ANSWERING LARA'S CALL: MAY CONGRESS PLACE NONMEMBER INDIANS WITHIN TRIBAL JURISDICTION WITHOUT RUNNING AFOUL OF EQUAL PROTECTION OR DUE PROCESS REQUIREMENTS?

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Indians of various lineages and tribal memberships regularly participate in the social structure of an individual Indian reservation. Tribal authority to criminally prosecute nonmember Indians is therefore an important component of effective tribal self-governance. Before a tribe may assert jurisdiction over nonmember Indians according to federal law, tribes must overcome one, and possibly two, hurdles. First, the federal government must recognize tribal sovereignty to prosecute the charged individuals, and second, this recognition must not run afoul of constitutional equal protection and due process limitations if these proscriptions apply. The first of these obstacles to tribal jurisdiction over nonmember Indians was surmounted when the Supreme Court, in United States v. Lara, affirmed Congress’s authority to recognize tribal jurisdiction over nonmember Indians. The Lara opinion has been a wellspring of law review articles and symposia. The second question, whether congressional recognition of tribal jurisdiction is constrained by equal protection and/or due process, was recognized by the Lara majority, but was not resolved in the Court’s ruling.

1 See infra notes 122–24 (describing intertribal events).
4 See Lara, 541 U.S. at 209 ("[W]e need not, and we shall not, consider the merits of Lara’s due process claim. Other defendants in tribal proceedings remain free to raise that claim should they wish to do so.").
In this comment, I examine two potential constitutional pitfalls that may interfere with congressional recognition of tribal jurisdiction over nonmember Indians that were not addressed by the Court in *Lara*. First, does Congress's explicit inclusion of nonmember Indians and implicit exclusion of nonmember non-Indians from tribal jurisdiction violate equal protection requirements by creating jurisdiction based on the Indian identity of the defendant? Second, does legislation subjecting nonmember Indian defendants to prosecutorial actions by tribal courts which do not provide the complete protections guaranteed in the Bill of Rights, specifically the right to counsel, violate the due process rights of those defendants?

In this article, I address these questions by walking through the legal strategy of a nonmember Indian seeking to invalidate his tribal imprisonment in federal court following *Lara*. I demonstrate the availability of federal court review for a nonmember Indian in tribal jail, but consider the significant statutory and socio-economic barriers that make such litigation more difficult. Looking at the content of claims available to the hypothetical nonmember Indian, I first examine and discount a manner of statutory construction that would permit federal judicial invalidation of tribal prosecutions that do not provide a right to counsel. I follow with a discussion of relevant due process and equal protection constitutional arguments, and demonstrate why the Court has no persuasive constitutional hook upon which it can invalidate Congress's decision to recognize tribal jurisdiction over nonmember Indians. Lastly, I explain why upholding tribal jurisdiction and congressional intent serves the important interest of advancing effective tribal government.

Before continuing, it should be noted why this discussion has been restricted to nonmember Indians instead of member Indians or nonmember non-Indians. This article does not examine the claims of tribally prosecuted non-Indians because tribes lack jurisdiction over this class of defendants; the detention of a non-Indian would be invalidated in federal court for a lack of jurisdiction before a statutory or constitutional argument could arise. Member Indians are also differently situated from nonmember Indians as their political-insider status permits member Indians to be subjected to the enacted rules of their tribe. As a result, member Indians do not have the same footing to challenge a tribal conviction on federal due process grounds as would a nonmember Indian. Notably, all individuals prosecuted by a tribe, whether member or nonmember, have the standing to challenge detention upon federal statutory grounds and thus the statu-

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tory argument, although discussed in the context of a nonmember Indian, would apply to members as well.

Nonmember Indians are differently situated because they are within tribal jurisdiction but outside the tribal polity. The unusual status of nonmember Indians provides them with a unique platform to challenge the constitutionality of congressional Indian legislation that defines the scope of tribal jurisdiction. Ultimately, these challenges should fail, as tribes should not be denied jurisdiction over nonmember Indians in the light of the constitutionally permissible and clearly articulated congressional intent to define tribal jurisdiction in a manner intended to support tribal self-government.

I. RELEVANT HISTORY OF TRIBAL SOVEREIGNTY

All analysis of the frontiers and intersections of Indian powers of self-determination and federal powers of regulation begins with Marshall's famous trilogy of cases: Johnson v. McIntosh, Cherokee Nation v. Georgia, and Worcester v. Georgia. In Cherokee Nation, Marshall labeled tribes as "domestic dependant nations," and described the Indian-federal relationship as one of "a ward to his guardian." The Court's recognition of tribes as "domestic dependant nations" did not strip the Indian tribes of their sovereignty, because, as Marshall noted, a state does not "surrender its independence—its right to self government, by associating with a stronger [state], and taking its protection." The extent to which sovereignty was acceded to the United States by tribes was limited by specific treaties between tribes and the federal government.

In Worcester, Marshall established that it was the federal, and not the state government, that had the power to develop relationships with Indian nations. The exclusive federal role in regulating Indian affairs originates in Article I of the Constitution, which grants Congress the power "to regulate Commerce ... with the Indian Tribes." The language of the Constitution established the federal government as the solitary and definitive regulator of intergovernmental relations with tribes. Although clearly placing the power of regulation in the

6 21 U.S. (8 Wheat.) 543 (1823).
9 Cherokee Nation, 30 U.S. (5 Pet.) at 17.
10 Id.
12 Id. at 520 ("[T]he regulation of [the relations between the United States and the Cherokee nation], according to the settled principles of our [C]onstitution, is committed exclusively to the government of the union.").
13 U.S. CONST. art. I, § 8, cl. 3.
lap of the federal government, this power was then viewed as restricted—the reach of federal power was constrained by tribal sovereignty and the limitations of Congress's "commerce-based" regulatory authority.\footnote{14 See infra note 23.}

After the Marshall Trilogy, the Court defined a much broader congressional power over internal tribal issues and ceased to require a commerce-related justification for federal tribal interference.\footnote{15 See infra note 22.} Although the Supreme Court found little constitutional text to justify enabling unfettered congressional authority over internal tribal matters unrelated to commerce,\footnote{16 In United States v. Kagama, the Court allowed the federal government to assume jurisdiction over crimes committed on reservations by and against Indians even though it would not fit within the powers conferred by the Indian commerce clause. 118 U.S. 375, 378-79 (1886) ("[I]t would be a very strained construction of this clause, that a system of criminal laws for Indians living peaceably in their reservations, ... without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.").} the Court upheld congressional legislation that regulated Indian criminal activities occurring within the boundaries of Indian reservations.\footnote{17 The Court stated: The power of the [g]eneral [g]overnment over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that 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 ... [This] is a valid law[]. Kagama, 118 U.S. at 384-85.} Although cognizant of its weak constitutional footing for permitting federal government intrusion into tribal matter, the Court found that the "power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution," but instead "from the ownership of the country in which the [t]erritories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else."\footnote{18 Id. at 380.} Although the Supreme Court has continued to recognize an expansive federal authority to manage internal Indian affairs,\footnote{19 The lack of a clear source of congressional power to so thoroughly regulate tribes troubles Justice Thomas in his Lara dissent. The Court hangs its constitutionality hook on the Commerce Clause, the treaty-making power (which is an executive, not legislative power) and prior case law, none of which seem to adequately account for the broad authority Congress has over tribes. See United States v. Lara, 541 U.S. 195, 226 (2004) (Thomas, J., concurring) ("The Court should admit that it has failed in its quest to find a source of congressional power to adjust tribal sovereignty."). The result is a naggingly inconsistent doctrine that permits the federal government to "simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain that the tribes possess ... 'sovereignty.'" Id. As neither the abrogation of federal authority to establish tribes as}
from relying upon the extra-constitutional "ownership right," and now more heavily rests federal control upon the enumerated federal treaty making power and Indian commerce clause.

Congress has since utilized its plenary power over Indian affairs to pass a wide assortment of laws that regulate on-reservation Indian conduct. Congress has stepped in to take jurisdiction over Indian-on-Indian reservation crimes, determined the minimum scope of rights available to individuals facing prosecution by tribal governments and established rules of adoption for Indian children. Although Indian country regulation is widespread, the legislation and judicial rulings of greatest relation to this examination of Lara and the Duro-fix are related to criminal jurisdiction in Indian, federal, and state courts.

Congressional regulation and Supreme Court action have sharply restricted tribal criminal jurisdiction while simultaneously expanding the role of the federal judiciary to prosecute serious crimes occurring in Indian Country. Although federal jurisdiction over these crimes has not displaced tribal jurisdiction, tribes, in accordance with federal statutory limitations, cannot sentence violators to prison terms greater than one year, and are thus reliant on the federal government for the prosecution of serious crimes.

true sovereigns, nor the assumption of complete federal control to eliminate tribal sovereignty are likely to have significant support. Justice Thomas will have to accept that "the confusion that [he has] identified will continue to haunt [Indian law] cases." Id.

Although it has been given little examination in this article, the treaty-making power has been an important source of federal power. See U.S. CONST. art. II, § 2, cl. 2 (describing the treaty-making powers).

Statute grants federal jurisdiction to prosecute the following offenses:


See infra notes 33.

See infra notes 40-41 (discussing the failure to provide counsel to non-Indians challenging their convictions in federal court).

See supra note 22 (describing the crimes that the federal judiciary has jurisdiction to prosecute in Indian Country).

As federal jurisdiction has expanded on the basis of the character of the crime, tribal criminal jurisdiction has been constricted by the identity of perpetrator. In United States v. Wheeler, the Supreme Court recognized the power of a tribe to prosecute its members as an undisturbed aspect of tribal sovereignty. In contrast, the Supreme Court in Oliphant v. Suquamish Indian Tribe held that the sovereignty of tribes to prosecute non-Indians has not been similarly retained, and tribes cannot prosecute non-Indians in tribal court. Oliphant drew the dividing line for tribal criminal jurisdiction by placing Indians on one side and non-Indians on the other. In Duro v. Reina, the Court re-drew the Oliphant jurisdiction line, moving from an Indian/non-Indian distinction to a tribal member/nonmember threshold for criminal jurisdiction. The Duro Court held that the retained sovereignty of tribes does not include the "the authority to impose criminal sanctions against a citizen outside its own membership," thus sweeping all nonmember Indians into a class outside of the tribe's jurisdictional boundaries. Congress responded to this ruling by passing the Duro-fix. The Duro-fix restored tribal authority to prosecute non-member Indians. The constitutionality of this legislation was decided by the Supreme Court a decade later in United States v. Lara, where the Court was asked to evaluate the appropriateness and meaning of this congressional recognition of tribal sovereignty.

29 See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 196–97 (1978) ("The effort by Indian tribal courts to exercise criminal jurisdiction over non-Indians ... is a relatively new phenomenon. And where the effort has been made in the past, it has been held that the jurisdiction did not exist.").

30 This case was raised in a double jeopardy context challenging the tribal action as a delegation of federal authority and thus creating two convictions by the same sovereign. As in Lara, the Court held that the tribes were acting as to their sovereignty and not federal authority. See United States v. Wheeler, 435 U.S. 313, 328 (1978) ("[T]he power to punish offenses against tribal law committed by Tribe members ... has never been taken away from them.").

31 The Supreme Court held that tribes did not retain this jurisdiction even in the absence of an explicit congressional action that established this limitation. The Court stated that Indian powers are limited by congressional action and where those powers are "inconsistent with their status." Oliphant v. Suquamish Indian Tribe, 435 U.S. at 208 (1978) (quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (1976)). The Court relied, in part, on the "commonly shared presumption of Congress, the Executive Branch, and the lower federal courts that tribal courts do not have the power" to show that exercising jurisdiction over non-Indians was inconsistent with their status. Id. at 206. How this view can be said to be commonly shared among lower federal courts is not entirely clear, as the Supreme Court had to reverse both lower court decisions, finding this power within retained tribal sovereignty.


33 Id.

In *United States v. Lara*, the Court examined the validity of Congress's decision to redefine the boundaries of tribal sovereignty in opposition to the Supreme Court *Duro* ruling. The Court found that Congress's action did not interfere with a constitutionally dictated rule. The Court viewed its *Duro* decision as simply the Court's "view of the tribes' retained sovereign status as of the time" when there was no direct legislation to define the boundaries of tribal jurisdiction. The Court considers the existing legislative landscape in discerning the scope of the "retained status." If Congress alters tribal jurisdiction through legislation, the courts will reexamine the "retained status" of tribes under the redefined landscape of tribal jurisdiction. When *Lara* was before the Courts, unlike at the time of *Duro*, the legislative backdrop specifically addressed the jurisdiction of tribes over nonmember Indians. Congress's alteration of tribal jurisdiction changed the status of the tribes and was within its power.

The Supreme Court further held that Congress's *Duro*-fix reflected a recognition of tribal power and was not a delegation of federal power. This seemingly semantic distinction means that the action of the tribal government does not represent an act of the federal government. Thus, a tribal prosecution followed or preceded by a federal prosecution does not create a valid double jeopardy defense.

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35 *Lara* made its way to the Supreme Court as a result of the following series of prosecutions:

Respondent Billy Jo Lara is an enrolled member of the Turtle Mountain Band of Chippewa Indians in north-central North Dakota. He married a member of a different tribe, the Spirit Lake Tribe, and lived with his wife and children on the Spirit Lake Reservation, also located in North Dakota. After several incidents of serious misconduct, the Spirit Lake Tribe issued an order excluding him from the reservation. Lara ignored the order; federal officers stopped him; and he struck one of the arresting officers.

The Spirit Lake Tribe subsequently prosecuted Lara in the Spirit Lake Tribal Court for "violence to a policeman." Lara pleaded guilty and, in respect to that crime, served 90 days in jail.

After Lara's tribal conviction, the Federal Government charged Lara in the Federal District Court for the District of North Dakota with the federal crime of assaulting a federal officer.

36 *Id.* at 205 (emphasis in original).

37 See *id.* at 207 ("[W]e do not read any of these cases as holding that the Constitution forbids Congress to change 'judicially made' federal Indian law through this kind of legislation.").

38 See *id.* (clarifying that tribal governments act pursuant to federal statute and not as the federal government itself).

39 The decision in *Lara* suggests that Congress also has the power to pass an *Oliphant*-fix to provide for tribal criminal jurisdiction over non-Indians. Senator Inouye of Hawaii introduced a bill in the Senate, S. 578, the Tribal Government Amendments to the Homeland Security Act of 2002, to expand the retained tribal sovereignty and rectify the *Oliphant* decision. See Tribal Government Amendments to the Homeland Security Act of 2002, S. 578, 108th Cong. § 13(b)(2)(A) (2002) ("The authority of an Indian tribal government...shall...extend to...all places and persons within the Indian country (as defined in section 1151 of title 18, United States Code) under the concurrent jurisdiction of the United States and the Indian tribal government[.]"). The bill did not pass.
The *Lara* opinion addressed congressional authority to set the boundaries of tribal sovereignty, but left unexplored the possibility that enacting the *Duro*-fix, although not a delegation of federal power to tribes, has other flaws, including violating either the Due Process and Equal Protection Clauses of the Constitution. Those issues have yet to be adjudicated by the Supreme Court and are the focus of this comment.

II. OBSTACLES TO PRESENTING A CLAIM

The failure of the prosecuting tribe to provide counsel presents the due process hook by which a nonmember Indian can challenge his tribal court conviction in federal court.\(^{40}\) The current landscape of tribal courts provides fertile ground for such challenges as defendants in a number of tribal courts are not guaranteed counsel in criminal tribal proceedings.\(^{41}\)

Considering the current operation of tribal governments without this guarantee, nonmember Indians are presently being convicted in tribal court without the provision of counsel. Consequently, there should be a pool of nonmember Indian defendants who can state a due process claim founded on a failure to provide representation. An equal protection argument should be more widely available, as all convicted nonmember Indians can make an argument that they were placed within tribal court jurisdiction based on racial identity.

A. Substantive and Procedural Obstacles

There are two preliminary questions that must be addressed by a nonmember Indian interested in pursuing a federal claim to invalidate a tribal sentence: what claims are available and in what manner must they be raised to get review in federal court? First, the defendant must recognize what substantive law governs the actions of tribal authorities. The relationship of tribes to the Constitution and the application of federal statutes to tribal actors creates a unique check

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\(^{40}\) Examining the failure of tribes to provide counsel in tribal court as a possible violation of the due process rights of the accused nonmember Indian is particularly resonant considering the Supreme Court's acknowledgment of potential future due process claims founded on this premise. See *Lara*, 541 U.S. at 209 (refraining from addressing *Lara*’s due process claim but acknowledging the opportunity for others to bring similar claims).

\(^{41}\) The exact number and percentage of tribes that do not provide representation is unclear. Compare United States v. Red Bird, 146 F. Supp. 2d 993, 997 (D.S.D. 2001) (noting that “[m]ost tribes within the jurisdiction of the United States District Court for the District of South Dakota, Central and Northern Divisions, do not provide this right [to a court appointed attorney]”), with Confederated Salish & Kootenai Tribe Laws Codified, § 1-2-401(2) (2000) (“An indigent defendant accused of a criminal offense punishable by imprisonment has a right to representation by the Tribal Defender’s Office.”).
on tribal prosecuting entities, one far different than those that limit federal or state governments. Second, the individuals must identify the proper way to challenge a tribal court ruling in federal court. As such litigation avenues have been sharply limited by Congress and the courts, obtaining federal review for this defendant may be different than for a defendant convicted in state or federal court.

Beginning first with content, a defendant seeking federal review of a tribal court conviction for a possible violation of due process rights cannot directly state a claim based on a tribal court's violation of his constitutionally protected rights. The Constitution was written to limit and define the scope of federal authority. The source of power for tribes, as nations with roots that predate the Constitution, originates and exists independent of federal and constitutional authority. Because actions of tribal governments do not derive from a federal source, those actions are not directly defined or limited by the constitutional provisions that limit federal powers. Although most of the limitations of the Bill of Rights have been extended to control state action, these rights have never been similarly incorporated to limit the actions of tribal governments. Consequently, a defendant convicted in tribal court cannot assert a due process claim against tribes on strictly constitutional grounds because tribes are bound by tribal law, targeted federal statutory restrictions, and federal common law, but not the Bill of Rights and the remainder of the Constitution.

\[42\] In Talton v. Mayes, 163 U.S. 376, 384 (1896) the Supreme Court recognized that because local tribal powers predate, and do not originate from the Constitution, tribal governments are not operated on by the Constitution. In Talton, the Court found that Cherokee Nation, in pursuing criminal convictions, were not required to fulfill the Fifth Amendment's requirement of indictment by grand jury. Talton, 163 U.S. at 376. Courts in a number of subsequent cases have held that other provisions of the Constitution are inapplicable to tribes. See, e.g., Martinez v. Southern Ute Tribe of the Southern Ute Reservation, 249 F.2d 915 (10th Cir. 1957) (holding that tribal actions are not restricted by the Due Process Clause of the Fifth Amendment), cert. denied, 356 U.S. 960 (1958); Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529, 533 (8th Cir. 1967) (holding tribal actions are not restricted by the Due Process Clause of the Fourteenth Amendment). Notably, holding tribal authorities outside Constitutional limitations does not abrogate congressional supremacy over tribes. According to the Court, tribes are still subject to “the supreme legislative authority of the United States.” Talton, 163 U.S. at 384.

\[43\] The Bill of Rights was originally interpreted to limit the actions of the federal government and not state governments. See Barron v. Baltimore, 32 U.S. 243, 247 (1833) (“[T]he [F]ifth [A]mendment must be understood as restraining the power of the general government, not as applicable to the states.”). The Court has since extended the reach of much but not all of the Bill of Rights to touch state action using the “no state shall” language of the Fourteenth Amendment to incorporate certain provisions of the Bill of Rights to states. See U.S. CONST. amend. XIV § 1; ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 478-86 (2d ed. 2002) (detailing the evolution of incorporation). The same reasoning cannot be used to incorporate the Bill of Rights to tribes as there is no parallel “no tribe shall” language expressed in the Fourteenth Amendment that could be interpreted to extend the Bill of Rights to limit tribal government actions. The result is that tribal governments, unlike state governments, remain outside all of the provisions the Bill of Rights.
Congress, aware of the inapplicability of the Bill of Rights to tribal governments, and the absence of federally mandated civil rights protections available to defendants in tribal court, enacted the Indian Civil Rights Act ("ICRA") to limit the powers of tribal governments. The ICRA was passed by Congress with the dual intent of preventing tribal interference with individual civil rights and preserving tribal capacity to self-govern. To fulfill this second aim of furthering tribal self-determination, ICRA was drafted to provide limited federal review of tribal court violations of the ICRA. The statute only permits federal review of tribal court action through federal habeas corpus review. The Supreme Court has upheld congressional intent to provide only a minimally intrusive mechanism for enforcing the ICRA, and has refused to read implicit authorizations of civil actions or actions for declaratory or injunctive relief into the ICRA. As a result, defendants seeking federal review of potential violations of the ICRA by tribal judiciaries may pursue a federal claim solely through habeas review. The ICRA is an inexact restatement of the Bill of Rights intentionally modified by Congress to exclude certain provisions, including the First Amendment prohibition on establishment of religion and the Fifth Amendment requirement of initiating criminal actions by jury indictment, that were deemed less appropriate in the tribal context. See 25 U.S.C. §§ 1301-03 (2000) (refraining from providing any clause preventing the establishment of religion or requiring indictment by a grand jury); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62 (1978) ("[R]ather than providing in wholesale fashion for the extension of constitutional requirements to tribal governments, as had been initially proposed, [Congress] selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments.") (footnote omitted).

See Martinez, 436 U.S. at 62 (describing the "two distinct and competing purposes . . . manifest in the provisions of the ICRA").

See 25 U.S.C. § 1303 ("The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.").

See Martinez, 436 U.S. at 72 ("[W]e are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.").

Federal courts are not the only venue that can review tribal trial court proceedings. Many tribes have appellate level courts with jurisdiction to examine the propriety of convictions in the context of the tribal laws and tribal constitutional provisions that safeguard civil rights or the ICRA. In forming appellate courts, tribes have either joined forces to develop intertribal appellate courts or have simply established discrete tribal appellate courts. Compare Frank Pommer-sheim, Looking Forward and Looking Back: The Promise and Potential of a Sioux Nation Judicial Support Center and Sioux Nation Supreme Court, 34 ARIZ. ST. L.J. 269, 291 (2002) (describing the Northern Plains Intertribal Court which "sits in panels with one judge from each participating tribe"), with Oglala Sioux Tribe: Law and Order Code Ch.1 § 6.0, available at http://www.njrc.org/cfolder/oglala_lawandorder1.htm ("There is hereby created the Supreme Court of the Oglala Sioux Nation.").
B. Habeas Obstacles

1. Exhaustion

A petitioner requesting federal habeas review of a state court proceeding must exhaust all available effective state remedies before federal courts can exercise habeas review.\textsuperscript{49} Federal courts require similar exhaustion of tribal court remedies when the petitioner is a member of the prosecuting tribe.\textsuperscript{50} Nonmembers, unlike members, however, may not be required to exhaust all remedies available in the tribal appellate system—courts have differed as to application of this rule to nonmembers.\textsuperscript{51} If nonmember Indians are exempted from the exhaustion requirement, federal habeas review of the trial would be swifter and conserve resources and time. An application of the exhaustion requirement to nonmember Indians would delay jurisdiction for a federal habeas claim and require the input of additional resources at the tribal court level.

2. In Custody Requirement of Habeas Review

Habeas review is available in a lesser number of cases than other forms of appellate review because habeas review is limited to cases where the petitioner is "in custody."\textsuperscript{52} Tribal civil and criminal cases where the defendant is no longer "in custody" do not qualify for habeas review, and cannot be challenged under the ICRA. Tribal courts, in accordance with limitations set by Congress in ICRA, can impose prison sentences of no longer than one year.\textsuperscript{53} The short duration of sentences in tribal jail provides a potential stumbling block to fulfilling the "in custody" prerequisite of habeas review. The peti-

\textsuperscript{49} See 28 U.S.C. § 2254(b)(1)(A) (2000) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State.").

\textsuperscript{50} See Wetsit v. Stafne, 44 F.3d 823, 826 (9th Cir. 1995) ("[A tribal member] is bound to follow the procedures of the tribe if they are consistent with the Indian Civil Rights Act. Having failed to do so, she is not entitled to have her petition for habeas relief considered.").

\textsuperscript{51} Courts have disagreed as to whether nonmembers must exhaust all remedies before seeking federal habeas review. Compare id. (inferring from Duro that "when a tribal court attempts to exercise criminal jurisdiction over a person not a member of a tribe, no requirement of exhaustion need be enforced"), with Lyda v. Tah-Bone, 962 F. Supp. 1434, 1435 (D. Utah 1997) (disagreeing with conclusion in Wetsit that does not require exhaustion of remedies for nonmembers).

\textsuperscript{52} See 28 U.S.C. § 2241(b)(c)(3) (2000) ("The writ of habeas corpus shall not extend to a prisoner unless... [h]e is in custody").

\textsuperscript{53} 25 U.S.C. § 1302(7) ("No Indian tribe in exercising powers of self-government shall... impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year").
tioner must file his petition for habeas review before federal courts cease to have jurisdiction, and before the case becomes moot.54

Considering the short time frame of imprisonment, the exhaustion requirement, and the sometimes sluggishly progression of a case through the judicial system, a petitioner may be unable to get a habeas petition heard in federal court before the maximum one year sentence is served. The “in custody” requirement, therefore, might present a serious obstacle to mounting a habeas challenge in federal court. Fortunately for the challenger, a petition filed before the completion of a sentence provides the reviewing federal court with jurisdiction even if the individual is released prior to the hearing.55 An individual seeking to press a challenge through habeas review must therefore ensure that the petition is filed before the completion of the sentence.

A released petitioner that has filed for habeas during his incarceration must also overcome a possible mootness defect.56 A mootness challenge in cases where the individual’s incarceration has since completed may be overcome by a showing of lingering collateral consequences of detention.57 A mootness defect resulting from the brevity of the tribal incarceration could also fall under the “capable of

54 The “in custody” requirement has been more broadly interpreted to include punishments other than imprisonment: “[B]esides physical imprisonment, there are other restraints on a man’s liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus.” Jones v. Cunningham, 371 U.S. 236, 240 (1963) (holding that the conditions of parole can be sufficient to qualify as in custody and trigger habeas review). This broad reading of the “in custody” provision for federal review of state trials may make it easier for a defendant to pursue similar federal reviews of tribal actions. There are tribally incarcerated individuals who would indisputably meet the “in custody” requirement, and possibly other non-imprisoned individuals facing other qualifying limitations of their liberty.

55 See Carafas v. Lavallee, 391 U.S. 234, 237–38 (1968) (holding that release from a state correctional facility does not destroy federal habeas jurisdiction); Salem v. Arm Springs Tribal Corr. Facility, 134 F.3d 948, 953 (9th Cir. 1998) (hearing a habeas petition where the claim was made while the petitioner was serving a sentence handed down in tribal court but had since been released).

56 See Reyes-Sanchez v. Ashcroft, 261 F. Supp. 2d 276, 283 (S.D.N.Y. 2003) (“When a habeas petitioner has been released from custody after filing a petition, the relevant inquiry is: ‘whether petitioner’s subsequent release caused the petition to be moot because it no longer presents a case or controversy under Article III, § 2 of the Constitution’” (quoting Spencer v. Kemna, 523 U.S. 1, 7 (1998))).

57 Collateral consequences of imprisonment keeps the controversy live. See Carafas v. LaVallee, 391 U.S. at 237 (stating that where there are “disabilities or burdens [which] may flow from petitioner’s conviction, he has ‘a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.’” (quoting Fiswick v. United States, 329 U.S. 211, 222 (1946))); Reyes-Sanchez, 261 F. Supp. 2d at 284 (“A petition is not moot if the petitioner suffers from any ‘concrete and continuing injury’ that is a collateral consequence of the detention and if the injury can be remedied if the petitioner prevails in his quest for a writ of habeas corpus.”).
repetition and evading review” exception to mootness. With the availability of mootness exceptions, and continued federal jurisdiction after the completion of a prison sentence, a nonmember Indian petitioner should be able to have a violation of the ICRA heard before a federal court on habeas review in spite of the short timeframe of tribal incarceration.

C. Extra-legal Obstacles

Congressional limitations of federal remedies for ICRA violations are not the only bottleneck restricting a nonmember Indian’s ICRA claim; a petitioner would likely face numerous logistical difficulties finding representation to assist in filing a habeas claim. A claim founded upon a failure to provide representation in tribal court would have to be brought by an imprisoned indigent individual who was not offered counsel at trial. As a number of tribes provide counsel in accordance with tribal law, the pool of petitioners is limited to individuals sentenced by tribal authorities lacking this protection. Such a petitioner would not have prior counsel to assist in recognizing the availability of federal habeas review. He would thus need to either identify and file the habeas petition pro se, or search for counsel from tribal prison—a difficult task considering the short timeframe of detention and the distance of many reservations from large communities of legal practitioners. As a qualifying petitioner would likely be financially constrained by the same conditions that prevented him from retaining representation at his initial tribal court trial, he would require a lawyer or organization willing to take the case without a significant fee.

The incarcerated individual is further restricted in retaining a lawyer as he would be ineligible for representation by a federally-funded legal services organization. Legal services organizations provide much of the no-cost representation for indigent persons needing representation in tribal court. Under federal rules, legal services

58 The “capable of repetition, but evading review” exception is applicable where the challenged action is of a duration too short to be resolved before the condition expires, and the action is likely to be repeated against the same individual. See Spencer v. Kemna, 523 U.S. 1, 17 (1998) (stating the requirements for meeting the evading review exception). The intent of this exception is to prevent violations of rights in cases with shorter sentences from sitting perpetually beyond the reach of appellate review. See Sibron v. New York, 392 U.S. 40, 52-53 (1968) (“We do not believe that the Constitution contemplates that people deprived of constitutional rights at this [minor offences] level should be left utterly remediless and defenseless against repetitions of unconstitutional conduct.”). The short duration of detention in tribal jails fits these sentences squarely within this policy justification for this exception.

59 See cases cited supra note 41.

60 Legal services organizations have a broader reach on reservations than they do in other locations. Unlike in federal and state courts, where legal services is typically unable to represent
organizations accepting federal Legal Services Corporation funding may not bring habeas claims on behalf of otherwise qualifying clients. Because of the federal restrictions on legal service providers, indigent individuals seeking to bring a habeas challenge to their tribal detention are prevented from retaining the primary provider of no-fee legal services available to indigent individuals on reservations. A petitioner desiring a lawyer must instead seek private pro bono counsel or find a non-profit organization unencumbered by federal legal services funding restrictions.

The nature of the claim would make the search for a lawyer even more difficult. The types of non-profit organizations that often focus on Indian and tribal issues would likely be uninterested in this habeas claim because it seeks to increase federal control and oversight over tribal authorities; organizations that utilize legal challenges to strengthen tribal sovereignty and self-determination would likely find this case antithetical to their ideology. That a habeas claim would challenge tribal sovereignty, and not federal or state actions, would likely limit the number of non-profit organizations (with the capacity to provide representation) that would sign on to provide such representation. Considering the limited availability of interested non-profit legal organizations, a petitioner would most likely have to rely on private pro bono representation. The logistical difficulties, primarily incarceration and geographic isolation, make the retention of clients in a criminal proceeding, misdemeanors and lesser offenses tried in tribal courts are explicitly exempted from the definition of "criminal proceeding" and thus fall within the cases available to legal services organizations operating in tribal court. See 45 C.F.R. § 1613.2 (2005) ("A misdemeanor or lesser offense tried in an Indian tribal court is not a 'criminal proceeding.'"). On reservations where many residents qualify financially for legal services, such organizations may provide the bulk of individual representation in tribal court. See Dakota Plains Legal Services, http://web.archive.org/web/20041009203840/www.dpls.org/history.html (last visited Aug. 18, 2006) (representing clients on or near nine reservations in North and South Dakota, which "is often the sole source of legal assistance available to our clients.").

See 45 C.F.R. § 1615.1 (2005) ("This part prohibits the provision of legal assistance in an action in the nature of habeas corpus . . . ").

See, e.g., Native American Rights Fund, http://www.narf.org/about/about_whatwedo_mission.html (last visited Apr. 11, 2006) (declaring the Native American Rights Fund (NARF) mission: "The future existence of the remaining Indian tribes in this country depends ultimately upon . . . the rights of self-determination necessary to preserve traditional customs and ways of life.").

There are organizations that would, ideologically, line up behind a habeas petition. See Citizens Equal Rights Alliance, http://www.citizensalliance.org (last visited Apr. 11, 2006) (stating the Citizens Equal Rights Foundation's ("CERF") support for greater federal control over tribal lands and government). CERF and similar organizations may support a habeas claim in this type of case, but it is not clear that they have or would provide direct representation. See Brief for Citizens Equal Rights Foundation as Amicus Curiae Supporting Respondent in Part, United States v. Lara, 541 U.S. 193 (2004) (No. 03-107), 2003 WL 22988876 (displaying CERF's capacity to develop an amicus curiae brief, but not necessarily direct representation).
private representation, likely an individual's only option for counsel, a difficult task.

There is probably a limited pool of lawyers interested in taking a challenge to a tribal court ruling against a nonmember Indian. An individual might be able to secure private pro bono representation, but would likely have to start the action pro se. The obstacles to securing counsel do not mean this claim will never surface, but it does make such a challenge more difficult to bring and less likely to receive federal review.

III. DUE PROCESS: A STATUTORY INTERPRETATION APPROACH

Once a nonmember Indian has secured representation or ventured into the legal process pro se, he should make an initial statutory argument that the ICRA must be read to provide a right to counsel under its statutory due process clause. This argument swims against the tide of Court dicta, but provides a statutory resolution that allows the court to avoid settling more difficult constitutional issues. The statutory argument would require a new reading of the ICRA, and would likely prevail only if the Court wishes to avoid addressing the possible underlying constitutional problems alluded to in Lara.64

The United States Supreme Court has held that the Sixth Amendment requires an accused individual be furnished with counsel in state and federal court where imprisonment is a consequence of prosecution.65 The Court has repeatedly stressed the importance of counsel in ensuring fair process and outcome, noting that it is an "obvious truth" that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."66 Recognizing the "obvious" value of representation to ensuring a fair trial, the Court has deemed the guarantee of counsel "a fundamental right, essential to a fair trial."67 By recognizing the provision of counsel as a fundamental right, the Court has made this requirement applicable to state prosecutions through the Fourteenth Amendment.68

Even those rights found fundamental by the Supreme Court cannot be applied to Indian tribes as the Fourteenth Amendment does

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64 See supra note 4 and accompanying text (describing the Lara question).
65 See, e.g., Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963) (holding that counsel must be provided to assure a fair criminal trial). See infra notes 79-80 and accompanying text (Gideon and Argersinger).
66 Gideon, 372 U.S. at 344.
67 Id. at 340.
68 See id. at 344-45.
not incorporate rights against tribal governments.\textsuperscript{69} As discussed above, an individual seeking to assert a violation of individual rights by tribal actors must typically pursue that claim as a violation of rights provided by the ICRA (in the form of a habeas petition) and not as a claim of a violation of constitutional rights. The ICRA provides a number of protections that mirror those found in the Bill of Rights.\textsuperscript{70} The two provisions most relevant to this analysis are the requirement that "[n]o Indian tribe in exercising powers of self-government shall...deny...any person of liberty or property without due process of law" nor "deny to any person in a criminal proceeding the right...at his own expense to have assistance of counsel for his defense."\textsuperscript{71} Because the ICRA is a statute and not a constitutional provision, an examination of the meaning of its provisions utilizes tools of statutory interpretation, not constitutional analysis. The question that follows is whether a right to counsel can be found to inhabit the rights guaranteed by the ICRA to individuals facing tribal prosecution.

The ICRA establishes a right to counsel that cannot be trumped by tribal authority, but limits the right to counsel to lawyers that can be obtained at the individual's own expense. The canon of statutory interpretation dictating a judiciary should "construe the language of an enactment so as to give it the effect Congress intended,"\textsuperscript{72} suggests that this explicit textual limitation should be upheld by the courts. The Ninth Circuit, in \textit{Tom v. Sutton}, found that the counsel requirement in the ICRA was not coextensive with the right to counsel provision of the Bill of Rights. The Ninth Circuit refers to Congress's decision to fashion a distinct Indian statute instead of creating a wholesale importation of the Bill of Rights into Indian tribal prosecutions. The Ninth Circuit suggests this selectivity demonstrates congressional intent to apply only enumerated provisions of the Bill of Rights to tribes, and reinforces an interpretation that the ICRA contains only a limited right to paid counsel.\textsuperscript{73} In addition, statements

\textsuperscript{69} See Settler v. Lameer, 507 F.2d 231, 241-242 (9th Cir. 1974) (holding that the right to counsel under the Bill of Rights does not apply to Indian tribes); Glover v. United States, 219 F. Supp. 19, 21 (D. Mont. 1963) ("[T]he provisions of the Federal Constitution guaranteeing due process and the right to counsel do not apply in prosecutions in tribal courts.").

\textsuperscript{70} See 25 U.S.C. § 1302 (precluding tribes from requiring compelling self-incrimination, trying an individual for the same crime twice, issuing a warrant without probable cause, performing unreasonable searches and seizures, etc.).

\textsuperscript{71} \textit{Id.}

\textsuperscript{72} \textit{Tom v. Sutton}, 533 F.2d 1101, 1104 (9th Cir. 1976).

\textsuperscript{73} The Ninth Circuit cited the following legislative history:

In 1965, Senator Ervin introduced a bill which would have restricted the Indian tribes, in exercising their powers of local self-government, to the same extent as imposed on the United States government by the United States Constitution. . . . As a result of the objec-
made prior to the enactment of the ICRA indicate Congress may not have intended to provide a right to counsel for the indigent in order to avoid overextending protections beyond the human and financial resources available to tribes.\footnote{Id. at 1104.}

Interpreting this single passage of the ICRA in isolation, however, neglects to consider the possible impact of the due process requirement applied to tribes through the ICRA.\footnote{Id. See id. at 1104.} The ICRA includes a textual commitment to the protection of individuals from denial of life, liberty, or property without "due process of law" by tribal governments.\footnote{Id. See 25 U.S.C. § 1302.} The exact textual replication of the constitutional due process requirement\footnote{Id. U.S. CONST. amend. XIV, § 1.} in the ICRA suggests the possibility that the two concepts, constitutional due process and tribal due process, should be similarly construed by the courts.

When the ICRA was adopted in 1968,\footnote{Id. 25 U.S.C. § 1302.} the right to counsel, as defined by the Supreme Court, required state and federal governments to provide representation to indigent defendants in all felony trials.\footnote{Pub. L. No. 90-284, § 202, 82 Stat. 77 (1968) (prior to 1986 amendment).} It was not until 1972, four years after the enactment of the ICRA, that the Supreme Court, under the Fourteenth Amendment Due Process

\begin{footnotesize}
tions to Senator Ervin's bill, the Department of the Interior submitted a substitute bill which guaranteed only specific enumerated rights to the Indians.
\end{footnotesize}
Clause, mandated state provision of representation to defendants charged with misdemeanor crimes.  

The ICRA, as first enacted, limited tribal judiciaries to imposing terms of no longer than six months in jail.  By restricting the scope of tribal sentences, Congress essentially limited tribal jurisdictions to imposing only misdemeanor-type penalties. At the time of its drafting, the sentences Congress made available to tribes under the ICRA were not of the type that would trigger a right to counsel under the constitutional Due Process Clause in federal and state court. Considering the fact that the Supreme Court had yet to recognize the necessity of counsel in misdemeanor cases to fulfill constitutional Due Process Clause requirements, it is not surprising that Congress was willing to skip the explicit requirement of counsel for indigent persons facing trial in tribal court.

The absence of this enumerated requirement, however, which at the time was not considered constitutionally problematic in federal and state court, may not mean that a requirement that all defendants be provided with counsel could not originate in the ICRA. The ICRA provides more than an itemized, explicitly defined set of protections; Congress included within it a vague due process requirement for the protection of individual rights with no explicit or implicit roadmap as to its scope or meaning. Might the due process clause in the ICRA have been intended by Congress to follow a parallel evolution as the Due Process Clause in the Constitution? As the constitutional Due Process Clause has since evolved to mandate the provision of counsel in misdemeanor trials, might tribal due process have been intended to follow a corresponding path that requires this same protection in tribal court? If Congress intended the “due process” of the ICRA to mirror the “Due Process” Clause of the Constitution, then the ICRA may define a right to counsel for the indigent defendant even where the explicit right to counsel provision in the statute is not so broad.

Judicial interpretation, however, has suggested that the two due processes may not be identical. The Supreme Court has noted that the ICRA was intended to “fit the unique political, cultural, and eco-

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80 See Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that “no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony unless he was represented by counsel at his trial”).

81 The ICRA has since been amended to increase the maximum duration of a tribal sentence to one year. See Pub. L. No. 99-570, § 4217, 100 Stat. 3207 (1986) (substituting “for a term of one year and a fine of $5,000” for “for a term of six months or a fine of $500”).

82 This was in the time period between Gideon and Argersinger, where counsel was required for felony charges but not for misdemeanors. See Argersinger, 407 U.S. at 40 (holding that counsel must be provided in misdemeanors where the possible penalty includes imprisonment); Gideon, 372 U.S. at 344-45 (holding that counsel must be provided in felony trials).
nomic needs of tribal governments. For example, circuit courts have found the equal protection clause in the ICRA is different from the constitutional clause of the same name because congressional intent was to create an Indian equal protection clause of a different scope than the Equal Protection Clause found in the Constitution. Because the ICRA was tailored to match the culture of tribal governments, courts can determine that the two due process clauses do not have a single meaning.

The meaning of due process in the ICRA has not been as well-defined in federal court as its constitutional homolog. Even though the boundaries of ICRA due process are poorly mapped, the Court's willingness to individualize the ICRA to each tribal entity suggests the Court is unlikely to simply transpose federal due process requirements upon the ICRA due process clause. Argersinger's creation of new federal and state constitutional due process protections likely will not dictate the meaning of tribal due process protections. It seems unlikely that an attempt to interpret the ICRA as providing a right to counsel for the indigent can overcome the ICRA's counsel provision, legislative history, and unique due process clause.

IV. A CONSTITUTIONAL APPROACH

Instead of approaching this question by seeking shelter within a particular statutory interpretation of the ICRA, a nonmember Indian habeas petitioner may find an alternative argument in an attack on the constitutionality of the ICRA's applicability to nonmember Indians. Congress amended the ICRA (the aforementioned Duro-fix) to recognize tribal jurisdiction over all Indians. In Lara, the Supreme Court held that in this amendment Congress had not delegated federal authority to Indian tribes, but simply recognized the bounds of

83 See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62-63 (1978) ("[The ICRA] selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments.").

84 See Groundhog v. Keeler, 442 F.2d 674, 682 (10th Cir. 1971) ("Congress intended... in some respects the equal protection requirement of the Fourteenth Amendment should not be embraced in the Indian Bill of Rights.").

85 Indeed, if this is the intent of the ICRA, the expected definition of the ICRA due process clause may have as many meanings as there are recognized tribes. Each tribe, based on its political, cultural, and economic needs, may have a unique community definition of the scope of due process. If so, individual Indian tribes, and not the federal government, are likely the most knowledgeable entity to define the local meaning of due process. However, under habeas review, the federal judiciary does have review power, as in a dispute over the right to counsel, and thus is asked to make this determination. See David Williams, Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law, 80 Va. L. Rev. 403, 497 (1994) ("[T]ribal courts could tailor the ICRA to reflect their own tribal context and values without persistent outside judicial influence.").

86 See Martinez, 436 U.S. at 62 (describing an instance of this type of reasoning).
inherent tribal sovereignty held by tribes. As a result of this distinction as to the source of tribal power, prosecutions by the federal and tribal governments originate from two different sovereign authorities, the tribe and the federal government, and not just from two heads of the same federal governmental body. The resolution of the recognition versus delegation debate in Lara means legislation that changes the boundaries of tribal authority cannot be analogized to typical affirmative (delegating) federal legislation creating administrative and federal courts.

Even though the ICRA recognizes tribal sovereignty rather than delegating federal authority, the ICRA was established in accordance with Congress's constitutionally granted plenary power. Lara decided that Congress, under its constitutionally provided plenary power, has the authority to pass statutes that “lift the restrictions on the tribes' criminal jurisdiction,” but did not decide whether the content of those statutes must be scrutinized for violations of non-plenary power constitutional protections. If the Duro-fix is analyzed not for the existence of constitutional authority as in Lara, but for its violation of constitutional limitations, then there are two possible arguments to be made: first, Congress has violated the Equal Protection Clause of the Constitution by recognizing tribal jurisdiction over nonmember Indians but not nonmember non-Indians; and second, that subjecting those facing tribal court prosecutions to incomplete liberty protections is a violation of their due process rights.

A. Equal Protection

Congress relied upon its plenary power—a power rooted in the Indian commerce clause and the responsibilities of the trust relationship—as the source of its legislative authority for the Duro-fix. Typically, when Congress regulates according to its authority in one portion of the Constitution it is constrained by the limitations found in other constitutional provisions. For example, when Congress legislates under the Interstate Commerce Clause, such legislation is con-

88 As a result of this distinction, Lara’s two trials do not present a double jeopardy problem as the authority for prosecution did not originate in the same sovereign.
89 For example, the authority for an administrative body hearing originates from the federal constitutional powers. An administrative body is acting as the federal government and not as a separate sovereign.
90 Lara, 541 U.S. at 200 (“Several considerations lead us to the conclusion that Congress does possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians as the statute seeks to do.”).
91 See id. at 202 (“Congress, with this Court's approval, has interpreted the Constitution's 'plenary' grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority.”).
strained by the Equal Protection Clause as applied to the federal government through the Fifth Amendment. An obvious analogy between the Interstate Commerce Clause and the Indian commerce clause beckons, and at least upon initial glance, it seems that if the Equal Protection Clause constrains congressional action under one Commerce Clause (interstate) it should also constrain congressional action under another commerce clause (Indian). However, this analogy turns out to be overly simplistic, and commentators have persuasively argued both for and against the application of the equal protection constraint to legislative action undertaken in accordance with the Indian commerce clause.

Scholars' preferences, however, do not decide law, and the Court has reached its own conclusion as to the judicial scrutiny that should apply to Indian legislation. The Court has noted it has not been "deterred... from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment." In Morton v. Mancari, the Supreme Court analyzed the applicability of the Equal Protection Clause in the context of a statute that gave employment preferences to Indians seeking a position with the Bureau of Indian Affairs. In examining this legislation as a potential violation of equal protection requirements, the Court avoided triggering a race-based strict scrutiny standard (which would likely have sunk the preference) by viewing Indians, at least in this context, as a

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93 Compare Williams, supra note 92, at 780 ("[E]ven if [A]rticle I gives Congress unlimited power over Indians, the [E]qual [P]rotection [C]lause may effectively take away that power by forbidding Congress to single out Indians for special treatment."), with Carole E. Goldberg, Individual Rights and Tribal Revitalization, 35 ARIZ. ST. L.J. 889 (2003). Williams suggests that the Equal Protection and Indian commerce clause sections are "in tension with each one another and cannot be easily reconciled." Williams, supra note 92, at 784. Relying upon canons of interpretation that favor newer over older, Williams asserts that the newer equal protection requirement—a reflection of more current distaste for unequal treatment—should take precedence over the Indian commerce clause which relies upon an outdated ambivalence toward unequal treatment. Id. at 784-85. Goldberg and Robert Clinton argue that actions under the Indian commerce clause are not constrained by the Fourteenth Amendment. Clinton notes that the Fourteenth Amendment explicitly singles out Indians for special treatment, an indication that the drafters did not express an intent to apply equal protection for Indians. See Robert N. Clinton, Isolated in the Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government, 33 STAN. L. REV. 979, 1011-12 n.201 (1981) ("[S]uggesting... the 14th Amendment was not intended to change the relationship between the tribes and the federal government."). The Fourteenth Amendment therefore can be read as not intending to alter the existing federal-tribal relationship. See id. In addition, Goldberg asserts that the Indian commerce clause and the Fourteenth Amendment "affirm the governmental status of Indian nations and their existence outside the formation of the United States." See Goldberg, supra, at 934-35.
political and not a racial group. By defining Indians as a political group, a characterization that does not create a suspect class, the Court is not beholden to an examination of the legislation according to the more searching strict scrutiny standard. One would expect that, in light of the lack of a suspect classification, the Court would settle on the less demanding rational basis test. However, the Court suggested that it would apply a stricter rule that would permit legislative "special treatment [towards Indians that] can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians." Subsequent decisions suggest that the Supreme Court may be examining the legislation in light of the trust relationship, or they may be simply settling upon the more common unfettered rational basis review for Indian legislation.

A nonmember Indian seeking to challenge the Duro-fix on equal protection grounds faces a difficult line of precedents that have established this minimal level of judicial scrutiny. Although equal protection limitations likely apply to the Duro-fix, the distinction between (nonmember) Indians and (nonmember) non-Indians would constitute a political and not a race-based distinction. Strict scrutiny would therefore not apply, and a traditional rational basis or modified Mancari rationally-based-in-accordance-with-federal-obligations test would apply. As the purpose of the Duro-fix was to extend tribal jurisdiction—an expansion of tribal sovereignty taken in accordance with the trust relationship—the Duro-fix would likely meet the requirements of either rationality test. Unless the Court is willing to reconsider its political classification of Indians, the Duro-fix is not vulnerable to an equal protection claim.

B. Due Process Violation

Congress passed the Duro-fix to restore the inherent sovereignty that was stripped from tribes by the Supreme Court. Because of this affirmative congressional action, nonmember Indians are subject to criminal prosecution by tribes. The protections available to nonmember Indians facing criminal prosecution include only those lim-

96 See Morton, 417 U.S. at 553 n.24 ("The preference is not directed towards a 'racial' group consisting of 'Indians'... the preference is political rather than racial in nature.").
97 See Williams, supra note 92, at 788 ("[I]f the federal government deals with the tribes as political units, then the law presents no suspect classification").
98 Morton, 417 U.S. at 555.
99 See United States v. Antelope, 430 U.S. 641, 646 (1977) ("Federal regulation... is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions."); Fisher v. Dist. Court, 424 U.S. 382, 391 (1976) ("[S]uch 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.").
ied guarantees provided by Congress in the ICRA and any additional tribal constitutional or statutory provisions. The due process issue that arises is whether Congress may subject American citizens (nonmember Indians) to a judicial system that provides fewer due process protections then are required by the Constitution even though Congress has the authority to define the exact individual protections available to defendants in that court. More specifically, is Congress’s failure to provide a right to counsel in ICRA to nonmember Indians in tribal court a violation of a nonmember Indian’s due process rights under the Constitution? Although the Court has hinted otherwise, the answer to this question should be no, as no viable due process claim exists under the current landscape of federal law.

Before endeavoring to answer this question, it should be noted why this analysis is limited to nonmember Indians: in other words, why does an Indian who is prosecuted by his own tribe not have the same footing for this claim as an Indian prosecuted by a tribe in which he or she is not a member? The Supreme Court has declared that it is “undisputed” that tribes have criminal jurisdiction over their own members. The Court has concluded that Indians, as “a separate people, with the power of regulating their internal and social relations,” retain the right to “prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions.” The Court has shown a greater willingness to accept tribal actions that regulate the tribe’s own people than those that affect nonmembers. The sure footing of tribal jurisdiction over tribal members is rooted in the ability of members to shape the content of tribal law and its protections through the political process. This same footing is absent for (Indian and non-Indian) nonmembers who, as political outsiders, have no internal avenue to address and define the scope of rights provided by the tribal authority. The inability of nonmember Indians to establish and change tribal law through the political process places nonmember Indians in a stronger position to assert a due process argument than member Indians whose prosecution represents the “regulat[ion of] . . . internal and social relations.”

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100 See United States v. Wheeler, 435 U.S. 313, 322 (1978) ("It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members.").
101 See id.
103 Wheeler, 435 U.S. at 322.
104 See Duro v. Reina, 495 U.S. 676, 679 (1990) (“We hold that the retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership.").
105 See Duro, 495 U.S. at 694 (“Retained criminal jurisdiction over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent.").
106 Kagama, 118 U.S. at 382.
In *Duro*, the court noted that the lack of complete due process protections available to nonmember Indians in tribal court might represent a due process violation. However, the Court did not conclude whether the prosecution violated Duro's due process rights. The Court, in suggesting the existence of a due process problem in *Duro*, referenced only one case, *Reid v. Covert*, to support this proposition. In *Reid*, the Court was reviewing the military trial of a serviceman's spouse. Ms. Covert was tried and convicted by a military court-martial for killing her husband, a sergeant in the Air Force, on a military base abroad. In her military prosecution, Ms. Covert was not provided the full scope of due process rights afforded to an individual in civil courts; most notably, she was not given the opportunity to have her case heard by a jury.

The Court framed the significant principle to be decided in *Reid* as the determination of whether it is within "the power of Congress to expose civilians to trial by military tribunals . . . with[out] all the safeguards of the Bill of Rights." The Court has regularly held that Congress may authorize prosecutions of members of the military under the lesser protections provided by military courts. In *Reid*, the Court asked whether an American citizen who is not a member of the military may similarly be subjected to military prosecution in peacetime. The *Reid* Court held that American citizens not serving in the military who are tried abroad by United States military officials in peacetime are entitled to Fifth and Sixth Amendment protections. The Court concluded in *Reid* that, "[w]hen the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life

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107 See *Duro*, 495 U.S. at 693 ("Our cases suggest constitutional limitations . . . 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.").


109 The Court asserts that cases, plural, align with this conclusion, but only explicitly supports this point by referencing a single case, *Reid*. See *Duro*, 495 U.S. at 693.

110 See *Reid*, 354 U.S. at 3 (describing how Mrs. Covert, who was not military personnel, killed her husband, a sergeant in the United States Air Force, on a base in England and explaining that she was tried and convicted by court-martial for murder).

111 *Id.*

112 See *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 240-41 (1960) ("The test for jurisdiction . . . is one of status, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.'") (emphasis in original); *Solorio v. United States*, 483 U.S. 435, 439 (1987) ("In an unbroken line of decisions from 1866 to 1960, this Court interpreted the Constitution as conditioning the proper exercise of court-martial jurisdiction over an offense on one factor: the military status of the accused.").

113 See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 263 (1990) (noting how the District Court cited to *Reid* for the proposition that "American citizens tried by United States military authorities in a foreign country were entitled to the protections of the Fifth and Sixth Amendments," and concluded that "'[t]he Constitution imposes substantive constraints on the federal government, even when it operates abroad.").
and liberty should not be stripped away . . ."\textsuperscript{114} In spite of the sweeping generality of this language, it should be noted that the Court holding is limited to non-military citizens and is not disallowing such "stripping" in trials of military personnel.

The \textit{Reid} decision provides a ready, but as we will see, flawed analogy to a nonmember Indian seeking to overturn his tribal court trial conviction on due process grounds. A nonmember Indian may analogize himself to Ms. Covert, as he too, an American citizen,\textsuperscript{115} has been subjected to punishment without the complete protections of the Bill of Rights. A nonmember Indian may have an even more compelling case than Ms. Covert as his conviction occurred within the boundaries of the United States, a seemingly more outrageous venue in which to be denied the constitutional protections than a trial occurring on a military base an ocean away.

Under its Article I power "to make Rules for the Government and Regulation of the land and naval Forces,"\textsuperscript{116} Congress has wide latitude to determine the procedure and protections available to military personnel tried by military tribunals.\textsuperscript{117} However, when the military deals with civilians, as in the case of Ms. Covert, the Court has been chary of extending the same discretion. The resulting status-based jurisdictional rules for military trials provide a convenient model for determining the extent of protections available in tribal courts. Through analogy, tribal members, similar to military personnel subject to lesser protections in military proceedings, may face the less encumbered powers of the tribe; as military personnel lose the benefit of these protections by entering the military, so too does an Indian joining his tribe. In contrast, nonmembers should be entitled to full protections in tribal actions in the same way civilians facing prosecution in peacetime military tribunals are ensured their full rights. Neither nonmembers nor non-servicemen have voided their full rights through membership, and thus both should be entitled to the full protections of the Bill of Rights.

\textsuperscript{114} \textit{Reid}, 354 U.S. at 6.

\textsuperscript{115} That he is an American citizen is important to this analysis. For example, see \textit{Verdugo-Urquidez}, 494 U.S. at 270, where the Court specifically noted that \textit{Reid}'s holding does not apply to non-citizens. ("Since respondent is not a United States citizen, he can derive no comfort from the \textit{Reid} holding.").

\textsuperscript{116} U.S. CONST. art. I, § 8, cl. 14.

\textsuperscript{117} See \textit{Solorio}, 483 U.S. at 439 (noting the Constitution's conferral of congressional authority to regulate the land and naval forces, thus enabling Congress to try servicemembers via court-martial). The Constitution grants to Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8, cl. 14. Exercising this authority, Congress has empowered courts-martial to try servicemen for the crimes proscribed by the Uniform Code of Military Justice.
The Court in *Reid* was wary of government attempts to restrict the applicability of the protections of the Bill of Rights for reasons of convenience:

The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government. An inconvenience-based rationale for providing incomplete protections was the entire reasoning behind Congress's decision to pass the ICRA without a right to counsel provision. Congress left out this protection because it believed that the provision of counsel would be too costly for limited tribal budgets (many of which rely heavily on federal financial support), and because many reservations were not geographically near a pool of attorneys that could provide legal services to all indigent clients. The decision to limit protections in the ICRA relies on arguments of financial convenience, the exact underpinnings that *Reid* worried would "undermine" our government.

The surface parallels that suggest a status-based tribal court theory might appropriately mirror a status-based military court theory do not hold up upon deeper examination of the sources of these two authorities. In military tribunals, citizens and military personnel are treated differently because the source for such prosecutions originates in Congress's constitutional authority to regulate "land and naval forces." Only prosecutions that can be justified under this objective are permitted, and, as prosecuting civilians in peacetime does not fall within this power, citizen civilians may not be subjected to military prosecutions. However, unlike military trials, tribal court actions are not authorized, and thus, limited, by the Constitution. As was reinforced in *Lara*, tribes prosecute nonmembers and members under the authority of the tribe's own sovereignty. In *Lara*, the Court made clear that the source of authority for tribal prosecutions does not originate from a federal delegation of power, but instead stems from the inherent retained sovereignty of the tribe. Because the source of authority is tribal sovereignty, a (United States) court has no constitutional handle akin to the "land and naval forces" provision with which to probe for federal government action that has gone beyond federally provided constitutional authority. There simply can be no interpretation that the federal government has exceeded its textually granted power, as was the Court's conclusion in *Reid*, where the fed-

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

119 *See id.* at 35 ("As this Court [has] stated . . . the business of soldiers is to fight and prepare to fight wars, not to try civilians for their alleged crimes.") (citing United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955)).
general government is not the sovereign actor in question. Thus, any attempt to analogize tribal nonmembers to military nonmembers falls flat because the source of authority and limitations for federal military judicial action is constitutional while the source for tribal judicial actions is the extra-constitutional authority of a tribal sovereign.

The simple showing that there has been an incomplete provision of constitutional protections, therefore, does not complete the analogy. In *Reid*, the Court was reviewing a trial pursued under federal authorities bound by the Constitution. In *Lara*, the Court made clear that the authority for tribal prosecution was not federal power, but tribal sovereignty. After *Lara*, asserting that the punisher in a tribal case is the federal government becomes exceedingly difficult. A challenger may attempt to draw scrutiny to the missing protections in the ICRA by suggesting that the entanglement exception to the state action doctrine could apply to tribal actions, but this argument seems too great a stretch considering the tribal source of authority is tribal sovereignty. An individual may also seek to persuade the Court that the broader principle behind *Reid*—Congress should avoiding placing citizens in the line of prosecution lacking full constitutional protections—carries more weight than the technical differences between military and tribal courts.

V. IMPORTANCE OF JURISDICTION TO EFFECTIVE TRIBAL GOVERNANCE

The inclusion of nonmember Indians within tribal jurisdiction is not only Constitutional, but is also important for effective tribal governance. Indians of various tribal memberships often participate in the social structure of an individual reservation. The existence of intertribal social events, including intertribal rodeos and pow-

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120 The state action doctrine requires (state or federal) government action to trigger Fourteenth Amendment concerns. The Court has developed a number of exceptions, including the "entanglement" exception, which allows for the extension of the Fourteenth Amendment where the government is entangled with private entities through subsidies, licensing, and regulation, among others. See generally CHEMERINSKY, supra note 43, at 478–86 (discussing the evolution of incorporation). Applying the entanglement application in this case would depend upon an argument that the federal government is so intertwined in the regulation of tribal government, both structurally and financially, that tribes' actions and due process violations can be superimposed on the federal government. The federal government would, therefore, be responsible for the violations, and would be required to fix (likely by amending the ICRA to include the full degree of Bill or Rights protections) the violation. However, as the source of authority for tribal action has been so explicitly defined as originating from a sovereign distinct from the federal government, a court would have to extend the entanglement doctrine from individuals to sovereigns, a seemingly unlikely application of the exception.

121 See infra notes 122–24 (describing intertribal events).

122 All-Indian rodeos occur on and off reservations in Arizona, Montana, Colorado, Florida, and other states. See, e.g., Indian Rodeo News, www.indianrodeonews.com (last visited Jan. 5,
creates a fluid movement of Indians through different regions and reservations. The mobility of tribal members and prevalence of intertribal social events have led to tribal intermarriage, multi-tribal children, and nonmember Indian reservation residency. With the fluidity of movement and marriage, some reservations may find a significant minority of its residents and visitors are Indians with an ancestral background different than that of the governing tribe. As a result of the regular involvement of nonmember Indians in tribal activities and communities, these cross-reservation Indians are "far more integrated into an American-Indian community than tourists in a foreign land."

Tribal jurisdiction over nonmember Indians is therefore important to ensure effective tribal self-determination. Without jurisdiction, tribes would lack authority to regulate and hold accountable a minority population that regularly participates, typically properly, but occasionally improperly, in tribal life. Because this justification for jurisdiction presumes a need based on the likelihood of future tribal prosecutions of nonmember Indians, nonmember Indians will certainly be placed within the acting powers of tribal courts. The regular exertion of tribal jurisdiction over nonmember Indians should trigger concern for the level of respect for civil rights afforded to these

2005) (listing Indian rodeo events and providing an online dating service, "The Hitch," a service likely to facilitate the creation of intertribal relationships).


124 See, e.g., Karen Ivanova, The Tapestry of Indian Ancestry: Data Offers First Look at Diversity of Native American Lineage, GREAT FALLS TRIBUNE ONLINE, available at http://www.greatfallstribune.com/communities/census2000/20010708/754973.html ("Carol Juneau can count a lot of nations on her family tree. A state representative from the Blackfeet Indian Reservation, Juneau is half Hidatsa-Mandan and half Norwegian. Her husband, Stan, is mostly Blackfeet, but also claims Tlingit-Haida blood from Alaska, Oneida blood from Wisconsin and French and English ancestry.").

125 See, e.g., id. (describing Rosebud County, Montana, site of a portion of the Northern Cheyenne Reservation, as including "113 Sioux, 8 Apache, 21 Blackfeet, 18 Chippewa and 12 Navajo" among its population).


127 That the involvement of nonmember Indians in social relationships and reservation life is typically greater than that of nonmember non-Indians presents a possible logical justification for Congress's decision to extend tribal jurisdiction to nonmember Indians without making a similar "Oliphant-fix" for non-Indians. See Duro v. Reina, 495 U.S. 676, 685–87 (1989) (describing the distinction between members and nonmembers in terms of self-governance and internal relations); see also infra note 34 (citing the "Duro-fix" legislation). Congress's decision may reflect a belief that tribes have a greatest need to regulate and manage those who have large roles in tribal society, and thus tribes should be permitted jurisdiction over more commonly integrated nonmember Indians. There are other possible justifications for drawing the jurisdiction line at the Indian/non-Indian, rather than member/nonmember or the presence of sufficient contacts, but this seems the most logical.
individuals by tribal governments; any assertion of government power should make individuals, especially those excluded from voting in that political system, wary of the possible application of unfair procedural or substantive laws that fail to acknowledge individual liberties. However, considering the enforceability of a fairly comprehensive set of protections in the ICRA in federal and tribal court, and the continuing development of tribal governments, this issue provides less ground for concern than one might imagine upon first blush. Tribes, as opposed to the federal government, are also in the best position to regulate and prosecute those individuals who, when interacting with the reservation community, commit on-reservation crimes. The expansion of tribal authority to independently govern should outweigh civil rights concerns, or at least suggest the best way to ensure these rights is to work cooperatively with tribal governments rather than to terminate their jurisdiction.

CONCLUSION

A nonmember Indian seeking to invalidate a tribal conviction on the grounds of a violation of due process or equal protection rights faces a number of challenges. An individual who overcomes the logistical difficulties of securing counsel and capturing the short window of availability for a habeas petition succeeds only in gaining the opportunity to bring a claim opposed by a series of Supreme Court precedents that unfavorably: (1) interpret the ICRA, (2) define equal protection jurisprudence for Indians, and (3) exempt Indian sovereigns from the application of the Bill of Rights. A nonmember Indian would, therefore, require one of the following changes in law to be successful: the Court would have to establish a new interpretation of the ICRA to apply its due process clause in a manner repeatedly disavowed in federal court opinions and legislative history; the Supreme Court would have to set aside its decision in Mancari or perform an extremely strained rational basis analysis to create an equal protection violation; or, the Court would have to eviscerate (but not overturn) the long standing doctrine developed in Talton by requiring Bill of Rights protections be applied to tribal governments when trying nonmembers.

Although none of these arguments have strong support in current interpretations and precedent, the Supreme Court has indicated its interest in hearing this case (in Lara), and suggested (in Duro) that

128 This wariness does not originate from any specific concerns as to Indian governments. All governments have the potential to abuse their power. Individuals and advocates for human rights and civil liberties protections should be watchful of how all governments, including those managed by tribes, use their police and prosecutorial powers.
such actions against nonmember American citizens may be constitutionally impermissible. The Court's interest in this case suggests it may view a nonmember Indian's arguments in a more favorable light and/or may be willing to dispense with (or distinguish from) previous precedent to reach that result. The Court's easiest avenue to strengthen the due process requirements in tribal courts while avoiding constitutional questions is to interpret the ICRA due process clause to include a right to counsel. If the Court is instead interested in reexamining the constitutional underpinnings of Indian law, the Court may be willing to revisit *Talton* and apply Bill of Rights protections to tribes. The outcome of this currently hypothetical, but likely real, future case therefore may swing less on the state of present law and more on the interest of the Justices in redefining the limits on tribal sovereignty.