Falling Through the Cracks After Duro v. Reina: A Close Look at a Jurisdictional Failure

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I. INTRODUCTION

The Chief Seattle Days festival is held each summer in the state of Washington on the Suquamish Indian Reservation. This festival offers the opportunity for American Indians of different tribes to gather together and to discuss and celebrate their unique histories and traditions. Of course, at any such sizable gathering, order does not always prevail. Indeed, some of the participants will likely commit misdemeanor criminal offenses such as assault and battery, trespassing, and public intoxication. After the tribal police have made their arrests, the accused Indians who are not members of the Suquamish tribe will have their day in court, or will they?¹

This question is raised by the recent United States Supreme Court decision of Duro v. Reina.² In Duro, the Court held that tribes do not have jurisdiction over minor, or misdemeanor, crimes committed on reservation by nonmember Indians.³ Because tribal courts have no jurisdiction over nonmembers under the Duro decision, the question thus becomes one of who has jurisdiction over crimes committed by nonmember Indians. Under the Federal Enclaves Act, the federal government does not have jurisdiction over offenses committed by “one Indian against the person or property of

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3. Id. at 2061.
another Indian . . . .” Furthermore, barring the adoption of Public Law 280, the state courts have no jurisdiction over any crimes whatsoever committed by Indians against Indians in Indian country. Thus, the decision in Duro needlessly creates a jurisdictional gap over nonmember Indians committing minor crimes against other Indians on reservation land and leaves open the very real possibility that neither the federal nor the state governments will move in to fill that gap. A nonmember offender at the Washington festival would simply walk away.

To understand how this jurisdictional gap over nonmember Indians needlessly came about and why neither the federal government nor the state governments will step in to exercise jurisdiction, this Note (1) looks at the complex web of law on criminal jurisdiction over Indians; (2) examines the Court’s reasoning in Duro that culminated in the conclusion that tribal courts have no jurisdiction over nonmember Indians committing minor crimes on reservation; (3) identifies the analytical errors made by the Court in Duro; and (4) examines the future of jurisdiction over this class of criminal offenders.

II. CRIMINAL JURISDICTION OVER INDIANS

Before truly grasping the complexities of jurisdiction over crimes committed on tribal land, one must first have some sense of the status of the tribes themselves. Whatever may have been the case for the tribes prior to the European “discovery” of America, the arrival of the Europeans drastically altered tribal status. The European doctrine of “discovery” gave the discovering government the sole right to establish relations between itself and the discovered country’s indige-

5. See infra notes 18-19 and accompanying text.
6. See infra note 16 and accompanying text. “Indian country,” as used in the criminal law context, means:
   (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the lists of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through same.
nous people. As the Supreme Court wrote, "[i]n the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were, necessarily, to a considerable extent, impaired." The Indians' rights were "impaired" in the sense that "discovery" rendered the tribes no longer "sovereigns" in the full sense of the word. Rather, the tribes became "domestic dependent nations." The tribes retained only those powers that were not limited by treaty or congressional statute or that were not inconsistent with the tribes' status as domestic dependent nations. Criminal jurisdiction over crimes committed on reservation revolves around precisely which powers the tribes have lost and which powers they have retained.

Keeping in mind the unique status of the tribes as nations within a nation, one can construct a framework of criminal jurisdiction as currently exercised by the federal, state, and tribal governments. This jurisdictional framework is best understood by examining several factors. When crimes are committed on reservation land, jurisdictional power over these crimes shifts according to (1) whether the act was a "major" crime or a crime "other" than a major crime; (2) whether a non-Indian, a member Indian, or a nonmember Indian committed the act; and (3) whether the transgression was against an

7. In Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 573 (1823), the Court held that the tribes had the power to grant lands only to the federal government and to no one else.

8. Id. at 574.

9. "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights . . . with the single exception of that imposed by irresistible power . . . ." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

Indian law commentators have long debated the definition of the term "sovereignty" in regard to the Indian tribes. For an examination of the differing views of sovereignty, see Bradley B. Furber, Two Promises, Two Propositions: The Wheeler-Howard Act as a Reconciliation of the Indian Law Civil War, 14 U. Puget Sound L. Rev. 211, 218-31 (1991).

10. The tribes were first characterized as "domestic dependent nations" in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831), where the Court held that, although a "state," the Cherokee Nation could not be considered a "foreign state" within Article III of the Constitution. Although the Court has not clearly defined the term "domestic dependent nation," the Court did shed some light upon the term in United States v. Kagama, 118 U.S. 375 (1886). Here, the Court explained that the tribes "are the wards of the nation. They are communities dependent on the United States; dependent largely for their daily food; dependent for their political rights . . . From their very weakness and helplessness . . . there arises the duty of protection, and with it the power." Id. at 383-84 (emphasis in original).

Indian or a non-Indian. For clarity, federal, state, and tribal jurisdiction are explained in turn.

A. Federal Jurisdiction

Federal jurisdiction over crimes committed on reservation\(^\text{12}\) falls into the categories of "major" and "other" than major crimes. Under the Major Crimes Act, certain enumerated major crimes committed on reservation by Indians against either Indians or non-Indians fall under the exclusive jurisdiction of the federal courts.\(^\text{13}\) Under the Federal Enclaves Act, any crime committed on reservation by non-Indians against Indians and any crime committed on reservation by Indians against non-Indians also fall under the jurisdiction of the federal courts.\(^\text{14}\) Notably, the Enclaves Act exempts Indian against Indian crime from federal jurisdiction.\(^\text{15}\)

In summary, the federal courts effectively have jurisdiction over major crimes committed on reservation by Indians against either Indian or non-Indian, over any crime committed

\(^\text{12}\) Crimes committed by Indians off reservation fall under either federal or state jurisdiction depending upon whether the offender violated a federal or state statute.

\(^\text{13}\) "[M]urder, manslaughter, kidnaping, maiming, a felony [committed] under chapter 109A [sexual crimes], incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 [larceny and theft crimes]" are the crimes that are subject to the laws of the federal government or of the state government if no federal law is in force. 18 U.S.C. § 1153 (1988).

Prior to the passage of this statute in 1885, the federal courts exercised no jurisdiction whatsoever over Indian against Indian crimes. See infra notes 81-85 and accompanying text. Congress passed the statute because it disapproved of the tribe's handling of Ex Parte Crow Dog, 109 U.S. 556 (1883). FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 339 (1982). The result of Crow Dog was that the tribal court had sole jurisdiction over the murder of one Indian committed by another Indian in Indian Country. Crow Dog, 109 U.S. at 556.

Note that the states, not the federal government, exercise jurisdiction over major crimes where Public Law 280 has been adopted. See infra note 19 and accompanying text.

\(^\text{14}\) The statute, 18 U.S.C. § 1152, provides:

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

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

\(^\text{15}\) Id.
by non-Indians against Indians, and over any crime committed by Indians against non-Indians.

B. State Jurisdiction

Despite the pervasiveness of federal jurisdiction over crimes committed on reservation, the states also enter the picture of jurisdiction over these crimes. Presently, the state courts have exclusive jurisdiction over all crimes committed on reservation by non-Indians against non-Indians. Additionally, some states exercise jurisdiction over crimes committed on reservation under Public Law 280. Where Public Law 280 has been adopted or mandated, the state obtains jurisdiction over all crimes committed on reservation whether by or against Indian or non-Indian. Congress enacted this law in 1953, at

16. In United States v. McBratney, 104 U.S. 621, 623-24 (1881), the Supreme Court held that, in the absence of a treaty provision to the contrary, Colorado acquired jurisdiction over non-Indians committing crimes in Indian territory when Colorado was admitted to the Union as a Territory. The Court bolstered this decision in Draper v. United States, 164 U.S. 240 (1896), when it held that the state courts had jurisdiction when the enabling act admitting the state to the Union did not exclude state jurisdiction over crimes committed on reservation by non-Indians or against non-Indians. The state courts also exercise jurisdiction over victimless crimes committed on reservation by non-Indians. The McBratney and Draper decisions mandate this result.

Prior to these decisions, Justice Marshall wrote that "the laws of Georgia can have no force" on Cherokee nation land. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832). The inconsistency between the later opinions and Marshall's opinion is probably best explained by the allotment and assimilation movement that was building in the late 1800s. This movement sought to break apart the reservations and blend the Indians into mainstream American culture. See infra notes 130-36 and accompanying text.


For an explanation of the retrocession of Public Law 280 jurisdiction, see infra note 164.

18. Neither the Major Crimes Act nor the Federal Enclaves Act applies to crimes
least in part, as a means of erasing the distinctions between Indians and other "citizens." 19

In summary, barring the adoption of Public Law 280, the states have jurisdiction over all crimes committed on reservation by non-Indians against non-Indians. A state adopting Public Law 280 has jurisdiction over all crimes committed by or against Indians or non-Indians on reservation land.

C. Tribal Jurisdiction

After sorting out the scope of federal and state jurisdiction over crimes committed on reservation, the issue remains concerning the reach of tribal jurisdiction over crimes committed on reservation. By federal statute, the maximum sentence the tribal courts can impose for any one tribal offense is limited to a $5,000 fine, a jail term of one year, or both. 20 Thus, the tribal courts can impose punishment only upon misdemeanor or minor crimes committed on reservation.

To determine against whom the tribal courts can impose these punishments, one must examine the seminal decision in Oliphant v. Suquamish Indian Tribe. 21 In Oliphant, two non-Indians were charged by tribal authorities with minor tribal crimes. 22 The United States Supreme Court held that the tribal courts did not have jurisdiction over crimes committed by non-Indians on reservation land. 23 In so holding, the Court explained that, even ignoring the lack of congressional authorization for tribal jurisdiction and ignoring the lack of tribal jurisdiction language in the relevant treaty, the exercise of tribal jurisdiction over non-Indians was inconsistent with the tribes' status as nations dependent upon the United States. 24


20. No tribe shall "impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and [sic] a fine of $5,000, or both." 25 U.S.C. § 1302(7) (1988).


22. Mark Oliphant was charged with assaulting a tribal officer while Daniel Belgarde was charged with both recklessly endangering another person and injuring tribal property. Id. at 194.

23. Id. at 208.

24. Id. The Court reasoned that the tribes' status was inconsistent with the exercise of tribal jurisdiction over non-Indians because the federal government
Thus, the Court set the standard that the tribes retain only that power which is consistent with that dependent status.25 Because the tribal assertion of power over non-Indians is inconsistent with that status, the tribes do not share concurrent jurisdiction with the federal government over minor crimes committed by non-Indians on reservation.

The standard set out in Oliphant appeared once again in the context of jurisdiction over minor crimes committed on reservation by tribal members in United States v. Wheeler.26 In Wheeler, a Navajo Tribe member was arrested by the tribal police on the Navajo reservation in Many Farms, Arizona, for disorderly conduct.27 The defendant pled guilty to disorderly conduct and contributing to the delinquency of a minor. A federal court later sought to prosecute the defendant for statutory rape.28 In holding that both the tribe and the federal court could prosecute for crimes arising out of the same incident, the court explained that the tribes undisputedly have the power to enforce tribal criminal laws against their own members.29 Therefore, the tribes exercise concurrent jurisdiction over some minor crimes committed on reservation by their own members.30 However, by speaking of tribal power solely over members, the court in Wheeler set out the possibility that the tribal courts did not possess criminal jurisdiction over non-member Indians.

III. DURO V. REINA

The Supreme Court's language in Wheeler concerning

possessed the power to protect and to punish its citizens, and thus, by submitting to the federal government, the tribes could not exact any greater criminal punishment upon non-Indian citizens than that acceptable to Congress. Id. at 210.

25. "Indian tribes are prohibited from exercising . . . those powers "inconsistent with their status."" Id. at 208.
27. Id. at 314-15.
28. Id.
29. The Court reasoned that, despite their existence within the borders of the United States, the tribes "remain 'a separate people with the power of regulating their internal and social relations.'" Id. at 322 (quoting United States v. Kagama, 118 U.S. 375, 381-82 (1885)).
member Indians remained untested until *Duro v. Reina.* In this case, Albert Duro, a member of the Torres-Martinez Band of Cahuilla Mission Indians, allegedly shot and killed a boy, who was a member of another tribe, on the Salt River Indian Reservation in Arizona. This reservation was home to the Salt River Pima-Maricopa Indians.

The federal government charged Duro with murder and with aiding and abetting murder under the Major Crimes Act and the Federal Enclaves Act. The United States Attorney dismissed both of these charges, and the Pima-Maricopa tribe then charged Duro with the illegal firing of a weapon on the reservation.

After the tribal court denied Duro's motion to dismiss for lack of jurisdiction, Duro filed a petition for habeas corpus in a federal district court. The district court granted the writ, and the Ninth Circuit Court of Appeals vacated and remanded. The United States Supreme Court granted certiorari to resolve a split between the Eighth and Ninth Circuits.

The Supreme Court began its discussion by explaining that the decisions in *Oliphant* and *Wheeler* set the framework for the Court's analysis of the current matter. The Court likened the *Duro* case to *Oliphant* by explaining that, as in *Oliphant,* no issue existed as to the explicit divestiture of tribal power through congressional authorization, treaty provision, or legislation. Rather, the Court explained, the issue was whether the tribal exercise of criminal jurisdiction over nonmembers was inconsistent with the tribes' dependent status, and thus, whether the tribes were implicitly divested of crimi-
nal jurisdiction over nonmembers.41

The Court then explained that the tribes were no longer possessed of the full attributes of sovereigns, but rather, the tribes possessed a limited degree of sovereignty.42 This retained sovereignty, as the Court interpreted the language in Wheeler,43 "is that needed to control [the tribes'] own internal relations, and to preserve their own unique customs and social order."44 The Court in Duro reasoned that this rule of internal relations indicated that any tribal attempt at controlling external relations, without delegation by Congress, would be inconsistent with the tribes' status as dependent nations and thus invalid.45 The Court's reasoning implies that because tribal control over members is internal and control over nonmembers is external, the former is within the tribes' power whereas the latter is not.

After framing the theory that only member relations were consistent with the tribes' status as dependent nations, the Court explained that other areas of the law recognized the distinction between members and nonmembers and the distinction's relation to self-governance.46 The Court stated first that in state taxation matters, nonmembers stand on a footing more similar to non-Indians than member Indians.47 Further, the Court asserted, the tribes cannot regulate hunting and fishing on land held in fee by nonmembers within the boundaries of the reservation.48 Thus, with the state taxation and hunting

41. Id.
42. Id. at 2060.
43. Although the Duro Court cited no specific passage, the Court presumably referred to the Wheeler language that the tribes "have a significant interest in maintaining orderly relations among their members and in preserving tribal customs and traditions . . . ." United States v. Wheeler, 435 U.S. 313, 331 (1978).
45. The Court explained that had the Wheeler case involved a "manifestation of external relations between the Tribe and outsiders, such power [of tribal prosecution] would have been inconsistent with the Tribe's dependent status . . . ." Id.
46. Id.
48. The Court stated that Montana v. United States, 450 U.S. 544 (1981), held that a tribe could regulate hunting and fishing by nonmembers on tribal land or trust land, but the tribe could not regulate the same activities by nonmembers on land held by nonmembers in fee. Duro, 110 S. Ct. at 2060-61.
and fishing regulation examples, the Court supported its argument that inherent tribal power does not extend to the activities of nonmembers.

After bolstering its argument, the Court addressed the issue of tribal power over nonmembers in the civil law versus criminal law context. The Court asserted that the tribes retain greater power over nonmembers in civil matters, which usually arise with respect to property or consensual relationships, while criminal matters involve a "far more direct intrusion into personal liberties."49 The Court concluded that, in the criminal context, "tribal power does not extend beyond internal relations among members."50

Having argued that the exercise of tribal power over nonmembers was inconsistent with the tribes' status as dependent nations and having distinguished the broader exercise of tribal power over nonmembers in the civil context, the Court reviewed the historical definition of the word "Indian" in the context of congressional and administrative provisions. The Court rejected the argument that these provisions defined "Indian" as a single broad class with respect to tribal power.51 In so doing, the Court reasoned that such definitions involved the tribal relationship with the federal government and not the tribal power to treat nonmembers and members equally.52 The Court further explained that the federal statutes merely indicated a past Indian policy to treat Indians as one undifferentiated group; this policy, the Court implied, was not determinative on the issue of tribal power over nonmember Indians.53 The Court also stated that the historical record showed little federal attention to the power of an individual tribe, and thus, the federal statutes could shed little, if any, light on the issue of tribal power.54 Hence, the Court dismissed any federal provisions defining the word "Indian" because the provisions involved were focused on the tribal relationship with the federal government, indicated a past Indian policy, and revealed little federal attention to the individual tribe's power.

49. Tribal courts have the power to resolve civil disputes arising on reservation involving nonmembers as well as non-Indians. Duro, 110 S. Ct. at 2061. See also Williams v. Lee, 358 U.S. 217 (1959).
50. Duro, 110 S. Ct. at 2061.
51. Id. at 2062.
52. Id.
53. Id.
54. Duro, 110 S. Ct. at 2062.
After finding all congressional and administrative decisions defining or discussing the term “Indian” useless in defining tribal power, the Court turned to the opinions of the Solicitor of the Department of the Interior to obtain “the most specific historical evidence” on the issue of tribal power over nonmembers.55 Although the Court cited five of these opinions, it stressed only three.56 The Court indicated that one of the Solicitor’s opinions suggested that tribes could obtain jurisdiction over nonmembers by amending their tribal constitutions or through a delegation of federal authority.57 A second opinion mentioned adoption of nonmembers into the tribe, or, again, delegation of federal authority.58 The third and final opinion relied upon by the Court indicated that the only way a tribe could deal with “interloping” nonmember Indians was to remove the nonmembers or to accept delegated authority.59

The Court argued that because these decisions “indicate that the tribal courts embody only the powers of internal self-governance,” the decisions supported the conclusion that inherent tribal power does not include criminal jurisdiction over nonmember Indians.60 Thus, rather than relying on the federal provisions defining the word “Indian,” the Court stressed the Solicitor’s opinions regarding tribal power over nonmember Indians.

The Court then asserted that the historical record must be viewed under the shadow of Albert Duro’s status as a citizen of the United States.61 The Court argued that with the federal grant of citizenship to all Indians in 1924 came protection from “unwarranted intrusions on [the Indians’] personal liberty.”62 An unwarranted intrusion on personal liberty included subjecting a nonmember to trial and punishment by another tribe.63 The Court asserted that such a tribal exercise was an

55. Id. at 2063. The opinions of the Solicitor are the opinions of the “chief legal officer” of the Department of the Interior, which is the federal administrative agency managing Indian affairs. 1 Op. Solic. Interior Dep’t at v (introduction to administrative compilation of Solicitor General opinions).

56. See, e.g., Reina, 110 S. Ct. 2053, 2063 (1990). The Court quickly dismissed two of the opinions because the opinions broadly addressed jurisdiction over Indians in general. Id.


61. Id. at 2063.

62. Id. (citation omitted).

63. The Court stated, “We hesitate to adopt a view of tribal sovereignty that would
unwarranted intrusion because nonmembers had not consented to be governed by other tribes. Hence, the Court indicated that tribal assertion of criminal jurisdiction over nonmembers was an unwarranted intrusion on the personal liberty guaranteed to all United States citizens.

The Court also argued that Duro's status as an American citizen invoked all the protections of citizenship. The Court asserted that because tribal governments need not apply full Bill of Rights protections to defendants, citizenship protection was missing in tribal courts. Again referring to the consent argument, the Court reasoned that "the voluntary character of tribal membership and the concomitant right of participation in a tribal government" justified not applying the Bill of Rights to members. Implicitly, however, the same logic did not apply to nonmembers because they had not consented to be governed by another tribe. Thus, allowing the tribal courts to try nonmembers would subject American citizens to criminal proceedings without constitutional guarantees. In conclusion, the Court argued that tribal assertion of criminal jurisdiction over nonmembers intruded upon the personal liberty guaranteed to all United States citizens and subjected American citizens to criminal proceedings without constitutional guarantees.

The Court quickly dismissed two other arguments and then confronted the jurisdictional gap problem that can arise when nonmember Indians commit crimes on reservations. In

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single out another group of citizens, nonmember Indians, for trial by political bodies that do not include them." *Id.*

64. The Court propounded that in addition to the authority shared by the tribes with the United States, the tribes possess additional authority through the consent of its members, and this consent marks the bounds of tribal criminal authority. *Duro v. Reina*, 110 S. Ct. 2053, 2064 (1990). By implication, because nonmembers do not consent to be governed by other tribes, the tribes have no authority over them.

65. *Id.*
66. *Id.*
67. *Id.*
69. First, the Court dismissed the argument that Duro's status as a member of a tribe indicated his self-identification as an Indian to be governed by another tribe. *Id.* at 2064-65. The Court argued that the variations between tribes in "customs, art, language, and physical characteristics" showed that Duro's status as an Indian indicated little about his consent to be governed by another tribe. *Id.* at 2065. Second, the Court dismissed a "contacts" test for nonmember Indians because nonmembers share "jurisdictional characteristics" of non-Indians, and thus, nonmembers should share the same jurisdictional status. *Id.*
70. The Court noted that the *Oliphant* Court rejected an argument that the absence of tribal jurisdiction over non-Indians would leave a jurisdictional void. *Duro*, 110 S. Ct. at 2065 (citing *Oliphant* v. Suquamish Indian Tribe, 435 U.S. 191 (1978)).
concluding that no jurisdiction gap existed, the Court made three arguments. First, the Court suggested that the tribal authorities could exclude trouble-makers, eject them, or detain the offenders for the “proper authorities.” The Court failed to indicate who the “proper authorities” would be. Second, the Court asserted that the states, with tribal consent, could assist the tribes in maintaining order. The Court noted that Public Law 280 provided the necessary mechanism for state assumption of criminal jurisdiction. Third, the Court implied that tribal governments may be able to enter into agreements that give each tribe jurisdiction over the other’s members. The Court also intimated that if the current jurisdictional scheme proved “insufficient,” Congress could create a new one. Through these suggestions and arguments, the Court asserted that no incurable jurisdictional gap problem would be created.

In summary, the substance of the Court’s reasoning in Duro was relatively straightforward. The Court stated that, under the Oliphant decision, Indian tribes are implicitly divested of power that is inconsistent with their dependent status. Next, the Court asserted that, under the Wheeler decision, tribal attempts at regulating external relations are inconsistent with the tribes’ dependent status. Finally, the Court concluded that tribal jurisdiction over nonmember Indians is an external relation and therefore inconsistent with the tribes’ dependent status.

The remainder of the opinion addressed Duro’s arguments and presented some alternative and rebuttal theories. First, the Court turned to the historical record and dismissed any federal provisions defining the word “Indian.” Immediately thereafter, the Court argued that the most illuminating historical evidence came from the opinions of the Solicitor of the Department of the Interior, and this evidence supported the conclusion that inherent tribal power did not include criminal jurisdiction over nonmember Indians. Next, the Court argued that Duro’s status as a United States citizen afforded him protection from intrusion on his personal liberty that would occur through the assertion of tribal criminal jurisdiction. The Court also noted that tribal criminal jurisdiction would subject Duro,

71. Duro, 110 S. Ct. at 2065-66.
72. Id. at 2066.
73. Id.
74. Id.
75. Id.
as an American citizen, to proceedings without constitutional guarantees. Finally, the Court insisted that no unresolvable jurisdictional gap was created by holding that a tribal court has no jurisdiction over nonmember Indians committing minor crimes on reservation.

IV. ANALYSIS OF DURO

The Court’s reasoning and arguments in Duro are flawed in three areas: its examination of the historical record, its emphasis upon Duro’s United States citizenship status, and its dismissal of the jurisdictional gap problem.

The Court’s examination of the historical record is incomplete. Although the Court placed great emphasis on the importance of the Oliphant decision, it did not fully consider the court’s reasoning in Oliphant. The Court dismissed the relevance of federal statutes defining the word “Indian,” thus ignoring a significant source on the scope of tribal jurisdiction over nonmember Indians. Finally, the Court misinterpreted and ignored relevant opinions by the Solicitor of the Department of the Interior.

The Court’s reasoning is also flawed in the arguments it espoused on the importance of Duro’s status as a United States citizen. By focusing on United States citizenship status for Indians, the Court harkened back to an era when the Indian tribes were losing power; this view runs completely counter to the current congressional policy of expanding tribal power. In addition, the Court’s argument that one must consent to criminal jurisdiction conflicts with fundamental principles of jurisdiction.

Finally, the Court’s assertion that no jurisdiction gap exists over nonmember Indians ignores the factual reality of this case. The Court held that the tribal court did not have jurisdiction over Albert Duro.76 Without tribal jurisdiction over him and with the dismissal of the federal charges, Albert Duro simply walked away. Moreover, the Court’s solution to this jurisdictional vacuum ultimately calls for Congress to create a new jurisdictional framework, which would require Congress to reshape its current policy of tribal self-determination.

76. Duro, 110 S. Ct. at 2061.
A. The Historical Record

The first flaw in the Court's review of the historical record is its limited consideration of Oliphant. Although the Court began its argument by likening the Duro matter to Oliphant,77 it did not give the same credence to the historical record that the Court did in Oliphant. To explain, although Oliphant partially relied upon federal statutory history to conclude that the tribes were implicitly divested of jurisdiction over non-Indians,78 Duro dismissed these statutes as irrelevant on the issue of jurisdiction over nonmember Indians.79 If the Court in Duro had followed the lead of Oliphant and addressed this statutory history, it would have found that the tribes had not been implicitly divested of jurisdiction over nonmember Indians.80

To recognize that the path of statutory analysis followed by Oliphant would have produced a different result in Duro, one must begin with the Trade and Intercourse Acts. Congress adopted the first of these Acts in 1790.81 The 1790 Act provided for federal court punishment of non-Indians committing criminal acts against "any peaceable and friendly Indian or Indians" on Indian land.82 Thus, the 1790 Act provided for fed-

77. The Court asserted that the issue in neither Duro nor Oliphant dealt with the explicit divestiture of tribal power. Duro, 110 S. Ct. at 2059. Rather, the issue in both cases was whether the tribes implicitly lost their power through the tribes' dependent status. Id.

78. In holding that tribal courts do not have criminal jurisdiction over non-Indian offenders, the Court discussed statutory history; although such history was not conclusive, the Court noted that the statutory indication of congressional presumption carried "considerable weight." Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978).

79. The Court dismissed the federal provisions because the provisions "reflect the Government's treatment of Indians as a single large class with respect to federal jurisdiction and programs. Those references are not dispositive of a question of tribal power to treat Indians by the same broad classification." Duro, 110 S. Ct. at 2062 (emphasis in original).

80. Duro, 110 S. Ct. at 2069 (Brennan, J., dissenting).


82. Id. Although the Act provided for the federal courts to hear the matter, the state and territorial laws were to become the criminal code:

And it be further enacted, That if any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit any crime upon, or trespass against, the person or property of any peaceable and friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen or white inhabitant thereof, would be
eral jurisdiction over non-Indian against Indian crime, but made no mention of federal jurisdiction over Indian against Indian crime.

Congress explicitly addressed jurisdiction over Indian against Indian crime in the 1817 revision of the Trade and Intercourse Act.\textsuperscript{83} This revision provided that federal jurisdiction would not extend to "any offense committed by one Indian against another."\textsuperscript{84} After succeeding revisions that retained the "Indian against Indian" provision, the Trade and Intercourse Acts became the existing Federal Enclaves Act.\textsuperscript{85}

Although these Acts merely facially define federal criminal jurisdiction, \textit{Oliphant}'s recognition of these Acts, versus \textit{Duro}'s failure to recognize them, is important in two respects. First, because congressional enactments can limit powers retained by the tribes,\textsuperscript{86} federal statutes may be relevant to the issue of the scope of tribal power.\textsuperscript{87} Second, and more important, the Trade and Intercourse Acts use the word "Indian" in defining federal criminal jurisdiction. If the term "Indian" includes both "member and nonmember," this strongly suggests that the federal government recognizes Indians as but a single class. If Indians are but a single class, then relations among the individuals of that class are "internal" relations. Under the Court's holding in \textit{Duro}, tribes retain that degree of sovereignty needed to control their internal relations.\textsuperscript{88} Thus, if "Indian" means "member and nonmember," the tribes do not violate their dependent status by exercising criminal jurisdiction over nonmembers because such an exercise of jurisdiction is necessarily included in the control of internal relations.

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\textsuperscript{83} Trade and Intercourse Act of 1790, ch. 33, § 5, 1 Stat. 137, 137-38 (current version at 18 U.S.C. § 1152 (1988)).
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\textsuperscript{84} Id.
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\textsuperscript{87} Indeed, as Justice Brennan noted in his dissent in \textit{Duro}, the Court in \textit{Oliphant} viewed the statutory history as evidence of a "commonly shared presumption" that the tribes ceded their power over non-Indians to the federal government. \textit{Duro} v. \textit{Reina}, 110 S. Ct. 2053, 2069 (1990) (Brennan, J., dissenting).
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\textsuperscript{88} See supra note 41 and accompanying text.
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This syllogism illustrates the importance of determining the exact definition of the term "Indian."

Unfortunately, the Court's failure in Duro to address the Trade and Intercourse Acts allowed it to avoid defining the word "Indian" as used in federal statutes. As a result, the Court never discovered the importance of the term "Indian."

By failing to define the term "Indian" as used in federal statutes, the Duro Court summarily dismissed two relevant cases. The first, United States v. Rogers, involved the murder of a white man by another white man on a Cherokee Indian reservation. The defendant claimed that he and the victim had been adopted into the tribe. The applicable federal statute contained a provision asserting that the statute should "not extend to crimes committed by one Indian against the person or property of another." In ruling that the federal courts had jurisdiction over the defendant, the Court explained that the statutory language "does not speak of members of a tribe, but of the race generally—of the family of Indians." This statement indicates that the Supreme Court has defined the term "Indians" to include member and nonmember Indians. Thus, because all "Indians" are a single group, a tribe would be exercising "internal relations" by asserting criminal jurisdiction over nonmember Indians committing crimes on reservation.

This theory that criminal jurisdiction over nonmembers is part of the "internal relations" of a tribe is also supported by the Court's holding in United States v. Kagama. In Kagama, a member Hoopa Valley Indian murdered another member Hoopa Valley Indian on the Hoopa Valley Reservation in California. The Court held that under the Major Crimes Act, the action fell under federal court jurisdiction.

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89. 45 U.S. (4 How.) 567 (1846).
90. Id. at 570.
91. Rogers claimed that he and the victim had voluntarily moved to Cherokee Country without any intention of returning to the United States, incorporated themselves into the tribe, gained tribal recognition as a tribal members, and resided on the land. Rogers, 45 U.S. at 570-71.
92. Id. at 572. The applicable federal statute was the Trade and Intercourse Act of 1834, ch. 161, § 25, 4 Stat. 729 (codified as amended at 18 U.S.C. § 1152 (1988)).
93. Rogers, 45 U.S. at 573.
94. The Duro Court stated that "the retained sovereignty of the tribes is that needed to control their own internal relations . . . ." Duro v. Reina, 110 S. Ct. 2053, 2060 (1990).
95. 118 U.S. 375 (1886).
96. Id. at 376.
97. Id. at 385.
conclusion, the Court explained that the effect of the Act, in the context of an Indian against Indian murder, was “confined to the acts of an Indian of some tribe . . . committed within the limits of the reservation.” The Court reasoned that this effect was within Congress’ power because the tribes “are wards of the nation,” and the government has a duty to protect them.

Thus, the Court indicated that the membership status of an Indian committing a major crime on reservation was irrelevant for federal jurisdiction purposes. Although the crime in Kagama was a major crime, if membership status is irrelevant for federal jurisdiction purposes, it should also be irrelevant for tribal jurisdiction purposes because the federal duty to protect the tribes is best carried out by protecting tribal autonomy. In turn, tribal autonomy is best protected through the tribal exercise of jurisdiction over crimes committed on reservation by any Indian regardless of tribal affiliation.

Both of the above Court opinions support the thesis that tribal courts should exercise jurisdiction over nonmember Indians committing minor crimes on reservation land. The Rogers decision indicates that members and nonmembers fall under the category of “internal relations,” and the Kagama decision implies that membership status should be irrelevant to tribal jurisdiction. Nevertheless, in deciding Duro, the Court cursorily dismissed cases defining or addressing the term “Indian.” Instead, the Court chose to rely upon the opinions of the Solicitor of the Department of the Interior to support the proposition that the tribes did not possess criminal jurisdiction over nonmembers. In addition to being merely persuasive authority upon the Supreme Court, these opinions do not stand for the proposition that the tribal courts possess no jurisdiction over nonmember Indians.

In Duro, the Court referred to five of the Solicitor’s opin-

98. Id. at 383.
99. Id. at 383-84. Note that this duty of protection arose because of the tribes’ "weakness and helplessness." Id. at 384.
101. "The utility of the opinions in these volumes [of the solicitor's opinions] is not that they have binding effect . . . ." 1 Op. Solic. Interior Dep't at v (introduction to administrative compilation of Solicitor General opinions).
102. The Duro court stated that two of the opinions gave a "strong indication that the . . . tribal courts were not understood to possess power over nonmembers." Duro, 110 S. Ct. at 2063.
ions but stressed only three.103 The first of these was an opinion of March 17, 1937.104 This opinion dealt with law and order ordinances adopted by the Tribal Council of the Confederated Salish and Kootenai tribes.105 The opinion stated that the ordinances defined "Indian" too broadly by including nonmembers.106 The opinion suggested that the tribes could assume jurisdiction over nonmembers in two ways: amendment of the tribal constitution or delegation of federal authority.107 The Court in Duro recognized this part of the Solicitor's opinion.108 The Court failed to mention, however, the opinion's subsequent assertion that the only constraint upon the tribe's power over nonmembers was its existing narrow tribal constitutional authority.109 Hence, by enlarging the tribe's power by amendment of the tribal constitution, the tribe could obtain jurisdiction over nonmembers.110 As the Court itself recognized in Duro, the option of amending the tribal constitution would "reflect a belief that tribes possess inherent sovereignty over nonmembers."111

The Court then turned to the Solicitor's opinions of August 26, 1938 and February 17, 1939.112 Both of these opinions dealt with the criminal jurisdiction of the Chippewa Cree Tribe of the Rocky Boys Reservation in Montana; the latter opinion also dealt with the Blackfeet Tribe in Montana.113 As the Court pointed out in Duro,114 these opinions suggested that jurisdiction over nonmembers be federally delegated to the tribes.115 However, the Court failed to cite another opinion

103. Id.
105. Id.
106. Id.
107. Id.
110. Id.
111. Duro, 110 S. Ct. at 2063. The Court avoided reaching this conclusion in Duro by asserting that the August 26, 1938 and February 17, 1939 Solicitor's opinions indicated that the tribal courts "were not understood to possess power over nonmembers." Id.
112. Id.
114. Duro, 110 S. Ct. at 2063.
115. 1 Op. Solic. Interior Dep't 849 (Aug. 26, 1938); 1 Op. Solic. Interior Dep't 872 (Feb. 17, 1939). Contrary to the Court's assertion in Duro, 110 S. Ct. at 2063, however, the February 17 opinion did not suggest the tribes could control Indians who are members of other tribes by ejecting them from the reservation. Rather, the opinion
that indicated that tribal power was not merely an exercise of federally delegated authority.

In the opinion of October 25, 1938, the Solicitor explained that the tribal law and order codes, developed by the tribes themselves and applicable to members only, created a jurisdictional gap over nonmembers.116 Barring constitutional restrictions, which could be amended by the tribes themselves,117 the law and order codes could be amended by the tribes to include jurisdiction over nonmember Indians. Thus, this opinion implies that the tribes have the inherent power to obtain jurisdiction over nonmember Indians in criminal matters.

Moreover, if the Court was looking for a pronouncement on whether tribal power was delegated to the tribes by the federal government, it needed to look no further than its own decision in United States v. Wheeler.118 In examining the source of tribal power in Wheeler, the Court concluded that tribal power to punish crimes by tribe members was "attributable in no way to any delegation to [the tribes] of federal authority."119 The Court reasoned that none of the federal acts or treaties that it examined "created" the tribal power to govern its members.120 Yet, the Court still held that the tribes possessed the retained power to enforce tribal criminal laws against their own members.121

stated that the tribes could control only "member of no tribe" Indians by removing them from the reservation. 1 Op. Solic. Interior Dep't 872 (Feb. 17, 1939). Thus, this assertion is irrelevant on the subject of tribal power over nonmember Indians who are members of other tribes because Indians who are members of no tribe have distanced themselves from the tribe whereas those who are tribal members have embraced their Indian heritage, at least to some degree. By virtue of this distancing, Indians who belong to no tribe should be treated jurisdictionally just as non-Indians.

The distinction between tribal members and nonmembers is important in Duro because Duro is an enrolled member of the Torres-Martinez Band of Cahuilla Mission Indians. Duro, 110 S. Ct. at 2056.

119. Id. at 328.

Discussion of the relevance of treaties to tribal power has been omitted in light of the Court's comment in Duro that scholars are divided in their opinions over treaty evidence. Duro, 110 S. Ct. at 2062.

121. Wheeler, 435 U.S. at 328.
Although *Wheeler* involved tribal jurisdiction over member Indians, the Court's reasoning is also applicable to the issue of tribal jurisdiction over nonmembers. Simply put, no federal statute delegates federal authority to the tribes to exercise jurisdiction over nonmembers. As the court explained in *Wheeler*, the absence of such a statute implies that exercise of such jurisdiction is an exercise of the tribes' retained sovereignty.

The Court's incomplete analysis of the opinions of the Solicitor of the Department of the Interior allowed it to reach a different conclusion than that for which the opinions stand. Indeed, both the March 1937 opinion cited by the Court and the October 1938 opinion omitted by the Court indicate that the tribes possess inherent power over nonmembers. The opinions relied upon by the Court to illuminate the historical record thus actually represent only part of the Solicitor's theory of tribal power and are ambiguous at best. Additionally, an explanation of whether tribal power over nonmembers was federally delegated to the tribes can be found in *Wheeler*. The *Wheeler* opinion, as Supreme Court precedent, is the authoritative source on the matter of tribal power, and it provides the framework for concluding that such power was not delegated to the tribes by the federal government.

A recent congressional act that amends the definition of "powers of self-government" and adds a new definition of "Indian" also sheds light upon the tribal power to exercise jurisdiction over nonmembers. A provision buried in the Defense Appropriations Act for 1991 states that "powers of self-government" mean the "inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians." "Indian" is defined as "any person who would be subject to the jurisdiction of the United States as an Indian under [the Major Crimes Act] if that person were to commit an offense . . . in Indian country." The Major Crimes Act, of course, extends federal jurisdiction to major crimes committed by any Indian, member or nonmember, on reservation land. The Defense Appropriations Act, made permanent by Congress in 1991, indicates Congress' intent that the tribes exercise criminal

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123. Id. at § 8077(b), 104 Stat. at 1892.
124. Id. at § 8077(c), 104 Stat. at 1892-93.
jurisdiction over member and nonmember Indians committing minor crimes on reservation.\textsuperscript{126} Furthermore, although this act was unavailable to the Court at the time of \textit{Duro}, given the Court's apparent inattention to congressional pronouncements on the scope of tribal power, one wonders whether the Court would have found it determinative in defining tribal jurisdiction.

The Court's analysis of the historical record leaves one wanting more. Although the Court starts with the \textit{Oliphant} approach that the tribes can be implicitly divested of their power, the Court fails to follow through with an analysis of the relevant federal statutes that would help define jurisdiction. Had the Court undertaken this analysis, it would have found that early in its history the Supreme Court was predisposed to treat member and nonmember Indians as a single broad class. The tribal regulation of this single broad class, through the exercise of criminal jurisdiction, is an "internal relation" that does not conflict with the tribes' dependent status. Despite the Court's assertion to the contrary, this conclusion is not undermined by the decisions of the Solicitor of the Department of the Interior. Indeed, the decisions actually substantiate the theory that the tribes possess inherent power over nonmember Indians. Additionally, as recently as 1991, Congress has indicated its desire that the tribes retain jurisdiction over nonmembers committing minor crimes on reservations.

\textbf{B. Indian Citizenship}

Having swept aside and misinterpreted much of the historical record, the Court argued that the importance of Albert Duro's status as a United States citizen mandated the result that tribes do not have jurisdiction over minor crimes committed on reservation by nonmembers.\textsuperscript{127} This citizenship status argument is unsatisfying first because Indian citizenship became a reality during an era of diminishing tribal power and, second, because one need not consent to be amenable to criminal jurisdiction.


\textsuperscript{127} Duro v. Reina, 110 S. Ct. 2053, 2063-65 (1990).
Indian citizenship became an issue for Indian reformers following the Supreme Court's controversial decision in *Ex Parte Crow Dog*. The reformers made some progress towards gaining citizenship for the Indians with the General Allotment Act, or the Dawes Act, of 1887. The Dawes Act was a congressional effort to allot specific parcels of tribal land to the head of each Indian family. Upon receiving an allotment in fee simple, the Indian became a United States citizen. The reformers' dream of Indian citizenship did not end with the Dawes Act, however; it continued into the turn of the century, and in 1901 Congress made every Indian in the Indian Territory a citizen of the United States. Subsequently in 1924, Congress granted citizenship to all Indians born within the boundaries of the United States through the Indian Citizenship Act. The effort to make the Indians United States citizens thus spanned the history of the allotment era. The significance of this trend is that the allotment era was a time of assimilating the tribes into European culture and removing their power. Thus, the period during which Indians gained


129. In *Crow Dog*, the Court held that the federal government had no jurisdiction over major crimes committed by one Indian against another. *Ex Parte Crow Dog*, 109 U.S. 556 (1883). The decision prompted Congress to pass the Major Crimes Act, now codified at 18 U.S.C. § 1153 (1988), which essentially negated the *Crow Dog* decision and substantially limited tribal power. See *supra* note 13.


135. The "Allotment and Assimilation" era of Indian history ran from 1887 to 1934. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 19 (1988).

136. Indeed, in 1914, after the allotment of the lands of the Cherokee Nation,
citizenship, from 1887 to 1924, was not a time of expanding tribal power. By making a citizenship argument, the Court in *Duro* harkens back to a distant era of limited tribal power.

The current status of congressional Indian policy is vastly different. The current policy is codified as the Indian Self-Determination and Education Act.\(^\text{137}\) This Act declares Congress' continuing commitment to maintaining the tribes' "unique" relationship with the federal government and promoting the establishment of the "meaningful participation" of the Indians in federal programs.\(^\text{138}\) In 1988, Congress amended the Act to declare that "the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs. . . ."\(^\text{139}\) Thus, Congress' current policy promotes tribal self-government.

The contrast between the allotment era and the current self-determination era is striking. By propounding the virtues of Indian citizenship in *Duro*, the Court effectively steps back to an era when congressional policy was to eliminate Indian power. This step back cuts against current Indian policy because current policy is to allow the tribes a high degree of self-government. A high degree of self-government is maintained through the tribal exercise of criminal jurisdiction over nonmembers because the tribes exert power over Indian people, as a single broad class, under tribally developed law. Thus, the Court's citizenship argument, although patriotically appealing in a sense, throws Indian policy backwards over 100 years.

In addition to the error of turning for support to a time of diminishing tribal power, the Court erred in its assertion that subjecting nonmember Indians to trial by another tribe was an


\(^{139}\) *Id.*
unwarranted intrusion on the personal liberty guaranteed to all United States citizens. The fallacy in this assertion results from the implied premise that nonmembers must consent to be governed by other tribes to be amenable to criminal jurisdiction. As Justice Brennan pointed out in his dissent, the Court has never held that participation in the political process is a prerequisite to the exercise of criminal jurisdiction by a sovereign. Justice Brennan wrote: "If such were the case, a State could not prosecute nonresidents, and this country could not prosecute aliens who violate our laws." Furthermore, even if one had to consent to be amenable to tribal criminal jurisdiction, nonmembers have consented to tribal jurisdiction merely by committing a crime on the reservation. Thus, the consent theory espoused by the Court in Duro ignores basic principles of criminal jurisdiction.

Overall, the Court's citizenship argument fails. First, the theory of protecting the status of Indians as United States citizens flies in the face of the current congressional policy to allow Indians a high degree of self-government. Second, the consent argument conflicts with fundamental legal principles of criminal jurisdiction.

C. The Jurisdictional Gap

After rebutting and asserting historical and citizenship arguments, the Court addressed the issue of a jurisdictional gap over nonmember Indians committing minor crimes on reservation. The Court essentially offered three arguments to prove that no jurisdiction gap problem existed; it also offered a possible solution should a jurisdictional gap problem appear.

The Court first argued that the tribal authorities could exclude the nonmember offenders, eject them, or detain them.

141. Id.
142. Id. at 2071 (Brennan, J., dissenting).
143. Id.
144. Justice Brennan asserted that "[t]he commission of a crime is all the 'consent' that is necessary to allow the tribe to exercise criminal jurisdiction" over nonmember Indians. Duro v. Reina, 110 S. Ct. 2053, 2071 (1990).
145. For an argument that the Court should have implemented an implied consent theory to allow tribal courts to obtain jurisdiction, see Peter Fabish, Note, The Decline of Tribal Sovereignty: The Journey from Dicta to Dogma in Duro v. Reina, 66 WASH. L. REV. 567 (1991).
146. Duro, 110 S. Ct. at 2065-66.
147. Id.
for “the proper authorities.” The powers to exclude or eject offenders are related and are fully possessed by the tribes. However, the powers of exclusion and ejection allow the tribes to do no more than to keep people off of reservation land. These powers do not include the power to punish criminal offenders with fines or jail time. Thus, exclusion and ejection do not equal the power of traditional criminal jurisdiction and do not support the conclusion that a jurisdictional gap over nonmembers does not exist.

The Court’s other notion was that, if jurisdiction to punish lies outside the tribe, the tribal authorities could detain the offender for the “proper authorities.” Under existing statutory and case law, neither the federal government nor those state governments that have declined to exercise Public Law 280 jurisdiction are the “proper authority” because neither can exercise jurisdiction over crimes committed by Indians against Indians on reservation land. The “detain” argument thus fails to support the Court’s argument that no jurisdiction gap exists. Rather, because there are no “proper authorities,” this argument actually supports the contrary conclusion that a gap does indeed exist.

The Court’s second jurisdictional gap argument asserted that the states, with tribal consent, could assume jurisdiction over nonmembers committing crimes on reservation via Public Law 280. This argument is flawed because the Court does not indicate which entity would exercise jurisdiction if states do not adopt Public Law 280; simply proposing that the states assume jurisdiction begs the question of whether at present an underlying jurisdiction gap problem exists. The Public Law 280 argument is also flawed because it asks the states to adopt a policy of tribal assimilation.

148. Id. at 2066.
149. In Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), the Court asserted that “[n]onmembers who lawfully enter tribal lands remain subject to the tribe’s power to exclude them.” Id. at 144 (emphasis in original). The power of exclusion includes the corollary power of ejection. Id. (Court speaks of the tribes’ “ultimate power to oust”). Exclusion and ejection are “sovereign” powers. Id. at 145.
151. The Federal Enclaves Act, 18 U.S.C. § 1152 (1988), exempts from federal jurisdiction “Indian against Indian” crimes occurring on reservation, and the McBratney and Draper decisions allow for state criminal jurisdiction over only non-Indian against non-Indian crimes committed on reservation. See supra note 16 and accompanying text.
152. Duro, 110 S. Ct. at 2066.
153. Congress enacted Public Law 280 during the “termination” era of Indian
ever, has given way to the current policy of tribal self-governance.\textsuperscript{154} Thus, the Public Law 280 argument ignores the issue of whether a jurisdictional gap exists and asks the states to execute a policy that clashes with current federal policy.

The Court also implied that no jurisdictional gap exists because the tribes could possibly enter into intertribal agreements to assume jurisdiction over each other's members who are criminal offenders.\textsuperscript{155} Had the court examined the intertribal agreement theory it would have found two basic problems: The theory provides for a potentially confusing jurisdictional patchwork over nonmembers, and if the intertribal agreements become widespread, the theory undermines the \textit{Duro} holding that the tribes have no jurisdiction over nonmembers committing minor crimes in Indian Country.

As to the first of these problems, formation of jurisdictional agreements between the numerous scattered tribes\textsuperscript{156} would result in a jurisdictional quagmire. For instance, the Ute tribe in New Mexico may have jurisdiction over members of the Taos and Picuris Reservations committing minor crimes but not over members of the Mescalero or Sandia Reservations committing the same crimes. This inconsistency simply creates unnecessary headaches for the tribal officers and judges trying to sort out the tribal affiliations of accused nonmembers before proceeding with, or dismissing, their cases. The Court offers no justification for adding confusion to the already confused jurisdictional framework now in place.

In addition, the intertribal agreement theory potentially undermines the result in \textit{Duro} that the tribes possess no jurisdiction over nonmember offenders. Although the agreements would not represent an exercise of the tribes' inherent jurisdictional power, the proliferation of jurisdictional agreements could place jurisdiction, in a practical sense, squarely with the tribes. Such an outcome would strip the \textit{Duro} decision of all practical meaning.

Finally, the Court indicated that Congress could create a

\textsuperscript{155} Duro v. Reina, 110 S. Ct. 2053, 2066 (1990).
\textsuperscript{156} There are at least 481 federally recognized Indian tribes in some 38 states. D. Getches ET AL., \textit{FEDERAL INDIAN LAW} 2-3, 5 (1979).
new jurisdictional scheme should the current jurisdictional scheme prove insufficient.157 This extreme solution to the jurisdictional gap problem asks Congress to do that which it should not have to do. Indeed, Congress has already made clear its policy to grant the tribes a high degree of self-government.158 Had the Court in Duro taken into account current congressional policy, it would not have proposed that Congress make any additional clarifications or changes.

Thus, by concluding that no jurisdiction gap exists, the Court demonstrates its fundamental misunderstanding of the nature of a jurisdictional void and ignores current federal Indian policy. The Court's solution to the jurisdictional gap problem asks Congress to clarify or change a policy that Congress has already clearly set forth.

In summary, the Court's decision in Duro was flawed in three areas. First, the Court incompletely analyzed the historical record by ignoring relevant federal statutes and judicial decisions illuminating criminal jurisdiction over nonmember Indian offenders. Next, the Court espoused the virtues of United States citizenship status for Indians, ignoring the current congressional policy of expansive tribal power. Finally, the Court wrongly insisted that no jurisdictional gap problem existed but that if there were a problem, Congress was the appropriate body to remedy the problem.

V. THE FUTURE OF JURISDICTION OVER NONMEMBER AGAINST INDIAN MINOR CRIME

The Duro decision renders academic any discussion of how the Court should have made its decision and by what measure it should have allowed the tribes to exercise jurisdiction over nonmember Indians, at least until the Court reconsiders its decision. Hence, after the Court's holding in Duro, the question becomes whether the states or the federal government will exercise jurisdiction over crimes other than major nonmember crimes committed on reservation lands. An indication of which entity may exercise jurisdiction may be gleaned by re-examining the existing status of federal and state jurisdiction over Indian against Indian crimes occurring on reservation land.

Federal jurisdiction over these crimes is currently statuto-

157. Duro, 110 S. Ct. at 2066.
rily impossible. A Federal Enclaves Act provision exempts from federal jurisdiction other than major "Indian against Indian" crimes occurring on reservation. In addition, Congress will probably not amend the Act or otherwise allow for federal jurisdiction of minor criminal offenses because the federal authorities are loathe to prosecute minor crime cases that would overload the already congested federal dockets, involve burdensome travel, and result in only low fines or suspended sentences. Furthermore, Congress has expressed its desire, through the Indian Self Determination Act, that the tribes retain a high degree of self-government. Passing a new law mandating federal jurisdiction over nonmember Indian crimes would strike at the self determination policy that Congress has so recently put into place. The existence of the Federal Enclaves Act and the slim possibility of the Act's revision imply that the federal government will not assume jurisdiction over minor crimes committed on reservation by nonmember Indians against other Indians. Furthermore, although Congress indicated its intent that the tribes exercise jurisdiction over nonmember offenders, it remains to be seen if this legislative pronouncement will withstand judicial scrutiny.

Second, just as Congress is unlikely to assume jurisdiction over minor nonmember crimes committed on reservation, the states probably will not assume jurisdiction over these crimes. Although Congress gave the states the opportunity to adopt jurisdiction under Public Law 280, some of the states that assumed jurisdiction under this statute have ceded the power back to the federal government. Perhaps the cost of extra

160. Steven M. Johnson, Note, Jurisdiction: Criminal Jurisdiction and Enforcement Problems on Indian Reservations in the Wake of Oliphant, 7 AM. INDIAN L. REV. 291, 298 (1978); see also Patricia Owen, Note, Who is an Indian?: Duro v. Reina's Examination of Tribal Sovereignty and Criminal Jurisdiction over Nonmember Indians, 1988 B.Y.U. L. REV. 161, 174 (1988). Both of these commentators assert that minor crimes committed on reservations are unlikely to interest federal prosecutors.
162. See supra notes 122-126 and accompanying text.
163. 25 U.S.C. § 1323(a) authorizes the United States to accept a retrocession of criminal or civil jurisdiction first assumed mandatorily or optionally by any state under Public Law 280.

The Washington legislature ceded criminal jurisdiction back to the United States over the Quileute, Chehalis, Swinomish, and Colville reservations as well as over "lands excluded from Olympic National Park." See WASH. REV. CODE §§ 37.12.100-.150 (1989). The Governor of Washington also ceded jurisdiction over the Suquamish Port Madison Indian Reservation and the Quinault Indian Reservation back to the
police patrols on reservation land stretched the taxpayers' patience and the states' coffers. Regardless, only nine states have ever assumed Public Law 280 jurisdiction. The state retrocession of Public Law 280 jurisdiction and the low number of states assuming Public Law 280 jurisdiction indicate that the states will not assume jurisdiction over minor nonmember crimes.

Thus, the jurisdictional gap over nonmember Indians, which the Court in Duro claimed did not exist, is all too real. Moreover, because of the existing federal and state jurisdictional situation, the gap will not soon be filled.

VI. CONCLUSION

The Supreme Court's holding in Duro v. Reina answers in the negative the question of whether the tribes have jurisdiction over minor Indian against Indian crime committed on reservation. However, the Court leaves open the question of which governing entity, federal or state, will exercise jurisdiction over this class of criminal offenses.

In reaching its decision, much of the Court's logic is flawed. First, the Court's analysis of the historical record is incomplete. Although the Court starts with the Oliphant approach that the tribes can be implicitly divested of their power, the Court fails to follow through with an analysis of the relevant federal statutes that would help in defining jurisdiction. Thus, the Court fails to give deference to the complete historical record.

Furthermore, the Court's citizenship argument fails. The theory of protecting the status of Indians as United States citizens ignores the current congressional policy that the tribes be allowed a high degree of self-government. Further, the argument fails to take into account the basic principle of consent to criminal jurisdiction.

Finally, the Court's argument that no jurisdictional gap

United States. COHEN, supra note 13, at 370 n.195. Wisconsin, Nevada, Minnesota, and Nebraska also ceded at least some part of their Public Law 280 jurisdiction back to the United States. Id.

164. Immediately following the enactment of Public Law 280 in its original form, one commentator asserted that few states would extend their criminal jurisdiction via Public Law 280 "because this law does not authorize any corresponding extension of the taxing power of the state to recoup the added cost of law enforcement." Laurence Davis, Criminal Jurisdiction Over Indian Country in Arizona, 1 ARIZ. L. REV. 62, 89 (1959).
exists begs the fundamental question. The Court's arguments ignore the existence of a gap and posit jurisdiction where there is none. The Court also ignores the current federal Indian policy of expansive tribal self-governance by asking the states to assume jurisdiction over tribal lands. The Court's solution to an insufficient jurisdictional scheme is to ask Congress to create a new jurisdictional framework. This solution is unnecessary given Congress' clearly stated policy of tribal self-governance.

The Court's decision also leaves open the possibility that a jurisdictional void will be unfilled by either the federal or the state governments. The prosecution of additional minor criminal offenses simply poses financial and practical burdens that may be too heavy for the federal and state governments.

A more efficient and sound approach for the Court would have been simply to allow the tribes to exercise their inherent sovereignty over nonmember criminal offenders. Instead, what remains after Duro is judicially pared down tribal sovereignty and a gap over crimes committed on reservation by non-member Indians.