagine,[60] while the power of Congress may no longer be plenary when it comes to trampling on the constitutional rights of individual Indians,[61] it is still very much plenary when it comes to controlling the internal affairs of the tribes.[62] One has to question whether such an emphasis on plenary power was necessary to the decision. Certainly, this emphasis provoked a reaction from Justice Thomas, who in his concurring opinion argued that he could not agree with the Court "that the Constitution grants to Congress plenary power to calibrate the 'metes and bounds of tribal sovereignty.'"[63] Justice Thomas seems to think that the political branches of the government did have "plenary" authority over Indian tribes, but that was only due to the war power and the treaty power. Since neither power is being used today, there is no sound basis for regulating "sovereign" Indian tribes except through the Commerce power, but his analysis convincingly demonstrates why the Commerce Clause does not vest plenary power over Indian tribes to Congress.[64]

Thomas cannot reconcile himself with the idea that if Indian tribes retained any form of inherent sovereignty, Congress can still have "plenary authority to legislate for the Indian tribes in all matters, including their form of government."[65] That is because, according to Thomas, "[i]t is quite arguably the essence of sovereignty not to exist merely at the whim of an external government."[66] This is why Thomas believes that the Court has to choose between inherent tribal sovereignty and congressional plenary power.[67] In reality, I wonder whether

60. *See* Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and the Methods of* Marbury v. Madison *to Tribal Courts' Criminal Jurisdiction*, 36 Ariz. St. L.J. 77, 85 (2004) (claiming that judges do engage in review even when asserting that the power of Congress is plenary and quoting with approval Justice Brennan's statement, in *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84 (1977), that "the power of Congress over Indian affairs may be of a plenary nature; but it is not absolute").

61. *See Hodel v. Irving*, 481 U.S. 704 (1987).

62. *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 14 (2002) (asserting that the Supreme Court has derived congressional plenary authority over Indian tribes from "inherent powers" external to the Constitution and that such "doctrine's origins instead lie in a peculiarly unattractive, late-nineteenth-century nationalist and racist view of American society and federal power").

63. *Lara*, 124 S. Ct. at 1642. Justice Breyer quoted with approval the often repeated but unsupported statement that "[t]he 'central function of the Indian Commerce Clause,' we have said, 'is to provide Congress with plenary power to legislate in the field of Indian affairs.'" *Id.* at 1633.

64. *Id.* at 1647-48. For a somewhat more comprehensive argument, see Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz. St. L.J. 113 (2002).

65. *Lara*, 124 S. Ct. at 1643.

66. *Id.* at 1644. Professor Ball made a similar observation in 1987 when he stated, "If an Indian nation is a nation, then its governmental powers cannot simply evanesce and reappear in the hands of another nation's government." *Supra* n. 15, at 21. Unlike Justice Thomas, Professor Ball did not let the question linger unanswered but used the occasion to thoroughly disprove that Congress should be recognized as having plenary power over Indian tribes.

67. *Lara*, 124 S. Ct. at 1648 (stating that "[t]he Federal Government cannot simultaneously claim

Thomas was not playing devil's advocate. Chiding the majority for finding both that Indian tribes are still sovereign and that Congress has plenary power over them, he seems to be daring the Court to choose one or the other. Thus, he warned that a thorough "analysis of the sovereignty issues posed by this case"[68] might push the Court to "find that the Federal Government cannot regulate the tribes through ordinary domestic legislation and simultaneously maintain that the tribes are sovereigns in any meaningful sense."[69]

However, it seems that if forced to choose between inherent tribal sovereignty and congressional plenary power, Thomas would probably choose the latter and hold that while nothing in the Constitution gives Congress plenary authority over "sovereign" Indian tribes except through the making of war or treaties, Indian tribes have in fact lost all their inherent sovereignty as the result of the 1871 Act of Congress which prohibited the government from signing treaties with Indian tribes.[70] While Thomas acknowledged that this Act "does not quite suffice to demonstrate that the tribes had lost their sovereignty,"[71] he asserted "the 1871 Act tends to show that the political branches no longer considered the tribes to be anything like foreign nations. And it is at least arguable that the United States no longer considered the tribes to be sovereigns."[72] He also pointed out that unlike the States, which retained a measure of sovereignty under the Constitution, "[t]he tribes, by contrast, are not part of this constitutional order, and their sovereignty is not guaranteed by it."[73] The language he uses suggests that he would join Justice Kennedy in refusing to hold that Indian tribes have been incorporated as third sovereigns within "Our Federalism."

The Court's fifth reason for upholding the power of Congress to enact the *Duro* fix was that "the change at issue here is a limited one."[74] Although I have similarly argued in last year's issue of this symposium that Congress should not have the power to drastically affect the status of Indian tribes such as, for instance, being able to completely eliminate them[75] or drastically reduce their powers, I am afraid these are not the kind of changes the Court had in mind. In effect, the sentence the Court probably meant to write was that "the enhancement to tribal sovereignty at issue here is a limited one." After mentioning that the reaffirmed power is "similar" to a power already possessed by Indian tribes, the Court

power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain that the tribes possess anything resembling 'sovereignty'").

68. *Id.*

69. *Id.*

70. For instance, Justice Thomas wrote that "I would ascribe much more significance to legislation such as the Act of Mar. 3, 1871, that purports to terminate the practice of dealing with Indian tribes by treaty." *Id.* at 1642 (citations omitted).

71. *Id.* at 1644.

72. *Lara*, 124 S. Ct. at 1644.

73. *Id.*

74. *Id.* at 1636.

75. *See* Alex Tallchief Skibine, *Integrating the Indian Trust Doctrine into the Constitution*, 39 Tulsa L. Rev. 247, 256-62 (2003).

mentioned that: "[I]n large part, . . . [the reaffirmed power only] concerns a tribe's authority to control events that occur upon the tribe's own land."[76]

More puzzling is the Court's additional remark that such reaffirmed tribal prosecutorial power was "consistent with our traditional understanding of the tribes' status as 'domestic dependent nations.'"[77] One has to wonder what this "traditional" understanding is since the Court's cryptic reference to *Cherokee Nation* does not really provide further enlightenment on this issue.[78] One would hope that the reference to such an old case does not mean that the court's "traditional" understanding of Indian tribes has not changed since 1831. Some scholars have already noted that the Court has a cramped vision of Indian tribes as modern sovereign entities, one which would confine Indian tribes to some static and past understanding of what they are supposed to be.[79] Such vision shortchanges Indian tribes by denying them a modern character. It would condemn them to being relics from the past rather than vibrant and evolving political, economic, and cultural entities, which are an integral part of our modern world.

Finally, the *Lara* Court fired a warning shot to Congress. After stating that "we are not now faced with a question dealing with potential constitutional limits on congressional efforts to legislate far more radical changes in tribal status,"[80] the Court specifically mentioned potential infringement on the power of any State as being particularly troublesome.[81] I believe that the importance of this statement lies in the fact that it reveals that the Court is far from having given up its role as the ultimate arbiter of tribal status. Its specific mention of the rights of States is a clear warning to Congress not to tread on issues affecting federalism. It is noteworthy that the congressional recognition of tribal prosecutorial power over non-member Indians in the instant case did not withdraw any power from any state.

The *Lara* caveat indicates that while the Court is content to allow Congress the task of integrating Indian tribes as third sovereigns within the political and legal system of the United States, it also indicates that the Court is reserving for itself the right to tell Congress when it has gone too far. Thus, the Court remains the ultimate arbiter of tribal status. This caveat also indicates that while the Court is more than willing to check the exercise of congressional power which would

76. *Lara*, 124 S. Ct. at 1636.

77. *Id.*

78. *Id.* The *Lara* Court just pointed out that in *Cherokee Nation*, the Court had described Indian tribes as "a distinct political society, separated from others, capable of managing its own affairs and governing itself." *Id.* (quoting *Cherokee Nation*, 30 U.S. at 16).

79. *See* Daan Braveman, *Tribal Sovereignty: Them and Us*, 82 Or. L. Rev. 75, 101 (2003) (stating that "[t]he Court appears more likely to recognize inherent tribal sovereignty when it views Indian peoples as different, and is less likely to do so when it perceives Indians as behaving like dominant groups by, for example, engaging in economic development activities").

80. *Lara*, 124 S. Ct. at 1636. One has to wonder what kind of prohibited radical changes the Court had in mind. The grant of criminal jurisdiction over non-Indians and not just non-members comes to mind.

81. *Id.*

enlarge tribal status at the expense of the States or beyond the Court's "traditional" understanding of tribes as domestic dependent nations, the Court does not show the slightest interest in controlling congressional power which would diminish the inherent sovereignty of Indian tribes beyond such traditional understanding. Congressional plenary power in this area remains intact but still unsupported.[82] From a tribal perspective, one of the problems with allowing Congress unlimited power in determining the status of tribes within the United States political system is that Justice Thomas was right when he stated in his *Lara* concurrence that "[f]ederal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse federal Indian law and our cases."[83]

## II. THE UNANAWERED QUESTIONS: DOES A TRIBAL PROSECUTION PURSUANT TO THE *DURO* FIX VIOLATE THE DUE PROCESS OR EQUAL PROTECTION CLAUSES?

As stated earlier, the Court declined to decide whether the *Duro* fix amounted to a denial of equal protection or a violation of the Due Process Clause. Because these issues will eventually have to be decided, the article discusses them next.

### *A. The Equal Protection Challenge*

As I have argued elsewhere,[84] a challenge to the *Duro* fix based on equal protection is weak and should not detain the Court too long.[85] The Court since *Morton v. Mancari*[86] has recognized that certain federal classifications singling out members of Indian tribes are not based on race but on a political classification: membership in quasi-sovereign political entities. As such, the strict scrutiny test is not applicable and congressional decisions will not be judicially disturbed as long as they are "rationally tied" to the trust relationship. In *United States v. Antelope*,[87] after stating that federal regulation of Indian crimes was "rooted in the unique status of Indians as 'a separate people,'"[88] the Court concluded that "[f]ederal regulation of Indian tribes, therefore, is governance of once-sovereign

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82. In this respect, what Professor Ball wrote in 1987 is worth repeating:

> Because we say we have a government of laws and not men, we hold our government to be limited and to have no unlimited power. If the federal government nevertheless exercises unrestrained power over Indian nations, then what we say is not true, and we have a different kind of government than we think we have. And if our government is different in fact in relation to Native Americans, perhaps it is not what we believe it is in relation to other Americans, including ourselves.

*Supra* n. 15, at 61.

83. *Lara*, 124 S. Ct. at 1644-45.

84. *See* Skibine, *supra* n. 27, at 35.

85. *But see* L. Scott Gould, *The Congressional Response to* Duro v. Reina*: Compromising Sovereignty and the Constitution*, 28 U. Cal. Davis L. Rev. 53 (1994) (arguing that the *Duro* fix is unconstitutional based on equal protection grounds).

86. 417 U.S. 535 (1974).

87. 430 U.S. 641 (1977).

88. *Id.* at 646.

political communities; it is not to be viewed as legislation of a 'racial' group consisting of 'Indians.'"[89]

It is true that there are limits to calling such classifications "political" and not "racial." For instance, the Ninth Circuit has limited the application of the "rationally tied to the trust" test to classifications contained in statutes "affect[ing] uniquely Indian interests."[90] However, the classification made by Congress in the *Duro* fix easily fits the mold and clearly meets the criteria for political classification. Thus, there is no question that the classification is tied to Congressional "governance" of Indian tribes. In addition, even if one was to adopt the Ninth Circuit's limitation, there is no doubt that the classification at issue here does affect "uniquely Indian interests." The only court to have so far considered the issue agreed. In *Morris v. Tanner,*[91] a federal district court held that the *Duro* fix did not amount to a denial of equal protection.[92] In the course of its analysis, the court distinguished cases such as *Rice v. Cayetano,*[93] and *Adarand Constructors v. Pena,*[94] as not dealing "directly with any Indian law questions."[95] Even though it found the rationally tied test applicable, the court went further and stated that even if the strict scrutiny test was applicable, the classification was narrowly tailored to the protection of a compelling governmental interest.[96]

The district court in *Morris* also found the classification to have a rational basis. Thus, the court mentioned the significant number of non-member Indians living on Indian reservations, and the fact that there was a need to enforce the law against them because states usually did not have such jurisdiction.[97] In addition, the court mentioned that Congress was attempting to fill a potential void in law enforcement that only existed with respect to intra-Indian crimes (i.e., crimes committed by one Indian against another Indian). The void did not exist with respect to inter-racial crimes, since these crimes are covered by federal or state criminal jurisdiction.[98]

### *B. The Due Process Argument*

The arguments concerning a potential denial of due process because tribal prosecutions do not afford defendants all the protections of the Bill of Rights are more complicated. Unlike arguments based on denial of equal protection, the

89. *Id.*

90. *See Williams v. Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997); *see also Am. Fedn. of Govt. Employees v. U.S.*, 330 F.3d 513 (D.C. Cir. 2003) (recognizing some limits but upholding a preference in contracting with the federal government as long as such preference was limited to tribally-owned corporations).

91. 288 F. Supp. 2d 1133 (D. Mont. 2003).

92. *Id.* at 1141-42. *See* Skibine, *supra* n. 27, at 28-30 (discussing similar arguments on how these cases can be distinguished); Skibine, *supra* n. 75, at 265-70 (same).

93. 528 U.S. 495 (2000).

94. 515 U.S. 200 (1995).

95. *Morris*, 288 F. Supp. 2d at 1142.

96. *Id.* at 1142 n. 7.

97. *Id.* at 1142-43.

98. *Id.* at 1143. The court cited to the following legislative reports: Sen. Rpt. 102-68 at 3 (Oct. 2, 1991); Sen. Rpt. 102-53 at 7 (Sept. 19, 1991); H.R. Rpt. 102-61 at 3-4 (May 14, 1991).

Court cannot avoid applying the applicable test by pronouncing certain classifications to be political and not racially based. Justice Kennedy in *Duro* had already warned that under *Reid v. Covert*,[99] "constitutional limitations [exist] even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right."[100] In *Reid*, the Court had stated:

> At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.[101]

In an earlier article, I briefly answered Justice Kennedy's *Duro* statement by pointing out that the Court in *Reid* had acknowledged that this principle had not been applied in a series of cases known as the *Insular Cases*.[102] The Court in *Reid* had distinguished these *Insular Cases* by stating, "[t]he 'Insular Cases' can be distinguished from the present cases in that they involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions."[103] Although the *Reid* Court did mention that the reasoning of the *Insular Cases* "should [not] be given any further expansion,"[104] I had found the reasoning for distinguishing the *Insular Cases* from *Reid* to be particularly appropriate to congressional governance of Indian tribes.[105] One scholar recently stated "that walling off Federal Indian Law from mainstream constitutional discourse is a mistake, for it undermines the ability to appreciate the relationship of that body of law to another."[106] Other scholars have also recently noted the striking similarities in the development of the plenary power doctrine in federal Indian law and in the laws relating to the power of Congress over territories and aliens.[107] These scholars have shown that in all these fields, the doctrines giving Congress plenary power are based on the same theories.

The issue in the *Insular Cases* was the status of some of the recently acquired territories such as Puerto Rico, the Philippines, and Alaska. If such territories were still foreign nations, certain tariffs could still be imposed, and Congress would still possess plenary power within these areas. The Court first held that these recently acquired territories were no longer "foreign" nations. Next, the

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99. 354 U.S. 1 (1957).

100. *Duro*, 495 U.S. at 693.

101. 354 U.S. at 5-6.

102. *See* Alex Tallchief Skibine, Duro v. Reina *and the Legislation That Overturned It: A Power Play of Constitutional Dimensions*, 66 S. Cal. L. Rev. 767, 799-800 (1993). The original *Insular Cases* are a series of nine decisions decided in 1901, dealing with the status of Puerto Rico, Hawaii, the Philippines, and Alaska, of which *Downes v. Bidwell*, 182 U.S. 244 (1901), is considered the most influential. Some scholars would extend this list to cover fourteen other cases, starting in 1903 with *Hawaii v. Mankichi*, 190 U.S. 197 (1903), and ending with *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

103. *Reid*, 354 U.S. at 14.

104. *Id.*

105. *See* Skibine, *supra* n. 102, at 799-800.

106. Resnik, *supra* n. 60, at 83.

107. *See* Cleveland, *supra* n. 62; *see also* Saito, *supra* n. 20.

Court had to decide whether the United States Constitution was applicable in these territories to the same extent as it was applicable inside the United States. The Court took the position that this depended on whether Congress had intended to "incorporate" such territories into the United States. Just as in 1831, when the Court came up with a new term for Indian nations, defining them as domestic dependent nations, the Court came up with a new concept for these insular territories: they were "unincorporated territories." Congress had retained plenary power, and the Constitution was not fully applicable to such territories.[108]

This did not mean that Congress could deny all constitutional rights to these territorial citizens. According to the Court in *Downes v. Bidwell*,[109] while Congress did have plenary power over the territories, it was limited by "fundamental limitations in favor of personal rights."[110] At least initially, the Court made a distinction between "fundamental rights," which were applicable even within unincorporated territories, and "procedural" or "artificial" rights, which were not.[111] In *Dorr v. United States*,[112] the Court adopted Justice White's concurring opinion in *Downes,* which had taken the position that what constitutional provisions were applicable inside unincorporated territories depended on "the situation of the territory and its relations to the United States."[113] In the last of the initial *Insular Cases*, the Court stated:

> The Constitution, however, contains grants of power and limitations which in the nature of things are not always and everywhere applicable, and the real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements.[114]

This "incorporation" theory was controversial and the Court was at first bitterly divided. For instance, Justice Harlan stated:

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108. For a comprehensive treatment of the *Insular Cases*, see Efren Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 Rev. Jur. U.P.R. 225 (1996).

109. 182 U.S. 244 (1901).

110. *Id.* at 268.

111. For instance, the rights to be indicted by a grand jury or convicted by unanimous jury were held to be only procedural and not fundamental. *See Mankichi*, 190 U.S. at 197.

112. 195 U.S. 138 (1904).

113. *Downes*, 182 U.S. at 293. The Court in *Dorr* stated:

> The limitations which are to be applied in any given case involving territorial government must depend upon the relation of the particular territory to the United States, concerning which Congress is exercising the power conferred by the Constitution. That the United States may have territory, which is not incorporated into the United States as a body politic, we think was recognized by the framers of the Constitution in enacting the article already considered, giving power over the territories .... Until Congress shall see fit to incorporate the territory ceded by treaty into the United States, we regard it as settled by [*Downes v. Bidwell*] that the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation.

195 U.S. at 142-43.

114. *Balzac*, 258 U.S. at 312.

> The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces–the people inhabiting them to enjoy only such rights as Congress chooses to accord to them–is wholly inconsistent with the spirit and genius as well as with the words of the Constitution.[115]

I agree with Justice Harlan that the "incorporation" theory adopted in the *Insular Cases* does not have much to recommend itself, and perhaps the time has come to abandon it. Thus in one recent case, *United States v. Pollard*,[116] a district court judge stated that in the *Insular Cases*, the Supreme Court had:

> [F]abricated out of whole cloth a brand new constitutional doctrine to accommodate these territories populated by non-white, non-Anglo-Saxon, non-European peoples. This is the racist doctrine of the "unincorporated" territory, judicially created in the infamous series of decisions known as the *Insular Cases*, decided by the same the [sic] Supreme Court that gave us the equally racist but now thoroughly repudiated and overruled "separate but equal" doctrine.[117]

Surprisingly, however, the *Insular Cases* are still good law.[118] Thus, Judge Moore in *Pollard* had to concede that:

> Rail as I may against the *Insular Cases* and their progeny, however, this federal trial court is bound by the view of the Supreme Court . . . that disparate treatment based on a territory's unincorporated status need only have a basis in reason. Thus, I am forced to reject the defendant's request for strict scrutiny review of the statute and regulation.[119]

While the basic "incorporation" theory is still good law, the kind of constitutional rights applicable to territories has somewhat been modified. Thus, a scholar recently stated:

> Nevertheless, the imperial era cases have retained vitality, and, when read in combination with *Reid*, have simply modified the analysis of the Constitution's application from whether a particular provision is "fundamental" to free government to a case-by-case analysis regarding whether the application of the right would be "impractical and anomalous" in any particular country.[120]

It might be that as far as the constitutionality of the *Duro* fix is concerned, the ultimate result reached by the Court may be the same whether Indian tribes are considered incorporated or not.[121] Nevertheless, applying the incorporation doctrine to Indian tribes to determine whether Congress has retained plenary

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115. 182 U.S. at 380 (dissenting).

116. 209 F. Supp. 2d 525 (D.V.I. 2002).

117. *Id.* at 539-40 (footnote omitted).

118. *See* Sanford Levinson, *Why the Canon Should be Expanded to Include* The Insular Cases *and the Saga of American Expansionism*, 17 Constitutional Commentary 241, 247 n. 22 (2000).

119. 209 F. Supp. 2d at 546 (citations omitted). However, the court managed to conclude that even using rational basis, the defendant had been denied equal protection. *Id.* For a recent circuit decision upholding the validity of the *Insular Cases*, see *Valmonte v. Immig. & Naturalization Serv.*, 136 F.3d 914 (2d Cir. 1998).

120. Cleveland, *supra* n. 62, at 246.

121. *See infra* nn. 149-57 and acompanying text.

power is a novel idea that makes more sense than just asserting that Congress has such power, which is what the Court essentially stated in *Lara*. As convincingly argued by Justice Thomas in *Lara*, there is no sound constitutional basis for upholding the existence of a congressional plenary power over Indian tribes. What is interesting about the *Insular Cases* is that the Court used the concept of "incorporation," which is the same concept that it used in determining that Indian tribes had been implicitly divested of some inherent powers. The difference being that in the *Insular Cases*, the concept was used to increase congressional power by finding that some territories had not been incorporated. In the Indian cases, it is being used to diminish the power of Indian tribes by finding that tribes have been incorporated.[122]

Applying the theory developed in the *Insular Cases* in the context of Indian tribes, the extent of congressional power should depend on whether Indian tribes and their territories have been "incorporated" into the United States. If they have been incorporated, the Constitution is fully applicable and Congress has no more power than anywhere else. If Indian tribes have not been incorporated, applying the case law developed in the *Insular Cases*, the question would become whether application of certain constitutional provisions would be "impractical" or "anomalous."[123] If one were to follow conventional Indian case law, the rationally tied to the trust test would be applicable, in which case the law in all likelihood would be held to be constitutional.[124]

Although in a previous article I assumed that Indian tribes had not been incorporated into the United States, perhaps such assumption was premature.[125] Under the *Insular Cases*, whether a territory has been incorporated depends on the intent of Congress. Justice White, in his *Downes* concurrence, took the position that the intent of Congress to incorporate could be either explicit or implicit.[126] He also stated that the granting of citizenship to the citizens of a territory was a clear indication of congressional intent.[127] However, in *Balzac*, the last of the *Insular Cases*, the Court held that even though Congress in 1917 had conferred citizenship on the inhabitants of Puerto Rico, this did not mean that Congress intended Puerto Rico to be incorporated into the United States.[128] The Court stated that "incorporation is not to be assumed without express declaration, or an implication so strong as to exclude any other view."[129]

Whether Congress intended to incorporate the various territories was not an easy question in the *Insular Cases*,[130] and it is not a question with an easy answer

122. *See supra* nn. 39-43 and accompanying text.
123. *See* Cleveland, *supra* n. 62, at 246.
124. *See infra* nn. 149-50 and accompanying text.
125. *See* Skibine, *supra* n. 102, at 799-801.
126. 182 U.S. at 339 (White, Shiras, & McKenna, JJ., concurring).
127. *Id.* at 332.
128. 258 U.S. at 305 (refusing to extend the constitutional right of jury trial to the defendant).
129. *Id.* at 306.
130. The only territory found by the court in the *Insular Cases* to have been incorporated into the United States was the territory of Alaska. *See Rasmussen v. U.S.*, 197 U.S. 516 (1905).

when it comes to Indian tribes.[131] According to one scholar, the Court in the *Insular Cases* considered the following factors to be relevant to a determination that Congress intended incorporation:

1. whether Congress had granted United States citizenship to the inhabitants of the territory;

2. the intention of Congress as reflected in the treaties;

3. the kind of "rights" conferred in those treaties; and

4. the nature of the legislation enacted by Congress concerning the territory.[132]

For sure, Indian tribes started outside the political system of the United States. Thus, the Constitution referred to "Indians not taxed" for the purpose of excluding them from being counted in determining apportionment of congressional representatives among the several States.[133] The fact that this language was reiterated in the Fourteenth Amendment shows that Indians were still considered outsiders in 1868.[134] In the many treaties signed by Indian tribes, the tribes acknowledged themselves to be under the "protection" of the United States, but protection, in and of itself, does not imply incorporation. Besides, many tribes never signed any treaties. Furthermore, even though the tribal territories were acknowledged to be within the geographical limits of the United States, geographical incorporation does not mean political incorporation. Although the Court has termed the government-to-government relationship existing between the United States and the tribes a trust relationship, the Court determined long ago that this trust relationship did not imply the political destruction of Indian tribes as sovereign political entities.[135] Finally, under *Balzac*, the fact that all tribal members eventually became U.S. Citizens, while a factor to be considered, does not dispose of the issue since the Court there found that even though Puerto Ricans were citizens, Puerto Rico was still unincorporated.

On the other hand, there no longer are "Indians not taxed" within the United States,[136] and reservation Indians are now considered to be citizens of the states where their reservations are located. In addition, Indian reservations are now considered to be within the borders of the states where they are physically located.[137] This has meant that each state has a certain amount of jurisdiction

131. At least one scholar has taken the position that Indian tribes were never incorporated. *See* Ball, *supra* n. 15.

132. *See* Ramos, *supra* n. 108, at 258.

133. U.S. Const. art. I, § 2, cl. 3.

134. U.S. Const. amend. XIV, § 2. *See also Elk v. Wilkins*, 112 U.S. 94, 102 (1884) (stating that Indians born within Indian reservations were not subject to the political jurisdiction of the United States and thus were not made citizens because the Fourteenth Amendment only made citizens out of persons born in the United States "and subject to the jurisdiction thereof").

135. *See Worcester v. Ga.*, 31 U.S. 515 (1832).

136. *See* Felix S. Cohen, *Handbook of Federal Indian Law* 388-89 (1982 ed., Michie 1982) (citing an opinion issued in 1940 by Nathan R. Margold, Solicitor for the Department of the Interior, *'Indians Not Taxed'—Interpretation of Constitutional Provision*, 57 Int. Dec. 195 (1940)).

137. *See Nev. v. Hicks*, 533 U.S. 353, 361-62 (2001) (stating that "an Indian reservation is considered

within such reservations.[138] Federal laws were also enacted granting states a certain amount of jurisdiction over the reservations,[139] and Congress has enacted various statutes that treat tribes as states for the purpose of certain federal laws.[140] During the allotment era, Congress adopted a policy of assimilation—since repudiated—which made it possible for a great number of non-members to purchase fee land within Indian reservations.[141] As a result, many reservations have a checkerboard pattern of alternating Indian and non-Indian land ownership. But most importantly, the Court has stated in the implicit divestiture cases that Indian tribes have been incorporated into the United States and this was the reason they had lost some of their inherent powers.[142]

At least one commentator has argued that because Indian tribes have in fact been "incorporated" into the United States legal system, this must mean not only that Congress has divested these tribes of all inherent sovereignty, but also that the United States Constitution is now fully applicable to tribal governments.[143] Others have disagreed,[144] and I believe them to have the better argument. Both the Court and Congress have always recognized Indian tribes as possessing a certain degree of inherent sovereignty.[145] The fact that the United States Constitution is not applicable to the tribes, however, does not automatically preclude a congressional intent to "incorporate" tribes and their territories into the United States.

Some scholars have argued that Indian tribes have become incorporated into the United States, but as sovereign entities, either through treaties[146] or because tribes are mentioned in the Commerce Clause as governmental entities.[147] Although I have also argued elsewhere that the reference to tribes in the Commerce Clause demonstrates that the drafters must have believed that Indian tribes possessed at least some kind of inherent governmental authority,[148] I do not believe that this single mention in the Constitution is enough to conclude that tribes have been incorporated into the United States. Instead, I believe that it

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part of the territory of the State").

138. *See id.* at 365.

139. *See* Pub. L. No. 280, 67 Stat. 588 (1953).

140. For instance, see the amendments to the *Federal Water Pollution Control Act*, Pub. L. No. 100-4, § 518(e), 101 Stat. 7, 77 (1987) (codified at 33 U.S.C. § 1377(3) (2000) (commonly referred to as the "Clean Water Act")); *Clean Air Act*, Pub. L. No. 101-549, § 107(d)(1)(A), 104 Stat. 2399, 2464 (1990) (codified at 42 U.S.C. § 7601(d) (2000)); *Safe Drinking Water Act*, Pub. L. No. 99-339, § 302, 100 Stat. 665 (1986) (codified at 42 U.S.C. §§ 300f-300j); *see also Indian Gaming Regulatory Act*, Pub. L. 100-497, 102 Stat 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721 (2000)) (requiring the tribes and the states to enter into gaming compacts before certain gaming activities can be conducted on Indian lands).

141. *See* Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. L. J. 1 (1995).

142. *See infra* nn. 39-43 and accompanying text.

143. James A. Poore III, *The Constitution of the United States Applies to Indian Tribes*, 59 Mont. L. Rev. 51, 53-54 (1998).

144. *See* Erik M. Jensen, *The Continuing Validity of Tribal Sovereignty under the Constitution*, 60 Mont. L. Rev. 3 (1999).

145. *See Talton v. Mayes*, 163 U.S. 376, 379-80 (1896).

146. *See* Monette, *supra* n. 16, at 630.

147. *See* Tebben, *supra* n. 17, at 321-37.

148. Skibine, *supra* n. 27, at 44-46.

would be reasonable for the Court to conclude that incorporation of Indian tribes has occurred as the result of cumulative acts of Congress.

More importantly, I believe that Congress has incorporated the tribes under a third sphere of sovereignty. Statutes such as the *Duro* fix certainly indicate a congressional intent to integrate Indian tribes as third sovereigns. Furthermore, if such incorporation has taken place, it means that Congress has lost "plenary" power over Indian tribes and Indian affairs. Thus, the issue in *Lara* is not whether the U.S. Constitution is applicable to tribal governments. The issue is whether Congress, after tribal incorporation, can reaffirm the inherent prosecutorial power of tribes without also providing that in exercising such power, tribes have to afford non-member Indians all the protection of the Constitution.

Clearly, if tribes have not been incorporated and Congress still has plenary power, the *Duro* fix would be upheld as constitutional. The federal district court in *Morris* held that the *Duro* fix did not amount to a denial of due process because when it enacted the Indian Civil Rights Act,[149] Congress "developed a scheme that respects the quasi-sovereign status of tribes and their inherent authority but also assures individuals of their rights in tribal courts."[150] Furthermore, the court noted that even if non-member Indians would be subject to tribal law that might not be constitutional if enacted by the federal or a state government, Congress, through its plenary power, had the authority to make such decisions.

If Congress no longer has plenary power, the argument is more difficult and although a full appraisal of the issue is beyond the scope of this article, I believe that on balance, the *Duro* fix maybe able to survive. For instance, footnote seven of the Court's opinion indicates that even if the strict scrutiny test were applicable, the court would have found the *Duro* fix to be a narrowly tailored measure protecting a compelling federal interest.[151] It cannot be forgotten that tribal prosecutions have to be conducted pursuant to the Indian Civil Rights Act, which makes almost all the provisions of the Bill of Rights applicable to tribal governments.[152] In addition, defendants can challenge the legality of their detentions by order of an Indian tribe in federal court through the writ of habeas corpus.[153] Finally, although some are advocating for more comprehensive judicial

149. 25 U.S.C. §§ 1301-1341 (2000); *Morris*, 288 F. Supp. 2d at 1133.

150. *Morris*, 288 F. Supp. 2d at 1143. Thus the court noted that "ICRA contains all the constitutional measures that protect federal defendants except that one may be tried before a jury of six, and grand jury presentment is not required." *Id.* The court also noted that ICRA provides for defendant a right to challenge the tribal proceedings through a writ of habeas corpus in federal court. *Id.*

151. *Id.* at 1142 n. 7. Of course, footnote seven only addresses itself to an allegation of racial discrimination but the strict scrutiny test used there is as or more demanding than the various tests used to determine if other provisions of the Bill of Rights have been violated.

152. The ICRA does not contain an Establishment Clause. In addition the tribes do not have to provide an attorney to a defendant who cannot afford one. Finally, there is no right to a jury trial in civil cases. While there is no right to an indictment by a grand jury, this requirement was mooted when Congress in the ICRA decided to limit tribal prosecutorial powers to essentially criminal misdemeanor jurisdiction.

153. 25 U.S.C. § 1303 (2000).

review of tribal courts' decisions by federal courts,[154] and others seem to be suspicious of the tribal courts' ability and willingness to protect the civil rights of those appearing before them,[155] other scholars have shown these fears to be baseless.[156] Furthermore, some scholarship indicates that allowing Indian tribes to develop their own civil rights norms may be beneficial not only to the tribes but would enrich the American legal system as a whole.[157]

## III. CONCLUSION

Although the incorporation doctrine developed in the *Insular Cases* does not have much to recommend itself, its development provides a useful analogy in determining whether Congress should still possess plenary power over Indian tribes. The Court should use the incorporation doctrine to conclude that Indian tribes have in fact been incorporated into the United States political and legal system as third sovereigns. Coming back to Justice Thomas's opinion in *Lara*, inherent tribal sovereignty and plenary power can survive together, but only as long as the tribes have not been incorporated into the United States. Now that they have been, it is not tribal inherent sovereignty that has disappeared, but congressional plenary power.

Finding that Indian tribes have been incorporated is a controversial proposition for those who believe that tribes should be considered as having retained their full independence from the United States. However, since tribes are at least de facto considered part of the United States, incorporation has its benefits. The dilemma faced by the tribes is that to many jurists, our system is one of dual federalism. All powers not delegated to the Congress are retained by the states. These days, the concept of congressional power is under attack. However, there is a real danger that unless Indian tribes are considered incorporated into "Our Federalism," all the power lost by Congress will flow to the states and not to the tribes.

154. *See* Resnik, *supra* n. 60, at 127; *see also* Jennifer S. Byram, *Civil Rights on Reservations: The Indian Civil Rights Act and Tribal Sovereignty*, 25 Okla. City U. L. Rev. 491 (2000).

155. *See* L. Scott Gould, *Tough Love for Tribes: Rethinking Sovereignty after* Atkinson *and* Hicks, 37 New Eng. L. Rev. 669, 681-92 (2003) (arguing for the overturning of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), and criticizing the enactment of the *Duro* fix).

156. *See* Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 Idaho L. Rev. 465, 489 (1998); Robert D. Probasco, *Indian Tribes, Civil Rights, and Federal Courts*, 7 Tex. Wes. L. Rev. 119, 152-53 (2001).

157. *See* Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 Fordham L. Rev. 479, 500-01 (2000).