

THE BLUE PRINT

U.S. Supreme Court Justices provide a Blue Print
For gaining their interest in hearing specific
Subject matter

1. Justice Blackmun, who delivered a unanimous opinion for the Court in *Morton v. Mancari*, 417 U.S. 535, 541 (1974), made the following statement.

"Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the B.I.A., single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians were deemed invidious racial discrimination, an entire Title of the United States code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government towards Indians would be jeopardized."

2. The *U.S. v. Lara* case (no. 03-107) decided April 19, 2004, Justice Thomas, in his concurring in the judgment, asked questions and made comments relative to the history of the Courts wavering approach to handling of "Indian Law". Justice Souter, with whom Justice Scalia joins dissenting, made similar comments and stated concerns on the same subject. The following eleven pages present their concerns and provide us more of the Blue Print.

Justice Thomas, concurring in the judgment.

As this case should make clear, the time has come to reexamine the premises and logic of our tribal sovereignty cases. It seems to me that much of the confusion reflected in our precedent arises from two largely incompatible and doubtful assumptions. First, Congress (rather than some other part of the Federal Government) can regulate virtually every aspect of the tribes without rendering tribal sovereignty a nullity. See, *e.g.*, *United States v. Wheeler*, [435 U. S. 313, 319](#) (1978). Second, the Indian tribes retain inherent sovereignty to enforce their criminal laws against their own members. See, *e.g.*, *id.*, at 326. These assumptions, which I must accept as the case comes to us, dictate the outcome in this case, and I therefore concur in the judgment.

I write separately principally because the Court fails to confront these tensions, a result that flows from the Court's inadequate constitutional analysis. I cannot agree with the Court, for instance, that the Constitution grants to Congress plenary power to calibrate the "metes and bounds of tribal sovereignty." *Ante*, at 8; see also *ante*, at 15 (holding that "the Constitution authorizes Congress" to regulate tribal sovereignty). Unlike the Court, *ante*, at 5-6, I cannot locate such congressional authority in the Treaty Clause, U. S. Const., Art. II, §2, cl. 2, or the Indian Commerce Clause, Art. I, §8, cl. 3. Additionally, I would ascribe much more significance to legislation such as the Act of Mar. 3, 1871, Rev. Stat. §2079, 16 Stat. 566, codified at 25 U. S. C. §71, that purports to terminate the practice of dealing with Indian tribes by treaty. The making of treaties, after all, is the one mechanism that the Constitution clearly provides for the Federal Government to interact with sovereigns other than the States. Yet, if I accept that Congress does have this authority, I believe that the result in *Wheeler* is questionable. In my view, the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously.

I

In response to the Court's decision in *Duro v. Reina*, [495 U. S. 676](#) (1990) (holding that the tribes lack inherent authority to prosecute nonmember Indians), Congress amended the Indian Civil Rights Act of 1968 (ICRA). Specifically, through this "*Duro* fix," Congress amended ICRA's definition of the tribes' "powers of self-government" to "recogniz[e] and affir[m]" the existence of "inherent power ... to exercise criminal jurisdiction over all Indians." 25 U. S. C. §1301(2). There is quite simply no way to interpret a recognition and affirmation of inherent power as a delegation of federal power, as the Court explains. *Ante*, at 4-5. Delegated power is the very antithesis of inherent power.

But even if the statute were less clear, I would not interpret it as a delegation of federal power. The power to bring federal prosecutions, which is part of the putative delegated power, is manifestly and quintessentially executive power. *Morrison v. Olson*, [487 U. S. 654, 691](#) (1988); *id.*, at 705 (*Scalia*, J., dissenting). Congress cannot transfer federal executive power to individuals who are beyond "meaningful Presidential control." *Printz v. United States*, [521 U. S. 898, 922-923](#) (1997). And this means that, at a minimum, the President must have some measure of "the power to appoint and remove" those exercising that power. *Id.*, at 922; see also *Morrison, supra*, at 706-715 (*Scalia*, J., dissenting).

It does not appear that the President has any control over tribal officials, let alone a substantial measure of the appointment and removal power. Cf. Brief for National Congress of American Indians as *Amicus Curiae* 27-29. Thus, at least until we are prepared to recognize absolutely independent agencies entirely outside of the Executive Branch with the power to bind the Executive Branch (for a tribal prosecution would then bar a subsequent federal prosecution), the tribes cannot be analogized to administrative agencies, as the dissent suggests, *post*, at 2 (opinion of *Souter*, J.). That is, reading the "*Duro* fix" as a delegation of federal power (without also divining some adequate method of Presidential control) would create grave constitutional difficulties. Cf. *INS v. St. Cyr*, [533 U. S. 289, 299-300](#) (2001); *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, [531 U. S. 159, 173](#) (2001). Accordingly, the Court has only two options: Either the "*Duro* fix" changed the result in *Duro* or it did nothing at all.¹

II

In *Wheeler*, [435 U. S.](#), at 322-323, the Court explained that, prior to colonization, "the tribes were self-governing sovereign political communities." The Court acknowledged, however, that, after "[t]heir incorporation within the territory of the United States," the tribes could exercise their inherent sovereignty only as consistent with federal policy embodied in treaties, statutes, and Executive Orders. *Id.*, at 323; see also *id.*, at 327-328. Examining these sources for potential conflict, the Court concluded that the tribes retained the ability to exercise their inherent sovereignty to punish their own members. *Id.*, at 323-330.

Although *Wheeler* seems to be a sensible example of federal common lawmaking, I am not convinced that it was correctly decided. To be sure, it makes sense to conceptualize the tribes as sovereigns that, due to their unique situation, cannot exercise the full measure of their sovereign powers. *Wheeler*, at times, seems to analyze the problem in just this way. See, e.g., *id.*, at 323-326; *id.*, at 323 (relying on *Oliphant v. Suquamish Tribe*, [435 U. S. 191](#) (1978), discussed *infra*).

But I do not see how this is consistent with the apparently "undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government." [435 U. S.](#), at 319. The sovereign is, by definition, the entity "in which independent and supreme authority is vested." Black's Law Dictionary 1395

(6th ed. 1990). It is quite arguably the essence of sovereignty not to exist merely at the whim of an external government.

Further, federal policy itself could be thought to be inconsistent with this residual-sovereignty theory. In 1871, Congress enacted a statute that purported to prohibit entering into treaties with the "Indian nation[s] or tribe[s]." 16 Stat. 566, codified at 25 U. S. C. §71. Although this Act is constitutionally suspect (the Constitution vests in the President both the power to make treaties, Art. II, §2, cl. 2, and to recognize foreign governments, Art. II, §3; see, e.g., *United States v. Pink*, [315 U. S. 203, 228-230](#) (1942)), it nevertheless reflects the view of the political branches that the tribes had become a purely domestic matter.

To be sure, this does not quite suffice to demonstrate that the tribes had lost their sovereignty. After all, States retain sovereignty despite the fact that Congress can regulate States *qua* States in certain limited circumstances. See, e.g., *Katzenbach v. Morgan*, [384 U. S. 641](#) (1966); cf. *New York v. United States*, [505 U. S. 144](#), 160-161 (1992); *Garcia v. San Antonio Metropolitan Transit Authority*, [469 U. S. 528](#) (1985). But the States (unlike the tribes) are part of a constitutional framework that allocates sovereignty between the State and Federal Governments and specifically grants Congress authority to legislate with respect to them, see U. S. Const., Amdt. 14, §5. And even so, we have explained that "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *New York*, [505 U. S.](#), at 166; *id.*, at 162-166; see also *Printz*, [521 U. S.](#), at 910-915.

The tribes, by contrast, are not part of this constitutional order, and their sovereignty is not guaranteed by it. As Chief Justice Marshall explained:

"[T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else... .

"[Y]et it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations." *Cherokee Nation v. Georgia*, 5 Pet. 1, 16-17 (1831).

Chief Justice Marshall further described the tribes as "independent political communities, retaining their original natural rights," and specifically noted that the tribes possessed the power to "mak[e] treaties." *Worcester v. Georgia*, 6 Pet. 515, 559 (1832). Although the tribes never fit comfortably within the category of foreign nations, 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.² Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse federal Indian law and our cases.

Nevertheless, if I accept *Wheeler*, I also must accept that the tribes do retain inherent sovereignty (at least to enforce their criminal laws against their own members) and the logical consequences of this fact. In *Heath v. Alabama*, [474 U. S. 82, 88](#) (1985), the Court elaborated the dual sovereignty doctrine and explained that a single act that violates the " 'peace and dignity' of two sovereigns by breaking the laws of each," constitutes two separate offenses. This, of course, is the reason that the Double Jeopardy Clause does not bar successive prosecutions by separate sovereigns. But whether an act violates the "peace and dignity" of a sovereign depends not in the least on whether the perpetrator is a member (in the case of the tribes) or a citizen (in the case of the States and the Nation) of the sovereign.

Heath also instructs, relying on *Wheeler*, that the separate-sovereign inquiry "turns on whether the two entities draw their authority to punish the offender from distinct sources of power." *Heath, supra*, at 88. But *Wheeler* makes clear that the tribes and the Federal Government do draw their authority to punish from distinct sources and that they are separate sovereigns. Otherwise, the subsequent federal prosecution in *Wheeler* would have violated the Double Jeopardy Clause.³ It follows from our case law that Indian tribes possess inherent sovereignty to punish *anyone* who violates their laws.

In *Duro v. Reina*, [495 U. S. 676](#) (1990), the Court held that the Indian tribes could no longer enforce their criminal laws against nonmember Indians. Despite the obvious tension, *Duro* and *Wheeler* are not necessarily inconsistent. Although *Wheeler* and *Heath*, taken together, necessarily imply that the tribes retain inherent sovereignty to try anyone who violates their criminal laws, *Wheeler* and *Duro* make clear that conflict with federal policy can operate to prohibit the exercise of this sovereignty. *Duro*, then, is not a case about "inherent sovereignty" (a term that we have used too imprecisely); rather, it is a case about whether a specific exercise of tribal sovereignty conflicts with federal policy.

Indeed, the Court in *Duro* relied primarily on *Oliphant v. Suquamish Tribe*, [435 U. S. 191](#) (1978), which held that tribes could not enforce their criminal laws against non-Indians. In reaching that conclusion, the Court in *Oliphant* carefully examined the views of Congress and the Executive Branch. *Id.*, at 197-206 (discussing treaties, statutes, and views of the Executive Branch); *id.*, at 199 (discussing Attorney General opinions, including 2 Op. Atty. Gen. 693 (1834) (concluding that tribal exercise of criminal jurisdiction over non-Indians was inconsistent with various treaties)). *Duro* at least rehearsed the same analysis. [495 U. S., at 688-692](#). Thus, although *Duro* is sprinkled with references to various constitutional concerns, see, e.g., *id.*, at 693-694, *Duro*, *Oliphant*, and *Wheeler* are classic federal-common-law decisions. See also *County of Oneida v. Oneida Indian Nation of N. Y.*, [470 U. S. 226, 233-236](#) (1985).

I acknowledge that our cases have distinguished between "tribal power [that] is necessary to protect tribal self-government or to control internal relations" and tribal power as it relates to the external world. *Montana v. United States*, [450 U. S. 544, 564](#) (1981); see also *Nevada v. Hicks*, [533 U. S. 353, 358-359](#) (2001); *South Dakota v. Bourland*, [508 U. S. 679, 695](#), n. 15 (1993); *Duro, supra*, at 685-686; *Wheeler*, [435 U. S., at 322-325](#). This distinction makes perfect sense as a matter of federal common law:

Purely "internal" matters are by definition unlikely to implicate any federal policy. But, critically, our cases have never drawn this line as a constitutional matter. That is why we have analyzed extant federal law (embodied in treaties, statutes, and Executive Orders) before concluding that particular tribal assertions of power were incompatible with the position of the tribes. See, e.g., *National Farmers Union Ins. Cos. v. Crow Tribe*, [471 U. S. 845, 853-854](#) (1985); *Oliphant, supra*, at 204 ("While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago [referring to *In re Mayfield*, [141 U. S. 107](#) (1891)] that Congress consistently believed this to be the necessary result of its repeated legislative actions").⁴

As noted, in response to *Duro*, Congress amended ICRA. Specifically, Congress "recognized and affirmed" the existence of "inherent power ... to exercise criminal jurisdiction over all Indians." 25 U. S. C. §1301(2). President Bush signed this legislation into law. See 27 Weekly Comp. of Pres. Doc. 1573 (1991). Further, as this litigation demonstrates, it is the position of the Executive Branch that the tribes possess inherent authority to prosecute nonmember Indians.

In my view, these authoritative pronouncements of the political branches make clear that the exercise of this aspect of sovereignty is not inconsistent with federal policy and therefore with the position of the tribes. Thus, while *Duro* may have been a correct federal-common-law decision at the time, the political branches have subsequently made clear that the tribes' exercise of criminal jurisdiction against nonmember Indians is consistent with federal policy. The potential conflicts on which *Duro* must have been premised, according to the political branches, do not exist. See also *ante*, at 10-11. I therefore agree that, as the case comes to us, the tribe acted as a separate sovereign when it prosecuted respondent. Accordingly, the Double Jeopardy Clause does not bar the subsequent federal prosecution.

III

I believe that we must examine more critically our tribal sovereignty case law. Both the Court and the dissent, however, compound the confusion by failing to undertake the necessary rigorous constitutional analysis. I would begin by carefully following our assumptions to their logical conclusions and by identifying the potential sources of federal power to modify tribal sovereignty.

The dissent admits that "[t]reaties and statutes delineating the tribal-federal relationship are properly viewed as 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 own membership." *Post*, at 3. To the extent that this is a description of the federal-common-law process, I agree. But I do not understand how the dissent can then conclude that "the jurisdictional implications [arising from this analysis are] constitutional in nature." *Ibid*. By this I understand the

dissent to mean that Congress cannot alter the result, though the dissent never quite says so.

The analysis obviously has constitutional implications. It is, for example, dispositive of respondent's double jeopardy claim. But it does not follow that this Court's federal-common-law decisions limiting tribes' authority to exercise their inherent sovereignty somehow become enshrined as constitutional holdings that the political branches cannot alter. When the political branches demonstrate that a particular exercise of the tribes' sovereign power is in fact consistent with federal policy, the underpinnings of a federal-common-law decision disabling the exercise of that tribal power disappear. Although I do not necessarily agree that the tribes have any residual inherent sovereignty or that Congress is the constitutionally appropriate branch to make adjustments to sovereignty, see Part II, *supra*, it is important to recognize the logical implications of these assumptions.

Similarly unavailing is the dissent's observation that when we perform the separate-sovereign analysis "we are undertaking a constitutional analysis based on legal categories of constitutional dimension." *Post*, at 4. The dissent concludes from this that our double jeopardy analysis in this context "must itself have had constitutional status." *Ibid*. This *ipse dixit* does not transform our common-law decisions into constitutional holdings. Cf. *Dickerson v. United States*, [530 U. S. 428, 459-461](#) (2000) (*Scalia, J., dissenting*).

I do, however, agree that this case raises important constitutional questions that the Court does not begin to answer. The Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty. The Court cites the Indian Commerce Clause and the treaty power. *Ante*, at 5-6. I cannot agree that the Indian Commerce Clause " 'provide[s] Congress with plenary power to legislate in the field of Indian affairs.' " *Ante*, at 6 (quoting *Cotton Petroleum Corp. v. New Mexico*, [490 U. S. 163, 192](#) (1989)). At one time, the implausibility of this assertion at least troubled the Court, see, e.g., *United States v. Kagama*, [118 U. S. 375, 378-379](#) (1886) (considering such a construction of the Indian Commerce Clause to be "very strained"), and I would be willing to revisit the question. Cf., e.g., *United States v. Morrison*, [529 U. S. 598](#) (2000); *United States v. Lopez*, [514 U. S. 549](#) (1995); *id.*, at 584-593 (*Thomas, J., concurring*).

Next, the Court acknowledges that "[t]he treaty power does not literally authorize Congress to act legislatively, for it is an Article II power authorizing the President, not Congress, 'to make Treaties.' " *Ante*, at 6 (quoting U. S. Const., Art. II, §2, cl. 2). This, of course, suffices to show that it provides *no* power to Congress, at least in the absence of a specific treaty. Cf. *Missouri v. Holland*, [252 U. S. 416](#) (1920). The treaty power does not, as the Court seems to believe, provide Congress with free-floating power to legislate as it sees fit on topics that could potentially implicate some unspecified treaty. Such an assertion is especially ironic in light of Congress' enacted prohibition on Indian treaties.

In the end, the Court resorts to citing past examples of congressional assertions of this or similar power. *Ante*, at 7-9. At times, such history might suffice. Cf. *Dames & Moore v. Regan*, [453 U. S. 654, 686](#) (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, [343 U. S.](#)

[579, 610-611](#) (1952) (Frankfurter, J., concurring). But it does not suffice here for at least two reasons. First, federal Indian law is at odds with itself. I find it difficult to reconcile the result in *Wheeler* with Congress' 1871 prospective prohibition on the making of treaties with the Indian tribes. The Federal Government cannot simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain that the tribes possess anything resembling "sovereignty." See Part II, *supra*. In short, the history points in both directions.

Second, much of the practice that the Court cites does not actually help its argument. The "Insular Cases," which include the Hawaii and Puerto Rico examples, *ante*, at 9, involved Territories of the United States, over which Congress has plenary power to govern and regulate. See *Reid v. Covert*, [354 U. S. 1, 13](#) (1957); U. S. Const., Art. IV, §3, cl. 2. The existence of a textual source for congressional power distinguishes these cases. And, incidentally, although one might think that Congress' authority over the tribes could be found in Article IV, §3, cl. 2, the Court has held that the territories are the United States for double-jeopardy purposes, see, e.g., *Wheeler*, [435 U. S., at 321-322](#); *Puerto Rico v. Shell Co. (P. R.), Ltd.*, [302 U. S. 253, 264-266](#) (1937), which would preclude the result in *Wheeler*. It is for this reason as well that the degree of autonomy of Puerto Rico is beside the point. See *Wheeler, supra*, at 321; *post*, at 4.

The Court should admit that it has failed in its quest to find a source of congressional power to adjust tribal sovereignty. Such an acknowledgement might allow the Court to ask the logically antecedent question *whether* Congress (as opposed to the President) has this power. A cogent answer would serve as the foundation for the analysis of the sovereignty issues posed by this case. We might 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. But until we begin to analyze these questions honestly and rigorously, the confusion that I have identified will continue to haunt our cases.

UNITED STATES, PETITIONER *v.* BILLY JO LARA

on writ of certiorari to the united states court of appeals for the eighth circuit

[April 19, 2004]

Justice Souter, with whom *Justice Scalia* joins, dissenting.

It is as true today as it was in 1886 that the relationship of Indian tribes to the National Government is "an anomalous one and of a complex character." *United States v. Kagama*, [118 U. S. 375, 381](#). Questions of tribal jurisdiction, whether legislative or judicial, do not get much help from the general proposition that tribes are "domestic dependent nations," *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831), or "wards of the [American] nation." *Kagama, supra*, at 383. Our cases deciding specific questions, however, demonstrate that the tribes do retain jurisdiction necessary to protect tribal self-government or control internal tribal relations, *Montana v. United States*, [450 U. S. 544, 564](#) (1981), including the right to prosecute tribal members for crimes, *United States v. Wheeler*, [435 U. S. 313, 323-324](#) (1978), a sovereign right that is "inherent," *ibid.*, but neither exclusive, *Kagama, supra*, at 384-385 (federal criminal jurisdiction), nor immune to abrogation by Congress, *Wheeler, supra*, at 323 ("the sufferance of Congress"). Furthermore, except as provided by Congress, tribes lack criminal jurisdiction over non-Indians, *Oliphant v. Suquamish Tribe*, [435 U. S. 191, 212](#) (1978), and over nonmember Indians, *Duro v. Reina*, [495 U. S. 676, 685, 688](#) (1990).

Of particular relevance today, we held in *Duro* that because tribes have lost their inherent criminal jurisdiction over nonmember Indians, any subsequent exercise of such jurisdiction "could only have come to the Tribe" (if at all) "by delegation from Congress." *Id.*, at 686. Three years later, in *South Dakota v. Bourland*, [508 U. S. 679](#) (1993), we reiterated this understanding that any such "delegation" would not be a restoration of prior inherent sovereignty; we specifically explained that "tribal sovereignty over nonmembers cannot survive without express congressional delegation, and is therefore *not* inherent." *Id.*, at 695, n. 15 (emphasis in original, citation and internal quotation marks omitted).¹ Our precedent, then, is that any tribal exercise of criminal jurisdiction over nonmembers necessarily rests on a "delegation" of federal power and is not akin to a State's congressionally permitted exercise of some authority that would otherwise be barred by the dormant Commerce Clause, see *New York v. United States*, [505 U. S. 144, 171](#) (1992). It is more like the delegation of lawmaking power to an administrative agency, whose jurisdiction would not even exist absent congressional authorization.

It is of no moment that we have given ostensibly alternating explanations for this conclusion. We have sometimes indicated that the tribes' lack of inherent criminal jurisdiction over nonmembers is a necessary legal consequence of the basic fact that the tribes are dependent on the Federal Government. *Wheeler, supra*, at 326 ("[The tribes' inability to] try nonmembers in tribal courts... . rest[s] 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"); *Oliphant*, [435 U. S., at 210](#) ("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 ..."). At other times, our language has suggested that the jurisdictional limit stems from congressional and treaty limitations on tribal powers. See *id.*, at 204 ("Congress' various actions and inactions in regulating criminal jurisdiction on Indian reservations demonstrated an intent to reserve jurisdiction over non-Indians for the federal courts"); *National Farmers Union Ins. Cos. v. Crow Tribe*, [471 U. S. 845, 853-854](#) (1985) ("In *Oliphant* we ... concluded that federal legislation conferring jurisdiction on the federal

courts to try non-Indians for offenses committed in Indian Country had implicitly preempted tribal jurisdiction"). What has never been explicitly stated, but should come as no surprise, is that these two accounts are not inconsistent. Treaties and statutes delineating the tribal-federal relationship are properly viewed as 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 own memberships.

What 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, certainly so far as its significance under the Double Jeopardy Clause is concerned. Our discussions of Indian sovereignty have naturally focused on the scope of tribes' inherent legislative or judicial jurisdiction. *E.g.*, *Nevada v. Hicks*, [533 U. S. 353](#) (2001) (jurisdiction of tribal courts over civil suit against state official); *South Dakota v. Bourland*, *supra* (tribal regulations governing hunting and fishing). And application of the double jeopardy doctrine of dual sovereignty, under which one independent sovereign's exercise of criminal jurisdiction does not bar another sovereign's subsequent prosecution of the same defendant, turns on just this question of how far a prosecuting entity's inherent jurisdiction extends. *Grafton v. United States*, [206 U. S. 333, 354-355](#) (1907). When we enquire "whether the two [prosecuting] entities draw their authority to punish the offender from distinct sources of power," *Heath v. Alabama*, [474 U. S. 82, 88](#) (1985), in other words, we are undertaking a constitutional analysis based on legal categories of constitutional dimension (*i.e.*, is this entity an independent or dependent sovereign?). Thus, our application of the doctrines of independent and dependent sovereignty to Indian tribes in response to a double jeopardy claim must itself have had constitutional status. See *Wheeler*, [435 U. S., at 326](#) (holding that tribes' inability to prosecute nonmembers "rest[s] 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").

That means that there are only two ways that a tribe's inherent sovereignty could be restored so as to alter application of the dual sovereignty rule: either Congress could grant the same independence to the tribes that it did to the Philippines, see *ante*, at 9, or this Court could repudiate its existing doctrine of dependent sovereignty. The first alternative has obviously not been attempted, and I see no reason for us to venture down a path toward the second. To begin with, the theory we followed before today has the virtue of fitting the facts: no one could possibly deny that the tribes are subordinate to the National Government. Furthermore, while this is not the place to reexamine the concept of dual sovereignty itself, there is certainly no reason to adopt a canon of broad construction calling for maximum application of the doctrine. Finally, and perhaps most importantly, principles of *stare decisis* are particularly compelling in the law of tribal jurisdiction, an area peculiarly susceptible to confusion. And confusion, I fear, will be the legacy of today's decision, for our failure to stand by what we have previously said reveals that our conceptualizations of sovereignty and dependent sovereignty are largely rhetorical.²

I would therefore stand by our explanations in *Oliphant* and *Duro* and hold that Congress cannot reinvest tribal courts with inherent criminal jurisdiction over nonmember Indians. It is not that I fail to appreciate Congress's express wish that the jurisdiction conveyed by statute be treated as inherent, but Congress cannot control the interpretation of the statute in a way that is at odds with the constitutional consequences of the tribes' continuing dependent status. What may be given controlling effect, however, is the principal object of the 1990 amendments to the Indian Civil Rights Act of 1968, 25 U. S. C. §1301 *et seq.*, which was to close "the jurisdictional void" created by *Duro* by recognizing (and empowering) the tribal court as "the best forum to handle misdemeanor cases over non-member Indians," H. R. Rep. No. 102-61, p. 7 (1991). I would therefore honor the drafters' substantive intent by reading the Act as a delegation of federal prosecutorial power that eliminates the jurisdictional gap.³ Finally, I would hold that a tribe's exercise of this delegated power bars subsequent federal prosecution for the same offense. I respectfully dissent.

FOOTNOTES

Footnote 1

I am sympathetic to *Justice Kennedy's* position that we need not resolve the question presented. *Ante*, at 1 (opinion concurring in judgment). If Congress has power to restore tribal authority to prosecute nonmember Indians, respondent's tribal prosecution was the legitimate exercise of a separate sovereign. As such, under the dual sovereignty doctrine, it does not bar his subsequent federal prosecution. On the other hand, if the amendment to ICRA had no effect (the only other possibility), jeopardy did not attach in the tribal prosecution. See, *e.g.*, *Serfass v. United States*, [420 U. S. 377, 391](#) (1975); *Grafton v. United States*, [206 U. S. 333, 345](#) (1907) (noting "that before a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged"); *United States v. Phelps*, 168 F. 3d 1048, 1053-1054 (CA8 1999) (holding tribal court prosecution without jurisdiction did not bar subsequent federal prosecution). Jeopardy could have attached in the tribal prosecution for federal purposes only if the Federal Government had authorized the prosecution. But Congress did not authorize tribal prosecutions, and nothing suggests that the Executive Branch prompted respondent's tribal prosecution.

Footnote 2

Additionally, the very enactment of ICRA through normal legislation conflicts with the notion that tribes possess inherent sovereignty. Title 25 U. S. C. §1302, for example, requires tribes "in exercising powers of self-government" to accord individuals most of the protections in the Bill of Rights. I doubt whether Congress could, through ordinary legislation, require States (let alone foreign nations) to use grand juries.

Footnote [3](#)

I acknowledge that *Wheeler* focused specifically on the tribes' authority to try their own members. See [435 U. S., at 323-330](#). But, as I discuss below, the distinction between the tribes' external and internal powers is not constitutionally required.

Footnote [4](#)

Justice Souter believes that I have overlooked *Oliphant's* reliance on sources other than "treaties, statutes, and the views of the Executive Branch." *Post*, at 5 n. 2. *Justice Souter* quotes the following passage from *Oliphant*: "[E]ven 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 both those powers of autonomous states that are expressly terminated by Congress and those powers *inconsistent with their status*." *Oliphant*, [435 U. S., at 208](#) (internal quotation marks and citation omitted). The second quoted sentence is entirely consistent with federal common lawmaking and is difficult to understand as anything else. I admit that the first sentence, which removes from consideration most of the sources of federal common law, makes the second sentence puzzling. But this is precisely the confusion that I have identified and that I hope the Court begins to resolve.

FOOTNOTES

Footnote [1](#)

Bourland was a civil case about the regulation of hunting and fishing by non-Indians. Its applicability in the criminal context is presumably *a fortiori*.

Footnote [2](#)

Justice Thomas's disagreement with me turns ultimately on his readiness to discard prior case law in this field and, indeed, on his rejection in this very case of the concept of dependent sovereignty. He notes, for example, *ante*, at 6 (opinion concurring in judgment) that the Court in *Heath v. Alabama*, [474 U. S. 82, 88](#) (1985), explained that one act that violates the peace and dignity of two sovereigns constitutes two separate offenses for purposes of double jeopardy. *Justice Thomas* then concludes that whether an act violates a sovereign's peace and dignity does not depend (when the sovereign is an Indian tribe) on whether the perpetrator is a member of the tribe. *Justice Thomas* therefore assumes that tribes "retain inherent sovereignty to try anyone who violates their criminal laws." *Ante*, at 7. This Court, however, has held exactly to the contrary: a tribe has no inherent jurisdiction to prosecute a non member. In rejecting this precedent,

Justice Thomas implicitly rejects the concept of dependent sovereignty, upon which our holdings in *United States v. Wheeler* [435 U. S. 313](#) (1978) and *Oliphant v. Suquamish Tribe* [435 U. S. 191](#) (1978) rested. Reciting *Oliphant's* examination of treaties, statutes, and views of the Executive Branch, *Justice Thomas* attempts to suggest that these opinions were only momentary expressions of malleable federal policy. But he somehow ignores *Oliphant's* own emphasis that its analysis did not rest on historical expressions of federal policy; rather, "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 both those powers of autonomous states that are expressly terminated by Congress *and* those powers *inconsistent with their status.*" *Id.*, at 208 (internal quotation marks and citation omitted; emphasis in original); see also *Duro v. Reina*, [495 U. S. 676, 686](#). There is simply no basis for *Justice Thomas's* recharacterization of this clear holding.

Footnote [3](#)

Justice Thomas suggests that this delegation may violate the separation of powers. *Ante*, at 2-3. But we are not resolving the question whether Lara could be "prosecuted pursuant to ... delegated power," 324 F. 3d 635, 640 (CA8 2002), only whether the prosecution was in fact the exercise of an inherent power, see Pet. for Cert. i, and whether the exercise of a delegated power would implicate the protection against double jeopardy.

3. In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) *Justice Scalia's* statement stands in opposition to *Mancari*, *supra*, as follows: " Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual, see Amdt. 14, 1 ("[N]or shall any State . . . deny to any person" the equal protection of the laws) (emphasis added), and its rejection of dispositions based on race, see Amdt. 15, 1 (prohibiting abridgment of the right to vote "on account of race") or based on blood, see Art. III, 3 ("[N]o Attainder of Treason shall work Corruption of Blood"); Art. I, 9 ("No Title of Nobility shall be granted by the United States"). To pursue the concept of racial entitlement - even for the most admirable and benign of purposes - is to reinforce and preserve for future [ADARAND CONSTRUCTORS, INC. v. PENA, ___ U.S. ___ (1995) , 2] mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American."



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