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Dispelling the Constitutional Creation Myth of Tribal Sovereignty, *United States v. Weaselhead*

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Dispelling the Constitutional Creation Myth of Tribal Sovereignty, *United States v. Weaselhead*

Long ago there were no stars, no moon, no sun. There was only darkness and water. A raft floated on the water, and on the raft sat a turtle. Then from the sky, a spirit came down and sat on the raft. "Who are you?" asked Turtle. "Where do you come from?" "I came from above," answered the spirit. "Can you create some land for us?" asked Turtle. "We need dry land and some people to live on it."

Creator scraped the earth from under Turtle's nails and rolled it around in his hand. At first nothing happened. Then the earth began to grow. It enlarged until it became as big as the world.

Then the spirit said that something else was needed, and he made people. The first man was called Kuksu, and the first woman was called Morning Star. And by and by there were many people on the earth.

For a long time everyone spoke the same language, but suddenly people began to speak in different tongues. Kuksu, however, could speak all the languages, so he called his people together and told them the names of the animals in their own languages, taught them to get food, and gave them their laws and rituals. Then he sent each tribe to a different place to live. Then he too left. He went to the spirit house that was up above.

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2. *Merwyn S. Garbarino & Robert F. Sasso, Native American Heritage* 182 (3d ed. 1994) (Maidu Creation Myth). It should be noted that this is the creation myth of a California tribe. Other tribes have their own creation myths.
I. INTRODUCTION

Indian and non-Indian interests have collided from first contact. Since the adoption of the United States Constitution, courts have struggled to reconcile society's infringements on indigenous peoples with democratic notions. Indian tribes were, and continue to be, vulnerable to majority interests. Early Supreme Court decisions attempted to affirm a measure of tribal autonomy and institute some

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3. See id. 420-32 (discussing the consequences of European invasion); see also Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823) (indicating that tribes are sovereigns, but the right of occupancy can be diminished by the United States government, the greater sovereign, by conquest, sale, or treaty).

4. See G. Edward White, The Marshall Court and Cultural Change: 1815-35, in III-IV THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 740 (Macmillan Publ'g 1988) (comparing the Marshall Court's treatment of Indians with African Americans, and stating, "[r]acial minorities received a message from the Marshall Court that they were to receive repeatedly in the subsequent course of American history: liberty and equality in America have been regularly contingent on whose freedom and whose equal treatment is at issue"); Martha A. Field, The Seminole Case, Federalism, and the Indian Commerce Clause, 29 Ariz. St. L.J. 3 (1997) (discussing the Court's "remarkable holding" that the Eleventh Amendment to the United States Constitution prohibits Congress from authorizing Indian tribes to sue states in federal courts under the Indian Gaming and Regulatory Act); see also Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (indicating that regulation of relations between the United States and tribes is the exclusive province of the United States government, and state laws that interfere with those relations are "repugnant to the Constitution, laws, and treaties of the United States"); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (2-2-2 split) (indicating that tribes are not foreign nations for constitutional purposes).

5. See David H. Getches, Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law, 84 Cal. L. Rev. 1573 (1996) (indicating that the Court has assumed the job it once conceded to Congress, "considering and weighing cases to reach results comporting with the Justices' subjective notions of what the Indian jurisdictional situation ought to be").
semblance of protection from the dominant white culture. However, the modern Supreme Court has steadily whittled away many of the early protective devices. The Court’s trend focuses on non-tribal interests in analyzing tribal sovereignty.

In United States v. Weaselhead, the United States District Court for the District of Nebraska recognized Congress’s authority to affirm tribes’ inherent sovereign authority. Initially, the majority of an Eighth Circuit Court of Appeals three-judge panel (the “Panel”) reversed the district court and gave constitutional weight to Supreme Court decisions that had diminished tribal sovereignty. Had the Panel’s majority decision stood, it would have necessarily abrogated Congress’s power to legislate on Indian affairs, and its decision would have had far-reaching implications for tribal governments and tribal members. As did the district court, the Panel focused on the source of tribal sovereignty and the effect of Congress’s amendments to the Indian Civil Rights Act. Subsequently, the Panel’s opinion was vacated. The Eighth Circuit Court of Appeals, sitting en banc and acting in a per curiam capacity, affirmed the district court’s order by a vote of an equally divided court and without opinion.

6. See Ex Parte Crow Dog, 109 U.S. 556 (1883) (interpreting a treaty so as to uphold tribal jurisdiction and declaring that departure from government’s general policy toward Indians required clear expression of congressional intent); Cherokee Nation, 30 U.S. 1 (stating that states cannot exercise state law over Indian territory); Johnson, 21 U.S. 543 (indicating that Indians cannot sell lands to states without congressional approval).


8. See Getches, supra note 5, at 1574; see also Field, supra note 4, at 23 (condemning the Supreme Court for using a tribal case for federalism retrenchment purposes, stating that “[r]ules involving Native Americans should be the result of decisions focusing on Native American needs and issues; they should not be the happenstance result of a political or legal battle on an altogether different subject”).


10. See Weaselhead, 156 F.3d 818. The Panel majority relied largely upon Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that Indian tribes have no jurisdiction over non-Indian criminal offenders on tribal lands), and Duro v. Reina, 495 U.S. 676 (1990) (holding that Indian tribes have no jurisdiction over non-member Indians, or in other words, Indians who do not belong to the tribe that is asserting jurisdiction).


13. See Weaselhead, 165 F.3d 1209.
The district court's order and the decisions of the Eighth Circuit Court of Appeals sitting as a three-judge panel and, subsequently, en banc, illustrate the clash between historical precedent, the Constitution, and pragmatics. This Note analyzes the primary conflicts among the order of the District Court for the District of Nebraska and the vacated majority and dissenting opinions of the Eighth Circuit Court of Appeals Panel in *United States v. Weaselhead*. The Note highlights the tension in logic with which modern Supreme Court analyses of tribal sovereignty has presented courts, Congress, and tribal governments. The Note also discusses the potential implications of giving constitutional weight to Supreme Court decisions that purportedly diminished tribal sovereignty.

After providing historical background necessary to place any case involving federal Indian law into context, the district court's order and the Panel's majority and dissenting opinions are summarized. Next, the major areas of disagreement—the source of tribal sovereignty and the nature of congressional authority over that sovereignty—are analyzed through a historical perspective. Last, because the Eighth Circuit did not decisively resolve issues that the various decisions in *Weaselhead* raised, the Note discusses the implications the Panel majority's vacated opinion would have had for future federal Indian legislation and policy, and the practical effects the opinion would have had on Indian tribes.

II. UNITED STATES V. WEASELHEAD

Under the Fifth Amendment's Double Jeopardy Clause, no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."14 Multiple prosecutions violate the Double Jeopardy Clause of the Fifth Amendment only if the prosecutions are initiated by the same sovereign.15 Neither a federal nor a state prosecution of the same person for the same act bars a subsequent prosecution by the other.16 However, the Fifth Amendment bars successive prosecutions by only nominally different entities.17 For instance, courts have reasoned that territorial courts and federal courts are both "creations em-

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14. U.S. CONST. amend. V.
16. See Abbate, 359 U.S. at 194-95; Bartkus, 359 U.S. at 131.
17. See, e.g., Waller, 397 U.S. at 394-95 (indicating that a state and city within that state cannot bring successive prosecutions for the same conduct even if state law treats each as separate sovereigns); Shell Co., 302 U.S. at 264 (holding that successive prosecutions by federal and territorial courts are prohibited); Grafton v.
anating from the same sovereignty” and, therefore, prosecution by one bars subsequent prosecution by the other.18

Both the magistrate judge, in his Report and Recommendation to the District Court,19 and the Eighth Circuit Panel majority20 determined that Congress’s definition of Indian tribes’ jurisdiction over non-member Indians,21 subsequent to Supreme Court interpretation of that jurisdiction, constituted a delegation of congressional power to tribal governments and not an affirmation of retained sovereignty. Therefore, the magistrate judge and the Panel majority found that the Winnebago Tribal Court had merely exercised authority emanating from the same source of power as that of federal jurisdiction when it convicted Robert Weaselhead, Jr. Accordingly, they concluded that the federal indictment of Weaselhead, subsequent to a tribal conviction, should have been dismissed on Fifth Amendment grounds.

In contrast, the district court22 and the Eighth Circuit Panel dissent23 both concluded that Congress is the final arbiter of the extent of retained tribal sovereignty. Both asserted that the Supreme Court’s decisions regarding limitations on tribal sovereignty were based on federal common law. Therefore, both concluded that Congress had merely affirmed tribes’ inherent sovereignty as it relates to criminal jurisdiction, and that the Winnebago Tribe’s jurisdiction did not emanate from the same source as that of the federal government.

A. Facts

Robert Lee Weaselhead, Jr. is an enrolled member of the Blackfeet Indian Tribe of Montana. In March 1997, Weaselhead was arraigned in Winnebago Tribal Court on several charges alleged to have been committed on the Winnebago Reservation, including sexual assault on a minor child. Pursuant to a plea agreement, Weaselhead pled no contest to one count of first degree sexual assault and the remaining charges were dismissed. The tribal court entered a judgment of con-
viction and sentenced Weaselhead to 280 days in jail, with 100 days of his sentence suspended.\textsuperscript{24}

On the same day Weaselhead entered his plea in tribal court, a federal grand jury indicted him on a charge of engaging in a sexual act with an Indian female juvenile.\textsuperscript{25} Weaselhead pled not guilty and moved to dismiss the indictment on grounds of double jeopardy. The grand jury then returned a superseding indictment, charging three counts of sexual assault for conduct on separate dates, with conduct on one of those dates being that upon which the tribal conviction was based. Weaselhead amended his motion to dismiss to include all counts of the superseding indictment, again on the grounds of double jeopardy.

The magistrate judge submitted a Report and Recommendation to the District Court for the District of Nebraska, suggesting the court dismiss the indictment on double jeopardy grounds.\textsuperscript{26} The magistrate judge based his recommendation on interpretation of prior case law\textsuperscript{27} and a subsequent congressional amendment to the Indian Civil Rights Act.\textsuperscript{28} He concluded that, because the tribal court exercised jurisdiction that emanated from a congressional delegation of power, the Fifth Amendment barred subsequent prosecution by the federal government for the same conduct.

However, the United States District Court for the District of Nebraska expressed a contrary view. The government objected to the magistrate judge's recommendation, asserting that separate sovereigns brought the successive prosecutions of Weaselhead.\textsuperscript{29} The district court determined that the congressional amendment to the Indian Civil Rights Act was simply an affirmation and clarification of tribes' inherent authority to prosecute member and non-member Indians.\textsuperscript{30} The district court sustained the government's objection and thereby denied Weaselhead's amended motion to dismiss the superseding indictment.

Weaselhead subsequently appealed the district court's denial of his amended motion to dismiss to the Eighth Circuit Court of Appeals.

\textsuperscript{24} Sentences imposed by tribal courts are limited by federal statute to a maximum of one year's imprisonment and a $5000 fine. See 25 U.S.C. § 1302(7) (1994).
\textsuperscript{26} See Report and Recommendation, supra note 19.
\textsuperscript{28} See 25 U.S.C. §§ 1301-1303 (1994); infra note 75 (referring to amendments to the Indian Civil Rights Act in the aggregate as the "post-Duro" amendments or revision).
\textsuperscript{29} See United States v. Weaselhead, 36 F. Supp. 2d 908 (D. Neb. 1997), aff'd on reh'g en banc by an equally divided Court, 165 F.3d 1209 (8th Cir. 1999) (per curium) (mem.), petition for cert. filed (Apr. 29, 1999).
\textsuperscript{30} See id. at 915.
He challenged only that portion of the superseding indictment directly related to the tribal court conviction. A majority of the Eighth Circuit Panel reversed the district court's denial. The Panel's opinion was later vacated and, upon rehearing en banc, an equally divided court affirmed the district court's order without opinion.

B. Background

From the commencement of our government, Congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts ... manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.

During the genesis of federal Indian law, through what has been dubbed "the Marshall Trilogy," the Supreme Court acknowledged that Indian tribes are sovereigns, but they are subject to the ultimate jurisdiction and authority of the federal government because they are "domestic dependent nations." In addition, the preeminent authority on federal Indian law indicated that tribal sovereignty is not a creation of the federal government. Therefore, to determine what

33. See Weaselhead, 165 F.3d 1290.
36. See Johnson, 21 U.S. at 545.
37. See Cherokee Nation, 30 U.S. at 17 (two justices indicating that Indian tribes were domestic dependent nations and therefore their sovereignty was diminished by definition; two justices indicating that Indian tribes possessed no sovereignty at all; and two justices viewing tribes as foreign nations and thus possessed all the sovereignty accompanying that status).
38. See Felix S. Cohen, Handbook of Federal Indian Law 122 (1942). The Handbook states:

Perhaps the most basic principle of all Indian law, supported by a host of decisions . . . is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power . . . . The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to
remains of tribal sovereignty, one must analyze those statutes by which Congress has expressly limited that sovereignty.\textsuperscript{39}

After \textit{Ex parte Crow Dog},\textsuperscript{40} wherein the Court determined that the federal government had no jurisdiction over a tribal member who had murdered another tribal member and had been punished by the tribe, Congress enacted the Major Crimes Act.\textsuperscript{41} Although \textit{Ex parte Crow Dog} may have acted as the ostensible catalyst for enacting this legislation, the Major Crimes Act was more likely a response to the Bureau of Indian Affairs (BIA) and the Secretary of the Interior's decade-long campaign to extend white man's criminal law to the reservation.\textsuperscript{42} In \textit{United States v. Kagama},\textsuperscript{43} the Court rejected the Indian Commerce Clause\textsuperscript{44} as the basis for congressional authority and jurisdiction in crimes perpetrated by Indians upon Indians while on reservations. However, the Court still upheld the Major Crimes Act on the basis that the federal government has a duty to protect Indian tribes and, therefore, the power to protect them.\textsuperscript{45}

In \textit{Lone Wolf v. Hitchcock},\textsuperscript{46} the Court declared that Congress had the authority to abrogate treaties it had made with tribes. The Court stated, "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."\textsuperscript{47}

determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty.

\textit{Id.}

39. \textit{See id.}
40. 109 U.S. 556 (1883) (interpreting treaty so as to allow tribe exclusive jurisdiction over murder of one tribal member by another tribal member).
42. \textit{See Cases and Materials on Federal Indian Law} 157 (David H. Getches et al. eds., 4th ed. 1998)). The Secretary of the Interior argued:

If offenses of this character cannot be tried in the courts of the United States, there is no tribunal in which the crime of murder can be punished . . . . If the murder is left to be punished according to the old Indian custom, it becomes the duty of the next of kin to avenge the death of his relative by either killing the murderer or some one of his kinsmen.

43. 118 U.S. 375 (1886).
44. \textit{U.S. Const.} art. I, § 8, cl. 3.
45. \textit{See Kagama}, 118 U.S. at 384.
46. 187 U.S. 553 (1903).
47. \textit{Id.} at 565.
Both Kagama and Lone Wolf emanated from Indian policy derived from a House of Representatives rider to an Appropriations Act. The House, via the rider, insisted that it be included in Indian policymaking. Although the Executive branch continued to negotiate treaties with tribes that were then enacted into laws even after the adoption of the rider, the Supreme Court gave the House's policy statement a very broad interpretation in Kagama and Lone Wolf. The Court interpreted the policy statement regarding shared responsibility between the House and Senate as carrying the broader purpose of subjugating tribes to the domestic law of the United States, and thus the plenary power doctrine was born. This forced subjugation is what the Court refers to when it speaks of tribes' "incorporation within the territory of the United States . . . [that] necessarily divested them of some aspects of the sovereignty which they had previously exercised," or their "dependent status." Congress has since implemented numerous policies and accompanying statutes under the auspices of plenary power.

48. See Deloria & Newton, supra note 7, at 74. The rider to the Appropriations Act stated: "[N]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." Id. (quoting Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified as amended at 25 U.S.C. § 71 (1994))).

49. See U.S. CONST. art. II, § 2, cl. 2.

50. See 118 U.S. at 382 (“But, after an experience of a hundred years of the treaty-making system of government, congress has determined upon a new departure, to govern them by acts of congress.”).

51. See 187 U.S. at 567-68. The Court stated:

In the view of the legislative power possessed by Congress over treaties with the Indian and Indian tribal property, we may not specially consider the contentions pressed upon our notice that the signing by the Indians of the agreement . . . was obtained by fraudulent misrepresentations, and concealment, . . . since all these matters, in any event, were solely within the domain of the legislative authority, and its action is conclusive upon the courts.

Id.

52. See Deloria & Newton, supra note 7, at 74.


54. For instance, Congress allotted and diminished tribal land and opened reservations to extensive settlement by non-Indians. See Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887) (or Dawes Act) (codified as amended at 25 U.S.C. § 331 (1994)). Congress also provided for forced allotment and termination of tribal tenure without Indians' consent. See ch. 17, 30 Stat. 495 (1898) (the Curtis Act). Congress's assimilationist policies to "civilize" Indians promoted taking Indian children from their parents and requiring them to attend "boarding schools," and prohibited Indians from engaging in their traditional religious practices. See Cases and Materials on Federal Indian Law, supra note 42, at 184-85. In 1953, the House of Representatives passed HCR 108 and ushered in the Termina-
Tribes continue to possess those aspects of sovereignty not withdrawn by treaty, statute, or implication necessarily resulting from their dependent status. In *Duro v. Reina*, the Supreme Court held that an Indian tribe's retained criminal jurisdiction does not extend to Indians who are not members of the tribe asserting jurisdiction but who commit crimes on that tribe's lands. The Court reasoned that tribal courts' prosecution of non-members is inconsistent with tribes' dependent status, and could therefore only be bestowed upon tribes "by delegation from Congress, subject to the constraints of the Constitution." Before *Duro*, in *Oliphant v. Suquamish Indian Tribe*, the Court held that tribal courts have no jurisdiction over non-Indians because such jurisdiction is necessarily inconsistent with Indian tribes' dependent status.

In contrast to *Duro* and *Oliphant*, in *United States v. Wheeler*, the Court found that, despite Congress's plenary authority to legislate for Indian tribes, tribes are not mere arms of the federal government. Because tribal courts and federal courts are arms of separate sovereigns, prosecution of a tribal member by the tribal court does not bar subsequent prosecution of the same offense by a federal court on double jeopardy grounds. Although tribes' powers of self-government remain subject to ultimate federal control, the right of Indian tribes to punish crimes committed by tribal offenders is not a creation of Congress. Rather it is part of tribes' "primeval sovereignty" that "has never been taken away from them, either explicitly or implicitly,
and is attributable in no way to any delegation to them of federal authority.\textsuperscript{63}

In \textit{Wheeler}, the Court was also concerned about the "undesirable consequences" that would result from allowing an assertion of double jeopardy to bar subsequent federal prosecutions.\textsuperscript{64} Prosecution by one sovereign, the tribe, for an offense, the punishment for which is limited by federal statute,\textsuperscript{65} could bar the federal government from prosecuting a much graver one.\textsuperscript{66} The double jeopardy bar would deprive the federal government of the right to enforce its laws.\textsuperscript{67} The Court issued a caveat that, although Congress could address potential double jeopardy problems by exercising its plenary powers to completely divest tribes of criminal jurisdiction, "such a fundamental abridgment of the powers of Indian tribes might be thought as undesirable as the federal pre-emption [sic] of state criminal jurisdiction that would have avoided conflict in \textit{Bartkus} and \textit{Abbate}."\textsuperscript{68}

The precarious status of Indians and Indian tribes has been determined by statute and federal common law and not by the Constitution. Until the Citizenship Act of 1924,\textsuperscript{69} Indians were not subject to the jurisdiction of the federal courts and, therefore, not protected by the Constitution.\textsuperscript{70} In addition, the Indian Civil Rights Act of 1968 was

\textsuperscript{63} \textit{Id.} at 328. Pursuant to federal legislation, the Bureau of Indian Affairs established a Code of Indian Tribal Offenses and a Court of Indian Offenses for the reservation. Also, the Secretary of the Interior had approved the Tribal Code, and the Indian Reorganization Act of 1934 and other legislation authorized tribes to adopt constitutions for self-government. Finally, the Indian Civil Rights Act of 1968 made most of the Bill of Rights provisions applicable to Indian tribes and limited the punishment tribal courts could impose. However, the Court concluded that none of these laws created Indians' power of self-government or their right to punish tribal offenders. \textit{See id.} at 327-28.

\textsuperscript{64} \textit{Id.} at 330-31. The Court continued:

\[ \text{The prospect of avoiding more severe federal punishment would surely motivate a member of a tribe charged with the commission of an offense to seek to stand trial first in a tribal court. Were the tribal prosecution held to bar the federal one, important federal interests in the prosecution of major offenses on Indian reservations would be frustrated.} \]

\textit{Id.}

\textsuperscript{65} \textit{See} 25 U.S.C. \textsection 1302(7) (1994). At the time of the \textit{Wheeler} decision, the punishment tribes could impose was limited to six months imprisonment or $500 fine, or both. In 1986, the statute was amended to allow tribes to impose one-year imprisonment and a fine of $5000, or both.

\textsuperscript{66} \textit{See Wheeler}, 435 U.S. at 329-30.

\textsuperscript{67} \textit{See id.} at 317-18, 330-31 (citing \textit{Abbate v. United States}, 359 U.S. 187, 195 (1959)).

\textsuperscript{68} \textit{Id.} at 331 (citations omitted).

\textsuperscript{69} Pub. L. No. 175, ch. 233, 43 Stat. 253 (1924) (current version at 8 U.S.C. \textsection 1401(b)(1994)) (providing for naturalization of all "Indians born within the territorial limits of the United States").

\textsuperscript{70} \textit{See} \textit{Elk v. Wilkins}, 112 U.S. 94 (1884) (finding that an Indian man living apart from his tribe had not been made a citizen by virtue of the Fourteenth Amendment).
originally enacted by Congress as a delayed response to the Court's determination that the Constitution does not protect Indians from the actions of tribal governments.\textsuperscript{71} However, although the Indian Civil Rights Act was an exercise of Congress's plenary authority to modify the effects of \textit{Talton v. Mayes},\textsuperscript{72} the Court determined that Congress did not explicitly provide a federal forum for violations of the Act.\textsuperscript{73}

In response to the perceived jurisdictional void created by \textit{Duro},\textsuperscript{74}
Congress amended the Indian Civil Rights Act so as to reaffirm tribes’ inherent authority to prosecute non-member Indians.\(^{75}\)

C. The Opinions

1. The District Court’s Order

The United States District Court for the District of Nebraska looked to Supreme Court case law and the legislative history of the post-Duro amendments to analyze Weaselhead’s double jeopardy claim.\(^{76}\) Congress took great pains to demonstrate that it intended the amendments to be merely a clarification of tribes’ status as domestic dependent nations and not a delegation of jurisdiction over non-member Indians.\(^{77}\) The court concluded that the post-Duro amendments within Pub.L. No. 102-137 accord[ ] the judiciary its proper and appropriate scope while preserving sacrosanct notions of congressional power to set the parame-

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75. See Pub. L. No. 102-137, 105 Stat. 646 (1991) (codified as amended at 25 U.S.C. § 1301(2), 1301(4) (1994)) (“An Act to make permanent the legislative reinstatement, following the decision of Duro against Reina (citation omitted), of the power of Indian tribes to exercise criminal jurisdiction over Indians.”). In 1990 Congress amended the Indian Civil Rights Act’s definition of tribes’ “powers of self-government.” The amendment added: “powers of self-government” “means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians[.]” Pub. L. No. 101-511, Title VIII, § 8077(b), 104 Stat. 1892 (codified as amended at 25 U.S.C. § 1301(2) (1994)). Another 1990 amendment defined “Indian” as “any person who would be subject to the jurisdiction of the United States as an Indian under section 1153 of Title 18 [the Major Crimes Act] if that person were to commit an offense listed in that section in Indian country to which that section applies.” Id. At § 8077(c) (codified as amended at 25 § 1301(4). This Note will refer to these amendments in the aggregate as the “post-Duro” amendments or revision.

76. The court stated:

Congress perceived the Duro decision as “[r]evolving two hundred years of the exercise of criminal misdemeanor jurisdiction over all Indians.” The legislative history accompanying Public Law 102-137 affirms that “[t]hroughout the history of this country, the Congress has never questioned the power of tribal courts to exercise misdemeanor jurisdiction over non-member Indians in the same manner that such courts exercise misdemeanor jurisdiction over tribal members.” See United States v. Weaselhead, 36 F. Supp. 2d 908, 915 (D. Neb. 1997) (quoting S. REP. NO. 102-153, at 2 (1991)) (U.S.S.C.A.N. citation omitted), aff’d on reh’g en banc by an equally divided Court, 165 F.3d 1209 (8th Cir. 1999) (per curium) (mem.), petition for cert. filed (Apr. 29, 1999).

ters of Indian law, within constitutional confines. Here, where Congress is merely affirming a power that Indian tribes have had from time immemorial, the court should also defer to Congress.\textsuperscript{78}

The court acknowledged that, had \textit{Duro} "been predicated upon constitutional grounds, Congress's ability to overturn \textit{Duro} would be greatly diminished."\textsuperscript{79} However, the court determined that the Supreme Court's reliance on a historical legislative background to divest tribes of authority to prosecute non-member Indians revealed that the federal common law was the basis for the \textit{Duro} decision.\textsuperscript{80}

Having found that the post-\textit{Duro} amendments affirmed inherent tribal authority over non-member Indians and that Congress did not delegate such authority, the court authorized the prosecution of Weaselhead under federal law. Because the tribe's authority arose under its inherent sovereignty and not under federal delegation, the Double Jeopardy Clause did not bar the subsequent prosecution.

2. \textit{The Eighth Circuit Court of Appeals - The Panel's Majority Opinion}

The Eighth Circuit Panel majority in \textit{United States v. Weaselhead} held that "the ascertainment of first principles regarding the position of Indian tribes within our constitutional structure of government is a matter ultimately entrusted to the Court and thus beyond the scope of Congress's authority to alter retroactively by legislative fiat."\textsuperscript{81} Siding with the magistrate judge, the majority based its decision on the series of Supreme Court decisions that suggested jurisdiction of Indian tribes over non-members is neither inherent nor sovereign and does not exist unless Congress affirmatively delegates that power to the tribe.\textsuperscript{82} Contrary to the district court's assessment, the Panel majority concluded that those decisions were constitutional interpretations of limitations on tribal jurisdiction.

Initially, the majority faced the threshold question regarding the source of a tribe's "'power to punish' nonmembers of the tribe whose racial status is nonetheless \textit{Indian}."\textsuperscript{83} The majority emphasized the Court's position in \textit{Duro} and \textit{Oliphant} that "'[c]riminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United

\textsuperscript{78} \textit{Id.} at 915 (footnote omitted).
\textsuperscript{79} \textit{Id.} at 913.
\textsuperscript{80} \textit{See id.}
\textsuperscript{81} \textit{United States v. Weaselhead, 156 F.3d 818, 824 (8th Cir. 1998), reh'g granted and opinion vacated, 1998 U.S. App. LEXIS 30874, at *1 (8th Cir. Dec. 4, 1998).}
\textsuperscript{83} \textit{Id. at 821 (quoting United States v. Wheeler, 435 U.S. 313, 322 (1978)).}
States.” 84 Non-member Indians’ status with respect to tribal authority was equated to that of non-Indian citizens. The majority reiterated concerns regarding subjecting non-member Indians to the jurisdiction of tribal governments in which they have no right to participate. 85 As did the Supreme Court in Duro, the Panel majority distinguished a tribal government’s jurisdiction over its members from lack thereof over non-members, by members’ consent via their tribal membership. 86

Next, the Panel majority characterized the post-Duro amendments to the Indian Civil Rights Act as Congress’s attempt to “rewrite the fundamental principles upon which Duro, Oliphant, and Wheeler were based by redefining the Indian tribes’ ‘inherent’ sovereign status as having always included criminal jurisdiction over nonmember Indians.” 87 Support for the majority’s conclusion was gleaned from Mousseaux v. United States Commissioner of Indian Affairs. 88 The majority interpreted dictum in Mousseaux as Congress intending to create a “legal fiction” that Duro had not been decided. 89 The majority deemed the post-Duro revision of the Indian Civil Rights Act as Congress’s attempt to rewrite history to alter the Supreme Court’s interpretation of how Indian tribes were incorporated into the constitutional structure. 90 In light of its construction of Congress’s efforts, the majority was faced with determining whether the revision was “simply a non-substantive ‘recognition’ of inherent rights that Indian tribes have always held or whether it [constituted] an affirmative delegation of power.” 91

Acknowledging that the Supreme Court had not yet interpreted the effects of Congress’s post-Duro revision of the Indian Civil Rights

84. Id. at 822 (quoting Duro, 495 U.S. at 693); see also Oliphant, 435 U.S. at 210 (“The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.”).
85. See id. at 822-23.
86. See id. (quoting Duro, 495 U.S. at 693).
87. Id. at 823.
88. 806 F. Supp. 1433, 1441-43 (D.S.D. 1992), aff’d in part and remanded in part on other grounds, 28 F.3d 786 (8th Cir. 1994).
89. See Weaselhead, 156 F.3d at 823 n.4 (construing Mousseaux, 806 F. Supp. at 1441-43). However, one should note that in Mousseaux, the district court reported that Duro “held that, as a matter of federal common law, Indian tribes lacked inherent criminal jurisdiction over non-member Indians.” 806 F. Supp. at 1439 (emphasis added). The Mousseaux court further stated that the post-Duro amendments to the Indian Civil Rights Act “overruled the Supreme Court decision in Duro.” Id. at 1441.
90. See Weaselhead, 156 F.3d at 823-24.
91. Id.
Act, the Panel majority relied on *South Dakota v. Bourland*, a Supreme Court decision regarding a tribe's authority to regulate hunting and fishing on Indian land that had been diminished by flood control acts. The Panel majority construed *Bourland*, which was decided after the amendments to the Indian Civil Rights Act, as an affirmation of the principle that an Indian tribe's jurisdiction over non-members of any race is neither inherent nor sovereign and does not exist without an affirmative congressional delegation of that power.

To nullify Congress's stated intent of recognizing and affirming tribes' inherent power to exercise criminal jurisdiction over all Indians, the Panel majority then looked to cases interpreting constitutional limitations on congressional authority. It concluded that Congress's "sweeping, plenary power to regulate Indian affairs under the Indian Commerce Clause . . . remains subject to constitutional limitations." Because the majority determined tribal criminal jurisdiction over non-member Indians did not exist prior to the post-*Duro* amendments, and despite Congress's power to delegate that jurisdiction to tribes, the majority found that Congress had exceeded its power when it declared a sovereignty-based jurisdiction existent that

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92. See id. (construing *South Dakota v. Bourland*, 508 U.S. 679(1993)).
93. See 508 U.S. at 694-95. In *Bourland* the Court stated:
   General principles of "inherent sovereignty" also do not enable the Tribe to regulate non-Indian hunting and fishing in the taken area. Although Indian tribes retain inherent authority to punish members who violate tribal law, to regulate tribal membership, and to conduct internal tribal relations, [1], the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.
   *Id.* at 694-95 (citations omitted).
94. See *Weaselhead*, 156 F.3d at 823 (construing *Bourland*, 508 U.S. at 694-95). To substantiate its position, the majority quoted a very contentious footnote from *Bourland*:
   The dissent's complaint that we give "barely a nod" to the Tribe's inherent sovereignty argument is simply another manifestation of its disagreement with *Montana* . . . . While the dissent refers to our "myopic focus" on the Tribe's prior treaty right to "absolute and undisturbed use and occupation" of the taken area, it shuts both eyes to the reality that after *Montana*, tribal sovereignty over non-members "cannot survive without express congressional delegation," [ ] and is therefore not inherent.
the Court had already declared to be nonexistent.\textsuperscript{97} Therefore, the post-\textit{Duro} revision of the Indian Civil Rights Act could only constitute Congress's affirmative delegation of jurisdiction from itself to tribes.\textsuperscript{98}

The Panel majority ultimately concluded that, because the Winnebago Tribe's power to punish non-member Indians emanates solely from authority delegated by Congress, its source of authority is identical to that of the federal court and, consequently, the dual sovereignty limitation on double jeopardy was inapplicable.\textsuperscript{99} Therefore, the Double Jeopardy Clause barred federal prosecution of Weaselhead for conduct based on the same factual basis as that of the prior tribal court conviction.\textsuperscript{100}

\section*{3. \textit{The Eighth Circuit Court of Appeals - The Panel's Dissenting Opinion}}

In a succinct dissent, Judge Sheppard Arnold challenged the majority's conclusion that the Supreme Court is the ultimate arbiter of Indian tribes' inherent sovereign powers and that Congress lacked the power to legislatively alter the Supreme Court's declarations retroactively.\textsuperscript{101} Judge Arnold found no legal principle in the Constitution or relevant case law to support the majority's conclusion.\textsuperscript{102}

The dissent summarily dismissed the majority's reasoning: "Indeed, it would be difficult to understand how Congress could have no power over determining the parameters of inherent tribal sovereignty unless the matter had some constitutional basis. But that is not the case."\textsuperscript{103} Judge Arnold sought to undermine the majority's reference to "the position of Indian tribes within our constitutional structure of government"\textsuperscript{104} and its reliance on \textit{Marbury v. Madison}\textsuperscript{105} by pointing out that inherent Indian sovereignty is not defined by the Constitution.\textsuperscript{106}

\textit{Cherokee Nation v. Georgia},\textsuperscript{107} a case from the Marshall Trilogy, substantiated the Panel dissent's conclusion. In \textit{Cherokee Nation}, to determine tribes' sovereign status, Chief Justice Marshall looked to the history of how the country had dealt with Indian tribes, along with principles of \textit{jus gentium},\textsuperscript{108} and not to the Constitution. By pointing

\begin{thebibliography}{100}
\bibitem{97} See id.
\bibitem{98} See id.
\bibitem{99} See id.
\bibitem{100} See id.
\bibitem{101} See \textit{Weaselhead}, 156 F.3d at 824-25 (Arnold, J., dissenting).
\bibitem{102} See id. at 825.
\bibitem{103} \textit{Id.}
\bibitem{104} \textit{Id.} (quoting the majority opinion, 156 F.3d at 824); see also \textit{supra} note 90.
\bibitem{105} 5 U.S. (1 Cranch) 137 (1803); see also \textit{supra} note 95.
\bibitem{106} See \textit{Weaselhead}, 156 F.3d at 825 (Arnold, J., dissenting).
\bibitem{107} 30 U.S. (5 Pet.) 1 (1831).
\bibitem{108} \textit{Jus gentium} is defined as:
\end{thebibliography}
to the Marshall Court’s allusion to treating tribes as states according to the historical dealings with tribes, the dissent in Weaselhead shed light on the constitutional void regarding inherent tribal sovereignty. The dissent concluded, “the question of what powers Indian tribes inherently possess, as the district court recognized, has always been a matter of federal common law.”

Having resolved the issue of what inherent powers Indian tribes possess as being a matter of federal common law, the dissent easily reconciled the effect of the post-Duro revision of the Indian Civil Rights Act. Because Congress has legislative authority over federal common law, it has the ultimate power to increase or diminish Indian tribes’ inherent sovereignty. Therefore, the post-Duro revision was merely Congress’s affirmation of tribes’ criminal jurisdiction over non-member Indians as an element of tribes’ retained inherent sovereignty and was not a congressional delegation of power. Because the Winnebago Tribe’s exercise of criminal jurisdiction over Weaselhead emanated from its inherent sovereignty and not from a congressional delegation of power, under the dual sovereignty doctrine, the Double Jeopardy Clause should not have barred the federal government’s subsequent prosecution. The dissent would have affirmed the trial court “on the basis of its well-reasoned opinion.”

The law of nations. That law which natural reason has established among all men is equally observed among all nations, and is called the “law of nations,” as being the law which all nations use. It must not be understood as equivalent to what we now call “international law,” its scope being much wider. It was originally a system of law, or more properly equity, gathered by the early Roman lawyers and magistrates... to be used in cases... between foreigners or between a Roman citizen and a foreigner. The principle upon which they proceeded was that any rule of law which was common to all the nations they knew of must be intrinsically consonant to right reason, and therefore fundamentally valid and just.


109. Weaselhead, 156 F.3d at 825 (Arnold, J., dissenting). The dissent also quoted a recent law review article in support of its conclusion. “Oliphant and Duro were not constitutional decisions; they were founded instead on federal common law.” Id. (quoting L. Scott Gould, The Consent Paradigm: Tribal Sovereignty at the Millennium, 96 COLUM. L. REV. 809, 853 (1996)). The district court also referred to Gould’s quotation. See Weaselhead, 36 F. Supp. 2d at 914 n.15. Other scholars take the same position. See, e.g. Deloria & Newton, supra note 7, at 72 (“[U]nder the rubric of federal common law, the Court has begun to impose its own notions of the role of tribal governments in the United States system... In other words, the rules of Oliphant and Duro are not rules of constitutional law.”).

110. See Weaselhead, 156 F.3d at 825 (Arnold, J., dissenting).

111. See id.

112. See id.

113. Id.
The gravamen of the disagreement among the various decisions in *United States v. Weaselhead* lies in the source of the Winnebago Tribe's sovereignty as it relates to criminal jurisdiction over the non-member Indian defendant. The effect of the post-*Duro* revision of the Indian Civil Rights Act necessarily follows the respective author's conclusion on this essential point.

The Panel dissent, along with the district court, and the Panel majority, along with the magistrate judge, looked to case law for their analyses. However, the sharp distinction between the conclusions is forged by each side's perception of the Supreme Court's basis for its past decisions. The Panel majority interpreted the Court's allusions to constitutional concerns as its determination of tribal sovereignty's position within the constitutional framework and, hence, its determination of constitutional limitations on congressional authority over Indian affairs. The Panel majority's position would have had the effect of defining tribal sovereignty as a creation of the Court resulting from its interpretation of the Constitution, as opposed to retained tribal sovereignty, undefined by the Constitution and not yet divested by congressional action.

In contrast, the Panel dissent indicated that the Constitution simply does not address issues of tribal sovereignty. Because there is no constitutional basis for the Court's analysis of tribal sovereignty, the dissent concluded the Court's decisions must necessarily be based on federal common law. Although the Court could divest tribes of sovereign powers based on tribes' incorporation within the United States via interpretation of congressional action and policy, and of prior decisions of the Court, Congress has the power to ultimately determine which sovereign powers tribes retain. Likewise, the district court found that the Court based its decisions divesting tribes of sovereign powers on federal common law and that Congress is the final word on tribes' retained sovereignty.

This Note will argue that the conclusions of the Panel majority rested on a fundamental mistaken interpretation of Supreme Court case law. Contrary to the implicit assumptions within the Panel majority's holding, inherent Indian sovereignty is not a constitutional innovation. Also, for better or worse, as history reveals, Congress's power over inherent Indian sovereignty is not contained by the Constitution. In decisions of the modern era, the Court has attempted to reconcile its treatment of non-member Indians with its emphasis of non-Indian interests over tribal interests. However, it has no constitutional basis for defining the parameters of tribal sovereignty related to criminal jurisdiction. Therefore, the Court cannot usurp congressional affirmation of retained tribal sovereignty by judicial fiat. The
Supreme Court’s decisions can only be fairly interpreted as resting on federal common law.

A. The Trilogy

Recently, the Supreme Court determined that early congressional enactments, unhindered by court action for many years, offer “weighty evidence” of the lack of constitutional restraints on Congress’s power. Although the Panel majority in Weaselhead looked to case law from the modern era to justify its position on the source of tribal sovereignty and congressional authority over that sovereignty, one must reconcile early case law and congressional action with the Court’s later positions. The Panel majority condemned Congress for attempting to create the “legal fiction that Duro was never decided,” yet it ignored foundational case law on the issue of tribal sovereignty. Judge Arnold pointed to the majority’s omission as the basis for his dissent.

In assessing the foundation of tribal sovereignty, and federal Indian law, one will find that tribal sovereignty is based on the “actual state of things” rather than any constitutional principle. As the Court has since indicated in more sophisticated terms, the appropriateness of attributing finality to the political departments’ actions and the lack of criteria for making judicial determinations are dominant considerations in assessing the Court’s ultimate authority. The Marshall Trilogy is notable for what it does not say about tribal sovereignty, particularly its lack of constitutional reference, as much as for what it does say. However, the Marshall Court made numerous statements that revealed its perception of tribal sovereignty and the Court’s inability to define tribes’ preexisting sovereignty.

In Johnson v. M’Intosh, the Court determined that, based on its supreme sovereignty, the United States had the right to extinguish Indian title of occupancy by treaty or conquest. Consequently, the government had the authority to invalidate titles and land investments of those to whom Indians and Indian tribes had conveyed land. Without alluding to constitutional principles, the Court stated that “discovery gave ... [the United States government] a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.” Perhaps even more telling of the extent of con-
gressive discretion over tribal sovereignty and the Court's lack of authority over that power is the following passage: "Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be . . . . The British government . . . whose rights have passed to the United States, . . . asserted also a limited sovereignty over [Indian tribes] . . . ."\(^{120}\)

Although the Court was directly addressing land title rights, it did not ground Congress's power over tribal rights, nor tribal sovereignty's status, in the Constitution.

Principles on which the Court could rely for its determination of congressional power were ostensibly lacking. Although it recognized humanity's "general rule," that conquered peoples should maintain those inherent rights which they are capable of possessing as a distinct people,\(^{121}\) based on Eurocentric perceptions, the Court felt that "[t]he resort to some new and different rule, better adapted to the actual state of things, was unavoidable."\(^{122}\) While the Court seemed perplexed by the logic of converting the discovery of land inhabited by Indians into conquest, pragmatics of the nation's reliance on the government's acquisition by discovery demanded that the pretense be sustained. The Court stated:

\[Ilt becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps be supported by reason, and certainly cannot be rejected by courts of justice.\(^{123}\)"

The Court reasoned that United States courts lacked the authority to protect title within Indian territory because those who purchased land from Indians in their territory took the property subject to tribal laws.\(^{124}\) No federal court would have the power to set such conveyances aside but would only have power to enforce conveyances after the United States had acted to take possession of tribal lands. Although Indians could transfer title, they could only transfer that which could be enforced in their own tribunals, or they could transfer title to the United States. Therefore, for title to be good, it had to be obtained from the United States because, as the supreme sovereign, the United States had the sole power to divest tribal title and had

\(^{120}\) Id. at 588.
\(^{121}\) See id. at 589.
\(^{122}\) Id. at 591.
\(^{123}\) Id. at 591-92.
\(^{124}\) See id. at 593.
itself made conveyances of Indian lands previously conveyed by Indian tribes.

Although Johnson does not address inherent sovereignty as it relates to tribes' criminal jurisdiction over non-members, the Court's resort to natural law principles, the doctrine of discovery, and federal statutes demonstrates lack of constitutional instruction on inherent sovereignty in general. The recognized right of tribes to sell their land to anyone they chose, subject to their own rules, but with all sales ultimately subject to the authority of Congress, suggests that the Court could not interfere with tribal jurisdiction nor Congress's authority over tribes.

Had the Johnson Court adopted the position of the Panel majority in Weaselhead, the federal government would have been constrained by the Panel majority's constitutional notions. Although at the time of Johnson the Court had not yet begun to stake out Fifth Amendment substantive due process protections, courts today would be forced to consider the constitutional implications for those who had been divested of title received from Indians. If Johnson were plucked from history and placed within the context of the Panel majority's analysis, such considerations would make the United States government accountable for its numerous conveyances of land that Indians had previously conveyed directly to non-government purchasers. Although perhaps yielding a more just result, the outcome would create the uproar the Marshall Court sought to avoid by deferring to the actual state of things.

In Johnson, the Court recognized inherent tribal sovereignty; however, the issue of the extent of self-government retained by the Indians was not resolved. In Cherokee Nation v. Georgia, the Court found that the Cherokee Nation was not a "foreign nation" within the meaning of Article III, Section 2, of the Constitution. Therefore, the Court had no original jurisdiction to entertain the Cherokee Nation's efforts to restrain Georgia from seizing land guaranteed to the Nation in violation of federal treaties.

As the Panel dissent in Weaselhead highlighted, in Cherokee Nation the Court implied that tribes' retained sovereign status was to be determined by the history of how the United States had dealt with tribes and not by their constitutional status. Although the Cherokee

125. See generally Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856) (analyzing Fifth Amendment due process rights with regard to deprivation of property of public debtors, but upholding congressional enactment to so deprive debtors).

126. See 30 U.S. (5 Pet.) 1 (1831) (2-2-2 decision) (two justices indicating that Indian tribes are domestic dependent nations and therefore their sovereignty was diminished by definition; two justices indicating that Indian tribes possessed no sovereignty at all; and two justices viewing tribes as foreign nations and thus possessed all the sovereignty accompanying that status).
Nation was not found to be a state or foreign state for purposes of granting the Court original jurisdiction under the Constitution, the Court acknowledged that "[t]he acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts." The Court thereby implied that, if the tribe had fallen within the auspices of the Constitution, as a state or foreign state, the Court would have protected the Cherokee Nation's retained sovereignty to the extent consistent with the government's acts, not according to constitutional proscriptions. Yet because it could find no placeholder for tribes within the Constitution, the Court found itself helpless to protect them.

Analogizing the tribe's status to that of a state carries connotations of allowing the tribe to invoke all those governmental functions associated with state sovereignty—those related to safety, health, morals, and general welfare. To the degree the federal government treated tribes as states, just as a state had the ability to assert criminal jurisdiction over violators of state law, the tribe would have likewise had the authority to assert its jurisdiction. Specifically, the Court stated:

They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable . . . of being responsible . . . for any aggression committed on the citizens of the United States by any individual of their community.128

"Community" is defined as "a group of people who reside in a specific locality, share government, and often have a common cultural and historical heritage." In Cherokee Nation, the Court did not distinguish Indian communities from tribes. Contrary to the assertion of the Panel majority in Weaselhead, this lack of distinction indicates that Indian jurisdiction was not determined by tribal membership.

However, the Court distinguished Indians' relationship with the United States from all others in that they were considered "domestic dependent nations." According to Chief Justice Marshall, "[t]heir relation to the United States resembles that of a ward to his guardian" because "[t]hey look to our government for protection; rely upon its kindness and its power; [and] appeal to it for relief to their wants . . . ." One should also note that the Cherokee Nation was referred to as a country. In looking to the Constitution for guidance, the Marshall faction of the Court concluded that, because where the framers had addressed Indians' relations with the United States, they had

127. Id. at 16.
128. Id. (emphasis added).
130. Cherokee Nation, 30 U.S. at 17.
131. Id.
132. See id.
done so explicitly, the framers' lack of specific delineation of Indians within Article III of the Constitution demonstrated their intent not to include them. Similarly, the Constitution does not delineate Indians' sovereign status as it relates to tribes' criminal jurisdiction. The logic of Cherokee Nation reinforces the proposition that tribal sovereignty is not a creature of the Constitution.

In the third opinion of the Marshall Trilogy, Worcester v. Georgia, the Court determined that, through a treaty with the United States government, the Cherokee Nation had not ceded one of the most important aspects of managing its affairs: "security against intruders on [their lands]." One commentator pointed out that Chief Justice Marshall "use[d] the opportunity to clarify that the implicit limits on tribal sovereignty discussed in his Cherokee Nation opinion relate[d] to land conveyance rights, not to self-government." The Court's conclusion again insinuated that tribes retained important aspects of their sovereignty by virtue of what they held prior to the United States government's intervention, and that those aspects were not created by federal action. The Court indicated that the Constitution eliminated any former constraints the Articles of Confederation may have imposed on Congress's authority to regulate relations with the Indians. The power to make war and peace, enter into treaties, and regulate commerce with Indian tribes demonstrated that Congress was "not limited by any restrictions on their free actions." Yet neither the Constitution nor the Articles of Confederation addressed or created tribal sovereignty. If the Court can speak to any of Congress's powers over Indian affairs on a constitutional basis, it may only do so in reference to congressional action taken pursuant to the Indian Commerce Clause. However, the Court is not the ultimate authority over that which Congress does not take from, or returns to, tribes pursuant to Congress's political relationship with tribes.

133. See id. at 18. The Court stated:

But we think that in construing them, considerable aid is furnished by that clause in the eighth section of the third article; which empowers congress to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

... When forming this article, the convention considered them as entirely distinct. We cannot assume that the distinction was lost in framing a subsequent article, unless there be something in its language to authorize the assumption.

Id. (reconciling the Articles of Confederation and the Constitution's Commerce Clause, and interpreting the Commerce Clause's distinction between the states, foreign nations, and tribes).

134. 31 U.S. (6 Pet.) 515, 554 (1832).

135. CASES AND MATERIALS ON FEDERAL INDIAN LAW, supra note 42, at 124.


137. See id; see also U.S. Const. art. I, § 8, cl. 3 (regulation of commerce); art. II, § 2, cl. 2 (treaty-making power); art. VI, cl. 2 (circumscribing states' authority in reference to federal treaties).
Although the Worcester Court made reference to the Constitution, it ultimately looked only to see what authority Congress had not taken by treaty.138 The Court again referred to those powers the United States gained and tribes lost due to war and conquest.139 However, apart from legislative enactments pursuant to the enumerated powers, only those branches with whom the war powers lie should decide what aspects of sovereignty they take and return.140 Rather than delegating the power to punish non-Indians to the Cherokee Nation, the treaty the Court construed did not extend protections of the United States government to its citizens who invaded Indian territory.141 The Court reiterated the position it took in Cherokee Nation, highlighted by the Panel dissent in Weaselhead, when it referred to Congress’s positive acts as implying that the United States “considered the Cherokees as a nation.”142 Similarly, the post-Duro revision of the Indian Civil Rights Act demonstrated the light in which the United States considers tribes. The revision constituted Congress’s affirmation of Indian tribes’ retained inherent sovereignty as it relates to jurisdiction over non-member Indians. Although in later opinions, the Court attempted to distinguish members from non-members in circumscribing tribes’ retained right to self-government,143 in Worcester, the Court clearly considered the tribe’s right to protect itself from in-

138. See 31 U.S. at 559. The Court stated:

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term “nation,” so generally applied to them, means “a people distinct from others.” The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words “treaty” and “nation” are words of our own language . . . . We have applied them to Indians as we have applied them to the other nations of the earth. They are applied to all in the same sense.

Id.

139. See id. at 543.

140. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (indicating political acts are never examinable by the courts).

141. See Worcester, 31 U.S. at 553 (construing the Hopewell Treaty). But see Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 197-98 (1978) (construing treaty provisions as a “request for affirmative congressional authority” and therefore inconsistent with the contention that criminal jurisdiction over non-Indians was an aspect of inherent tribal sovereignty).


truders, not as an authorization by the United States government, but as an aspect of retained self-government.\textsuperscript{144}

B. Plenary Powers and Consequences of Allotment

Lack of constitutional guidance on Indian sovereignty again surfaced in \textit{United States v. Kagama}.\textsuperscript{145} The Court found that basing Congress's authority to establish the Major Crimes Act on the Indian Commerce Clause would be a "very strained construction" of the Clause.\textsuperscript{146} The Court could find no place in the Constitution that gave Congress the authority to punish Indians who committed crimes against other Indians on the reservation.\textsuperscript{147} Yet the Court determined that it was "within the competency of [C]ongress" to do so based on Congress's duty to protect the Indians emanating from its trust relationship.\textsuperscript{148} The power of Congress to protect Indians was "necessary to their protection, as well as to the safety of those among whom they dwell."\textsuperscript{149} The Court concluded that the power must exist in Congress because Indian tribes resided within the geographical boundaries of the United States, and because the power had "never . . . existed anywhere else . . . [and had] never been denied."\textsuperscript{150}

Although the Panel majority in \textit{Weaselhead} rested its decision on its conclusion that the Court had determined tribes' constitutional status,\textsuperscript{151} the lack of constitutional guidance is what gave rise to the plenary powers doctrine. Also, as \textit{Kagama} illustrates, Congress's duty to protect tribes is extra-constitutional. Therefore, Congress's affirmation of tribes' criminal jurisdiction over non-member Indians via the post-\textit{Duro} revision of the Indian Civil Rights Act is entirely consistent with its extra-constitutional duty. Contrary to the \textit{Weaselhead} Panel majority's contention that Congress could only delegate its own authority in the area of criminal jurisdiction over non-member Indians

\textsuperscript{144} See 31 U.S. at 561. The Court stated:

\begin{quote}
The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.
\end{quote}

\textit{Id.}

\textsuperscript{145} 118 U.S. 375 (1886).

\textsuperscript{146} \textit{Id.} at 378-79.

\textsuperscript{147} \textit{Id.} at 379-80. Notably, the Court did not distinguish between members and non-members. It stated that the effect of the Major Crimes Act was "confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation." \textit{Id.} at 383.

\textsuperscript{148} \textit{Id.} at 383-84.

\textsuperscript{149} \textit{Id.} at 384.

\textsuperscript{150} \textit{Id.} at 384-85.

subject to constitutional restraints, Congress's authority can only arise from its power not subject to the limitations of the Constitution.

The lack of constitutional instruction on inherent tribal sovereignty has been the cardinal source of tribes' vulnerability. The unchecked plenary powers doctrine enabled the United States government, through its allotment policy, to diminish tribal land holdings that had been guaranteed to tribes by treaties from 138,000,000 acres in 1887, to 48,000,000 acres in 1934, with nearly half of the remaining lands being desert or semi-desert. This diminishment by acts of Congress is what ultimately gave rise to the decisions the Weaselhead Panel majority used to corroborate its position on diminishment of tribes' retained inherent sovereignty. It is significant that allotment was a congressional policy and that the Court recognized Congress's complete, unconstrained authority to carry out its policy. In Lone Wolf, the Court explicitly declared that "[p]lenary authority over tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." The Court's explicit recognition of Congress's unchecked powers, used for many devastating actions toward tribes, is further evidence of the lack of constitutional basis for tribal sovereignty, and therefore, the Court's lack of ability to constitutionally determine what inherent sovereignty tribes retain.

The modern Court has attempted to distinguish tribal members from non-members by the former's consent to tribal membership and, consequently, to their tribes' criminal jurisdiction. However, in

152. See Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (holding that Congress could abrogate treaties with tribes because legislative power over treaties with the Indians was solely within the legislative domain and, therefore, Congress's action was conclusive upon the courts).


155. 187 U.S. at 565.

156. See Duro, 495 U.S. at 694. However, this premise defies logic in light of congressional involvement in defining tribal membership. See M. Annette Jaimes, Federal Indian Identification Policy: A Usurpation of Indigenous Sovereignty in North America, 16 POLY STUD. J. 4 (1988), reprinted in NATIVE AMERICAN SOVEREIGNTY 204 (J.R. Wunder ed., Garland Pub'l'g 1996) (indicating that, despite the nearly universal practice of entitling a sovereign to determine its own “criteria by which its citizenry, or ‘membership,’ is to be recognized by other sovereign na-
Lone Wolf the Court considered tribal members' lack of consent to congressional action to be of no consequence because tribal sovereignty had no constitutional basis and congressional policy had no constitutional limitations.\textsuperscript{157} Members could not have avoided congressional action by declaring they were no longer tribal members because as Congress allotted tribal land, it simultaneously declared when Indians as individuals would be eligible to control their allotted land.\textsuperscript{158}

Congress long ago repudiated its former allotment and corresponding assimilation policies\textsuperscript{159} and has since adopted a self-determination policy toward tribes.\textsuperscript{160} However, the Court has fixated on the repudiated allotment policy based on the effects of the policy: diminishment of the tribal land base.\textsuperscript{161} In Montana, the Court construed the General Allotment Act of 1887, along with treaties that reduced the size of a reservation, to have divested the Crow Tribe of its jurisdiction to regulate non-Indian hunting and fishing on Indian territory held by non-Indians in fee.\textsuperscript{162} However, the Court created two exceptions to its general holding. First, tribes retain the inherent power to regulate activities of non-Indians who enter into consensual business dealings with tribes. Second, tribes retain inherent civil authority over non-Indians whose conduct on lands held in fee within reservation boundaries "threatens or has some direct effect on the political integrity, the

\textsuperscript{157} See 187 U.S. at 567-68.

\textsuperscript{158} See History of the Allotment Policy, Hearings on H.R. 7902 Before the House Comm. on Indian Affairs, 73d Cong., 2d Sess. (1934) (report of Delos Sackett Otis).

\textsuperscript{159} See Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 (ending the policy of allotment), 464 (prohibiting transfer of Indian land or tribal corporate shares except to the tribe), 470 (establishing system for making loans to tribes for economic development), 476 (providing for tribal self-government), 477 (providing for charters of incorporation for tribes), and 478 (providing for the Indian Reorganization Act not to apply to reservations wherein a majority of adult Indians voted against its application)(1994); see also Harjo v. Kleppe, 420 F. Supp. 1110, 1129 (D.D.C. 1976) ("Congress had declined to terminate the tribal existence or dissolve the tribal governments, despite all of its earlier intentions to do so . . . ").


\textsuperscript{161} See Montana v. United States, 450 U.S. 544 (1981); see also Royster, supra note 164, at 53 ("A majority of the justices believed that the ultimate aim of the discredited allotment policy, the destruction of the tribes, should continue to control tribal authority decades after the allotment program was terminated."). Also, not only has the Court continued to rely on the allotment policy to analyze those cases where land was divested by the General Allotment Act, but it has used the same rationale to apply to cases involving entirely different statutes. See id. at 59.

\textsuperscript{162} See 450 U.S. at 558-59.
economic security, or the health or welfare of the tribe.” The Court had no constitutional basis for its determination but relied solely on congressional enactments and policy, along with its own judicially created “general principles” that “Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns.” One should note, however, that those principles were based on early case law that did not rely on constitutional interpretation.

Although the Panel majority in Weaselhead relied on a contemptuous footnote from the Bourland decision as affirmation of the principle that “tribal sovereignty over nonmembers cannot survive without express congressional delegation,” the Court’s comment in Bourland was not based on any constitutional foundation. The Bourland decision, including the footnote, was merely another construction of a congressional enactment along with application of allotment policy rationale. Just as the Court had no constitutional authority to limit Congress’s actions in implementing allotment policy or other detrimental enactments, it has no constitutional authority to limit Congress’s explanation or revision of those enactments. Contrary to the Weaselhead Panel majority’s primary assumption, for the Court to hold otherwise would create a glaringly unprincipled double standard. The Court would have declared itself constitutionally powerless to limit Congress’s devastation to tribes, but would assume the role of the supreme impediment to Congress rectifying its extra-constitutional past deeds. In addition, the Bourland Court only addressed tribes’ inherent sovereignty as it related to its civil regulatory jurisdiction over non-Indians. Therefore, its statement cannot serve as an implicit negation of the post-Duro amendments to the Indian Civil Rights Act, which explicitly addresses tribes’ criminal jurisdiction over non-member Indians.

C. Implicit Divestiture

In the same vein, the Court’s interpretation of tribes’ dependent status as having implicitly divested tribes of criminal jurisdiction over non-Indians and non-member Indians is only another interpretation of early case law and congressional enactments, neither being

163. See id. at 566.
164. Id. at 565.
168. See 508 U.S. at 694-95.
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grounded in constitutional principles. Although the Panel majority in Weaselhead was concerned with the post-Duro revision of the Indian Civil Rights Act only creating a fiction, implicit divestiture is a judicial fiction emanating from the Marshall Trilogy and its deference to the “actual state of things.” Again, because the Constitution did not address tribes’ retained inherent sovereignty, and based on a law of nations concept that the conquered was still entitled to retain certain aspects of its sovereignty subject to the wishes of the conqueror, the Marshall Court contrived the fiction of implicit divestiture in order to protect conveyances made by the United States government that Indian tribes had previously conveyed.\(^{171}\) Yet implicit divestiture still has no more constitutional basis in the modern era than it did in the Marshall era.

In Oliphant, the Court relied on treaty provisions, congressional policy and enactments, and examination of its earlier precedents to determine that, absent Congress’s affirmative delegation, Indian tribes do not have criminal jurisdiction over non-Indians because such power is “inconsistent with their status.”\(^{172}\) However, the Court was simply interpreting Congress’s repudiation of its former allotment and assimilation policies. To undo the effects of these policies, Congress enacted the Indian Reorganization Act, under which tribal governments, courts, and constitutions were established.\(^{173}\) Congress’s treaty and war powers, as they relate to Congress’s relationship with tribes, are not subject to constitutional scrutiny because the Court has considered those powers political. The Court even went so far as to allow a House policy statement intrude into the treaty making powers of the Senate and Executive.\(^{174}\) Congressional actions that provide fodder for judicial interpretation are rooted either in Congress’s extra-constitutional plenary powers or its authority under the Indian Commerce Clause, which does not address tribes’ criminal jurisdiction. Therefore, the Court’s earlier precedents necessarily rested either on its interpretation of constitutionally unconstrained congressional actions or the line of cases based on the extra-constitutional fiction born of the Marshall Trilogy.

Giving the Court the benefit of the assumption that it may not have reached the issue of tribes’ inherent criminal jurisdiction over non-member Indians earlier in its history, the source of tribal sovereignty and the extent of its own authority over that sovereignty were issues certainly determined in the cradle of federal Indian law and reaffirmed many times since. As case law, including Oliphant, and

172. 435 U.S. at 208 (quoting Oliphant v. Schie, 544 F.2d 1007, 1009 (1976)).
174. See Deloria & Newton, supra note 7, at 74.
congressional enactments demonstrate, there has been no constitutional basis for defining tribal sovereignty or congressional authority over tribal sovereignty. On numerous occasions, the Court has upheld congressional enactments subsequent to its prior denial of congressional authority.\textsuperscript{175}

The \textit{Oliphant} Court perfunctorily reviewed treaties, legislation, and case law. Subsequently, it made a seemingly arbitrary determination that Indian tribes' power to try non-Indian offenders without the "careful proceedings" Congress had extended to non-Indian offenders within Indian country via the Trade and Intercourse Act of 1790, "would belie the tribes' forfeiture of full sovereignty in return for the protection of the United States."\textsuperscript{176} The \textit{Oliphant} Court interpreted a congressional enactment stemming from Congress's powers under the Indian Commerce Clause. However, congressional authority to regulate tribes' criminal jurisdiction does not flow from the Indian Commerce Clause.\textsuperscript{177}

In \textit{Oliphant}, the Court attempted to redefine its role as the interpreter of what Congress had taken away from tribal sovereignty to include independently defining that sovereignty with which tribes began. In essence, the Court tried to create its own vision of inherent tribal sovereignty and force Congress to legislate affirmatively to contradict it, as opposed to Congress legislating to divest inherent sovereignty.\textsuperscript{178} The Court stated that "by submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."\textsuperscript{179}

The \textit{Oliphant} Court's rationale is circular at best. The Court had previously determined that the relationship between the tribes and the federal government was a trust relationship. Thereby, the Court allowed Congress to legislate to protect tribes when Congress deemed tribes' own protective devices insufficient, despite no constitutional


\textsuperscript{176} \textit{Oliphant}, 435 U.S. at 211.

\textsuperscript{177} See \textit{Kagama}, 118 U.S. at 378-79.

\textsuperscript{178} See \textit{Oliphant}, 435 U.S. at 212. \textit{But see id.} at 212 (Marshall, J., dissenting) ("In the absence of affirmative withdrawal by treaty or statute, I am of the view that Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation.").

\textsuperscript{179} \textit{Id.} at 210.
authority for Congress to do so.\textsuperscript{180} Yet the \textit{Oliphant} Court seemed to require Congress to legislate in order to protect tribal citizens in a way acceptable to Congress, despite Congress having not divested tribes of the authority to protect themselves. However, Congress's authority to legislate to protect tribes from non-Indian criminal offenders would necessarily rest on its extra-constitutional plenary powers borne of its trust responsibility to protect tribes.

In \textit{Duro}, the Court extended its implicit divestiture concept recognized in \textit{Oliphant} to exclude tribal jurisdiction over non-member Indians who commit crimes on reservations. In part, the \textit{Duro} Court relied on \textit{Montana}.\textsuperscript{181} As previously noted, \textit{Montana} was an interpretation of early treaties and Congress's repudiated allotment policy. Courts ought to look to "the prior state of the law, including judicial decisions applicable to the subject of the legislation in question" to instruct their interpretation of legislative enactments.\textsuperscript{182} As a general principle, when legislating subsequent to judicial interpretation, Congress should enjoy the benefit of relying on the Court's prior decisions.\textsuperscript{183} When Congress enacted the General Allotment Act shortly after \textit{Lone Wolf}, it did so under the pall of the Court's assertion that the Court had no authority to constitutionally scrutinize congressional action in Indian affairs. To give constitutional weight to decisions emanating from the Court's interpretation of early treaties and allotment policy,\textsuperscript{184} in contradiction to the Court's earlier position, would allow prior Congresses, reacting to eras of very different "actual state[s] of things," to bind all Congresses thereafter. One would have to question the Court's ability to magically extract a tribal sovereignty nativity from the Constitution via the implicit divestiture fiction more than a century after the Court contrived that fiction.

D. Comments on the Constitution

The Panel majority in \textit{Weaselhead} relied heavily on references to constitutionally significant distinctions between tribal members and non-member Indians.\textsuperscript{185} However, the Supreme Court's references to constitutional considerations do not have the effect of divesting Congress of its fiduciary responsibilities. Nor do the references place in-

\begin{itemize}
\item \textsuperscript{180} See \textit{Kagama}, 118 U.S. at 384.
\item \textsuperscript{181} See \textit{Duro v. Reina}, 495 U.S. 676, 687 (1990) (construing \textit{Montana v. United States}, 450 U.S. 544 (1981)).
\item \textsuperscript{182} 2A \textsc{Norman J. Singer, Sutherland Statutory Construction} § 48.04, at 324-25 (5th ed. 1992).
\item \textsuperscript{183} See id. § 45.12, at 62-63.
\item \textsuperscript{185} But see \textit{United States v. Weaselhead}, 156 F.3d 818, 821-23 (8th Cir. 1998), \textit{reh'g granted and opinion vacated}, 1998 U.S. App. LEXIS 30874, at *1 (8th Cir. Dec. 4, 1998).
\end{itemize}
herent tribal sovereignty “within our constitutional structure of government . . . ultimately entrusted to the Court . . . .”186 In Oliphant, the Court indicated that through submission to protections of the United States government, Indians gave up their authority to try non-Indian citizens “except in a manner acceptable to Congress.”187 As history demonstrates, the Court has no constitutional reference for its implicit divestiture fiction. Also, presumably, Congress’s post-Duro affirmation of tribes’ retained authority to prosecute non-members merely recognizes that tribal prosecutions of non-members, subject to the Indian Civil Rights Act, are conducted in a “manner acceptable to Congress.”

In Duro, because the Court was concerned with intrusions on non-member Indians’ personal liberties, it extended Oliphant by indicating that tribes could assert criminal jurisdiction over non-member Indians if that jurisdiction was delegated to tribes by Congress, subject to constitutional limitations.188 However, as Kagama illustrates, Congress could only delegate power pertaining to criminal jurisdiction pursuant to its extra-constitutional plenary power. Also, because Congress is the political authority over Indian affairs and has the duty to protect tribes, it had the ultimate authority to declare that it had never divested tribes of the authority to prosecute non-member Indian offenders, presumably a function consistent with protecting tribes and with the tribes’ inherent right to protect themselves.189

In contrast to Duro, the Court previously distinguished tribal authority over members, indicating that tribes’ sovereign power to prosecute members for tribal offenses “clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status,” and was “attributable in no way to any delegation to them of federal authority.”190 In Wheeler, the Court viewed federal statutes that explicitly excluded or did not mention crimes committed by Indians against other Indians as recognition of inherent tribal jurisdiction over members.191 The same rationale should support inherent tribal jurisdiction over non-member Indians because the statutes relied upon do not distinguish tribal jurisdiction over Indians who are tribal members from non-member Indians.192 The Court found that

186. See id. at 824.
187. See 435 U.S. at 210 (emphasis added).
188. See Duro, 495 U.S. at 686-88.
192. See id. at 324-25.
193. But see Duro, 495 U.S. at 689-90 (“[T]he historical argument [based upon evidence that definitions of ‘Indian’ in federal statutes and programs apply to all Indians without respect to membership in a particular tribe . . . . [is] not disposi-
federal laws that authorized tribes to adopt constitutions to facilitate their self-government did not create Indians' power to govern themselves or their right to punish tribal criminal offenders.\textsuperscript{194} Therefore, under the dual sovereignty doctrine, the Double Jeopardy Clause did not bar federal prosecution of a tribal member subsequent to tribal prosecution.\textsuperscript{195}

However, the \textit{Duro} Court determined that federal statutes not distinguishing members from non-members was not dispositive evidence of inherent tribal jurisdiction over all Indians. Still, the \textit{Duro} Court's bases for determining that tribes did not retain inherent sovereignty sufficient to prosecute non-member criminal offenders—consent to statutes establishing tribal courts and constitutions, prior treaties, and scholarly articles—are not constitutionally dispositive of lack of inherent jurisdiction over non-members.\textsuperscript{196}

Furthermore, in \textit{Wheeler} the Court rejected the request to limit the dual sovereignty restrictions on double jeopardy to successive state and federal prosecutions because of pragmatic policy considerations.\textsuperscript{197} The Court reasoned that tribal members could very easily be motivated to quickly plead to tribal charges, for which penalties are limited by federal statute, to avoid much more severe penalties under federal prosecution.\textsuperscript{198} Those same pragmatic concerns would have applied if the Panel majority's holding that jurisdiction over non-member Indians is not inherent and therefore arises under the same sovereignty as do federal prosecutions would have stood. The policy analysis supporting \textit{Wheeler} implies that, in general, tribal criminal jurisdiction is not rooted in constitutional footings.

The \textit{Duro} Court and the Panel majority in \textit{Weaselhead} were concerned with Bill of Rights protections not applying to those who come before tribal courts.\textsuperscript{199} In \textit{Talton v. Mayes}, the Court declared that despite being subject to the ultimate legislative authority of Congress, tribes' powers of self-government, including their authority to prosecute crimes, did not spring from the Constitution because tribes en-


\textsuperscript{195} See \textit{Wheeler}, 435 U.S. at 329-30 (construing \textit{Talton v. Mayes}, 163 U.S. 376 (1896)).

\textsuperscript{196} See 495 U.S. at 690.
\textsuperscript{197} See 435 U.S. at 330-31.
\textsuperscript{198} See \textit{id}.
joyed those powers prior to the adoption of the Constitution.200 The Talton Court reiterated rationale from Kagama, stating that “Indians . . . were and always have been, regarded as having a semi-independent position . . . not as states, . . . but as a separate people, with the power of regulating their internal and social relations . . . .”201

Although the Duro Court attempted to distinguish members from non-member Indians by the former’s consent, it ignored the language the Talton Court highlighted. If tribal jurisdiction extended only to members, the Duro Court had to interpret “internal” and “social relations” as mere tautology. However, the most applicable definition of “social” is “living or disposed to live in companionship with others in a community, rather than in isolation,” or “of or pertaining to the life, welfare, and relations of human beings in a community.”202 “Internal,” in contrast, would ostensibly refer to members. In its determination that the Bill of Rights did not apply to tribal courts, the Talton Court apparently did not limit inherent tribal jurisdiction to tribal members. Apart from the Duro Court’s assertion that federal statutes not distinguishing between members and non-members was not dispositive of tribes’ inherent jurisdiction, the Court’s own precedent should, at a minimum, illustrate the lack of constitutional instruction on the matter.

Still, Congress addressed concerns regarding unfettered tribal authority by enacting the Indian Civil Rights Act.203 One must question the solemnity of the Supreme Court’s concerns regarding “serious . . . intrusion[s] on personal liberty”204 in light of the fact that it has construed the protections of the Indian Civil Rights Act as narrowly as possible.205 In Duro, the Court acknowledged that all Indians were made citizens in 1924.206 However, the Court failed to point out that Indians were made citizens only by statute.207 Congress, and not the

201. Id. at 384 (quoting United States v. Kagama, 118 U.S. 375, 381 (1886)).
202. RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY, supra note 129, at 1270.
204. Duro, 495 U.S. at 693.
205. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71 (1978) (limiting federal forums for Indian Civil Rights claims); see also McCurdy v. Steele, 506 F.2d 653, 656 (10th Cir. 1974) (finding that despite no specific tribal agency to hear a controversy related to tribal elections, an Indian Civil Rights Act violation was first to be analyzed by the Council alleged to have committed the violation before it could be reviewed by a federal court); Conroy v. Frizzell, 429 F. Supp. 918, 925 (D.S.D. 1977) (stating that the court has “neither the inclination nor the power to review or overturn [a tribal court’s] determination by forcing concepts of Anglo-American law upon the Tribe”).
206. See 495 U.S. at 692.
207. See Citizenship Act of 1924, Pub. L. No. 175, ch. 233, 43 Stat. 253 (current version at 8 U.S.C. § 1401(b)(1994)) (naturalizing all “Indians born within the territorial limits of the United States”). Previously, courts had held that the
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Court, should have the last word on what that statute entails, as discomforting as that premise might seem in some contexts.

Previously, in reference to the Pueblo Indians, who held their lands in fee and were not part of a reservation, the Court held that "citizenship is not in itself an obstacle to the exercise by Congress of its power to enact laws for the benefit and protection of tribal Indians as a dependent people." In shamefully paternalistic terms, the Court indicated that:

Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities... within or without the limits of a state.

Historical precedent indicates that the Constitution did not limit Congress to protecting Indians according to their tribal membership. Ostensibly, the Sandoval Court considered Congress's constitutional commerce authority as distinctly separate from judicial interpretation of legislative and executive infringements on tribal sovereignty in noncommerce areas. The latter can only be based on common law interpretation.

The Duro Court and the Panel majority in Weaselhead also referred to constitutional limitations on Congress's political powers. In Reid v. Covert, the Court refused to allow Congress or the Executive branch to exercise political powers in such a way that deprived individuals of their constitutional protections. In that case, an executive agreement between the United States and Great Britain permitted military courts of the United States to exercise exclusive jurisdiction over offenses committed in Great Britain by dependents of military servicemen. The military courts did not extend Bill of Rights protections to such non-military dependents. The Court stated that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." However, had the agreement not been made, Congress or the Executive branch certainly could not have

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Footnotes:
208. Sandoval, 231 U.S. at 48.
209. Id. at 45-46 (emphasis added).
211. 354 U.S. 1.
212. Id. at 16.
unilaterally deprived the government of Great Britain of its jurisdiction. Nor could the Court have insisted that United States constitutional protections be extended to Great Britain's prosecution of an individual. Congress's treaties with Great Britain, or lack thereof, would not determine that Great Britain is no longer a sovereign nation. Similarly, in the absence of congressional action depriving tribes of their inherent jurisdiction, the Court cannot extend constitutional protections to those subject to tribal jurisdiction. Nor can the Court extend those protections if Congress has simply returned jurisdiction to the tribes, much like the effect of revoking treaties with foreign countries.

The Marshall Court determined in *Cherokee Nation* that Indian tribes are not foreign nations for the purpose of extending the Court's original jurisdiction to protect tribes. It is Congress's and not the Court's role to determine the extent to which power is taken from tribes. Although Congress could unilaterally act to deprive tribes of their criminal jurisdiction over non-members, it has not done so. Quite to the contrary, as the district court pointed out in *Weaselhead*, Congress has affirmed that it has not taken certain aspects of tribal sovereignty. The Court has found that Congress did not intend to extend a federal forum to those claiming tribal governments' violations of the Indian Civil Rights Act. Similarly, the Court is without authority to unilaterally extend the protections of the United States Constitution to individuals who are before tribal courts when Congress has not exercised its political power to deprive tribes of their inherent jurisdiction.

In *United States v. Lopez* and *Seminole Tribe of Florida v. Florida*, the Court declared constitutional limitations on Congress's power to regulate under the Commerce Clause. However, Congress did not exercise its commerce powers in affirming tribes' inherent criminal jurisdiction over non-members. It is simply exercising its fiduciary responsibility in affirming that it had not divested the tribe of its prosecuting authority. In interpreting limitations on Congress's power to infringe on state sovereignty, the Court can look to the Tenth and Eleventh Amendments for guidance and substantiation. However, the Court has no analogous basis for determining the inherent boundaries of tribal sovereignty or Congress's extra-constitutional responsibility to protect tribes or tribal members. Although the Panel majority in *Weaselhead* cited *Seminole Tribe* as establishing limits on congressional power, in *Seminole Tribe* the Court was interpreting the

217. U.S. CONST. amend. X; U.S. CONST. amend. XI.
scope of Congress's authority under the Indian Commerce Clause. Congress's authority as it relates to tribal criminal jurisdiction has no comparable constitutional basis.

IV. PRACTICAL IMPLICATIONS THE EIGHTH CIRCUIT AVOIDED BY VACATING THE PANEL'S DECISION

The most obvious practical effect the decision of the United States v. Weaselhead Panel majority would have had was that the fears expressed in Abbate v. United States,218 Bartkus v. Illinois,219 and United States v. Wheeler220 would have come to fruition. In Weaselhead, a non-member Indian would have only been subject to minimal punishment for relatively serious crimes perpetrated on a young Winnebago tribal member. Through their own constitutions modeled after the federal Constitution, tribes have implemented protections of the rights of those who come before tribal courts. For instance, the Omaha Tribe requires that those individuals detained for crimes be charged and arraigned within a limited number of hours after arrest or be released.221 Federal prosecutors who are not located on reservations may have neither the time nor desire to assert juris-

221. TRmAL R. Cmr. P. tit. II, Gen. Provisions, Rule 5(j); tit. III, Provisions Gov't Crim. Proceeding, Rule 23(a), (c) (Omaha Tribe of Neb.). Rule 5(j) states:

The right to be released on bail as provided herein shall not accrue until charges under this Code shall have been filed. Persons incarcerated in the Tribal jail for violation of the federal and state laws shall be subject to be released on bail by the jurisdiction under whose authority the arrest was made according to the provisions of the laws under which their arrest was made. A person arrested for violation of federal law shall not be entitled to be released on bail until the prosecution of such charges has been declined by the U.S. Attorney, plus a reasonable time thereafter, not to exceed 36 hours after receipt of notification of such declination, in which charges for violation of this Code, if any, may be filed, provided that upon the arrest of any person solely for violation of federal law, custody of the arrested party shall immediately be given to the appropriate federal authorities. Unless such authorities accept custody of the defendant and make arrangements with the Chief of Police to physically remove the arrested party from the Tribal jail, or to pay the Tribal jail to hold said party as Federal prisoners, the Chief of Police shall release said party from custody upon 24 hours notice to the appropriate U.S. Attorney and to the Tribal prosecutor if no tribal charges have been filed as of that time.

Id.

Rule 23 states:

(a) As soon as reasonably possible after arrest but not more than 36 hours thereafter, or within the period designated on the summons whichever is the lesser, the defendant shall appear or be brought before a Tribal judge, and the defendant shall be informed of his right to counsel and of his right to bail.
diction within that timeframe. In *Weaselhead*, before federal grand jury indictments could be issued, the defendant entered a plea and the tribal court rendered judgment.\textsuperscript{222} Tribal prosecutors would therefore be faced with the untenable decision of releasing dangerous non-member Indian offenders without charging them, thus leaving them free to abscond or perpetrate again, or charging them and risking quick pleas to tribal charges subject only to statutorily limited punishment. Had the *Weaselhead* Panel majority’s decision stood, the latter choice would have barred subsequent prosecution by the federal government. Because tribal punishment is limited by federal statute, non-member Indians who rape or murder tribal members or non-member Indians on Indian reservations and quickly plea to a tribal charge could feasibly have gotten away with one year’s imprisonment and a $5000 fine.\textsuperscript{223}

In *Duro*, the Court stated that its “decision . . . [did] not imply endorsement of the theory of a jurisdictional void . . . .”\textsuperscript{224} Furthermore, the Court challenged policy criticisms by stating that if the jurisdictional scheme was “insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs.”\textsuperscript{225} Congress met that challenge with its post-*Duro* revision, which was designed to elucidate judicial misperceptions and affirm inherent prosecutorial sovereignty over non-member Indians, thereby remediating perceived jurisdictional voids. However, to hold that *Duro* grounded inherent sovereignty in the Constitution would have made it impossible to both cure jurisdictional voids and prevent double jeopardy bars on federal prosecutions of serious offenses committed by non-member Indians.

One option would have been to pass federal legislation giving federal prosecutors the authority to prosecute non-member Indian offenders for all crimes, including misdemeanors, committed on reservations. However, as it is, at least some federal prosecutors choose not to prosecute felonies under the Major Crimes Act unless it appears convictions will be readily obtained.\textsuperscript{226} Federal prosecutors based long distances from reservations would not be likely to expend the resources necessary to prosecute serious or minor misdemeanors.


\textsuperscript{224} Duro v. Reina, 495 U.S. 676, 697 (1990).

\textsuperscript{225} Id. at 698.

\textsuperscript{226} See Kathleen M. Neary, supra note 74; Honorable J. Wm. Moreland, supra note 74.
Another option, as the Court suggested in *Duro*, would have been for tribes to consent to state jurisdiction under Public Law 280, so that states could “assist in maintaining order on the reservation by punishing minor crime.” However, that option would have created the very double jeopardy issue the *Weaselhead* Panel majority and the *Duro* Court itself sought to avoid. Because states do not possess inherent authority to prosecute Indian offenders on tribal lands, they may only prosecute pursuant to a congressional delegation of authority, such as Public Law 280. Consequently, if a state prosecutor would choose to prosecute minor crimes committed by non-members on a reservation, her authority to do so would emanate from the same source as the authority for federal prosecution. Therefore, state prosecution of a minor crime would bar subsequent prosecution of any related felony.

This suggestion also ignores a lurid history of tribal-state relations. As the Court in *Duro* noted, “[s]tate authorities may lack the power, resources, or inclination to deal with reservation crime.” Also, citizens in areas surrounding reservations may create environments unfavorable to states expending resources to prosecute crimes committed on reservations. Disturbing illustrations of non-Indian community pressures abound. For instance, an 18-year old Indian woman was beaten, raped, and shot five times in her head and back, near her home on the Standing Rock Indian Reservation abutting Mobridge, South Dakota. Although the murderers had attended a party with the victim earlier on the night of the incident, they were not arrested until fourteen years after the murder when the ex-wife of one of the non-Indian Mobridge offenders apprised authorities of her former spouse’s involvement. Subsequently, more than a hundred Mobridge citizens signed a petition to lower one suspect’s bond, including the priest of the Catholic Church attended by families of both the suspect and the victim.

In *United States v. Weaselhead*, the Panel majority’s conclusion that certain modern Supreme Court cases were based on the Court’s interpretation of the Constitution, and not on its interpretation of the common law, would have designated the Supreme Court as the authoritative body for determining the substance of Indian tribes’ re-

227. See *Duro*, 495 U.S. at 697.
228. Id.
229. See Brian Bonner, *Racial Tensions Flare in the Heat of 16-year-old Murder Investigation*, BUF. NEWS, March 3, 1996, at A10. The primary perpetrator pled guilty to manslaughter in 1996. See Brian Bonner, *Man Pleads Guilty to 1980 Murder of Sioux Teen*, BUF. NEWS, May 8, 1996, at A4; see also Field, supra note 4, at 22 (“If the original purpose of federal plenary and exclusive authority over Indian affairs is the perceived inability of states to deal fairly with Indian tribes, it seems perverse to require enforcement of Indian rights in state court.”).
tained sovereignty. In so doing, the Panel majority would have substituted the Court for Congress as the ultimate policymaking authority for Indian affairs. Although Congress is responsible for protecting tribes, it would have been limited in its ability to carry out its fiduciary duties to those means reconcilable with the Court's policy preferences. Because the Court has insisted on focusing on policy of the allotment era, Congress's policy of self-determination for Indian tribes would have been permanently usurped. Furthermore, any congressional attempt to rectify past harms and return to tribes those aspects of inherent sovereignty previously divested would have been subject to judicial scrutiny.

Perhaps the most devastating implication on many levels would have been tribes' lack of ability to protect their own members from crimes committed by non-member Indians. If Congress could only alleviate potential double jeopardy issues by divesting tribes of jurisdiction over non-member Indians, tribes would lack the power to shape, empower, and protect their communities. Families residing on reservations include tribal members and non-members. Many tribes employ non-member Indians on reservations. When tribal jurisdiction is juxtaposed with state or federal jurisdiction, the impracticalities of the Panel majority's vacated decision become crystal clear. A world wherein a state could not prosecute any offender who was not a citizen because the offender had no right to participate in the state's government is incomprehensible. Further, foreign offenders, such as the convicted bombers of the World Trade Center, are not exempt from federal prosecution simply because our courts observe customs that are strange and unknown to them.

Concerns implying the strange practices of tribal courts are unfounded in light of the fact that tribal governments, courts, and constitutions were modeled after those of the United States and are required to be approved by the Secretary of the Interior. In addition, the Indian Civil Rights Act extends most of the Bill of Rights protections to offenders who appear before tribal courts. To the same extent non-Indian communities expect their governments to vindicate

231. But see Duro, 495 U.S. at 694 ("[Tribes' broad freedom was] all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system.").
232. But see id. at 693 ("While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts['] ... legal methods may depend on 'unspoken practices and norms.'" (quoting Cohen, supra note 38, at 334-35)).
Wrongs perpetrated upon them, tribal communities should be able to expect their governments to protect them.

V. CONCLUSION

The Eighth Circuit Panel's vacated decision in United States v. Weaselhead was based on a flawed assumption that the Court has a constitutional basis for determining the inherent sovereignty with which tribes began or the extent of tribes' retained inherent sovereignty. In Duro, the Court could only have based its decision on the common law. The Duro Court did not base its decision on the Constitution because all congressional enactments regarding Indian affairs are either extra-constitutional or based on the Indian Commerce Clause, which does not speak to tribes' criminal jurisdiction. Also, the Court's fiction of implicit divestiture was based on the "actual state of things" and the law of nations in order to justify congressional usurpation of tribes' inherent sovereignty. Implicit divestiture is not the product of constitutional guidance. Had there been a constitutional basis for tribal sovereignty, tribes would have had more protection from majority infringing enactments carried out by congressional policies and enactments throughout the country's history. Because early in the history of federal Indian law the Court declared there were no constitutional limitations on congressional authority over tribes' sovereign powers, Congress relied on such declarations in divesting those powers. Congress should not now be limited in defining what it has not taken or what it chooses to restore. If courts now determine that there is a constitutional basis for tribal sovereignty, or divestment thereof, the lack of constitutional protections for tribes in the past would be inexplicable.

If the Court should choose to ground limitations on Congress's fiduciary authority in Congress's constitutional war and treaty powers, it should also revisit the constitutionality of allowing the House to limit the Senate and Executive's treaty powers by virtue of a rider, from which the unconstrained plenary powers doctrine arose.\textsuperscript{234} Should that doctrine fail, manifestations of Congress's allotment policy must also fail.

Now is not the time for the Court to discover a constitutional basis for tribal sovereignty. Finding that the Court has ascertained tribe's positions within our constitutional structure would have precluded Congress from repairing harms perpetrated upon Indian tribes during less enlightened eras and would have bound Congress to policies of the past. A constitutional foundation for tribal sovereignty would prevent Congresses of the future from improving Indian affairs and empowering tribal communities. Despite the modern Supreme Court's focus on

\textsuperscript{234} See Deloria & Newton, supra note 7, at 74.
non-tribal interests, the actual state of things requires that Congress be allowed to affirm or return those aspects of inherent tribal sovereignty that are necessary to allow tribal governments to protect their communities and make those communities whole.

As the District Court of the District of Nebraska indicated, Congress merely affirmed tribes' inherent criminal jurisdiction over non-member Indians. Finding that tribes' criminal jurisdiction is inherent is essential to prevent jurisdictional voids and double jeopardy bars on more substantial federal prosecutions. Unlike Congress taking land promised to tribes by treaties under the pretense of its fiduciary duties, Congress should be able to exercise its duty to legitimately protect tribes free of the Court's agenda. By vacating the Panel majority's decision and affirming that of the district court, the Eighth Circuit Court of Appeals left the door open for Congress to make amends for the past and to avert further devastation to tribal communities. Although modern Supreme Court decisions have obscured the ability of courts and Congress to acknowledge and protect tribal sovereignty and communities, the path is made clear by history.

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