Supreme Court of the United States.
Russel MEANS, Petitioner,
v.
NAVAJO NATION, a federally recognized Indian Tribe; and Honorable Ray Gilmore, Judge, Navajo Nation District Court, Chinle, Navajo Nation, Arizona,
Respondents.

No. 05-1614.
June 16, 2006.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

Petition for Writ of Certiorari

John Trebon, (Counsel of Record), John Trebon, P.C., 308 N. Agassiz, Flagstaff, AZ 86001, Ph.: (928) 779-1713, Fax: (928) 774-1265, Attorney for Petitioner.

QUESTIONS PRESENTED

1. Can Congress lawfully vest Indian Nations, which are not subject to the United States Constitution, with criminal jurisdiction over nonmember Indians who are citizens of the United States - but not over nonmember non-Indians - without violating the equal protection and due process clauses of the Fifth Amendment to the United States Constitution? Can Indian tribes exercise criminal jurisdiction over nonmembers, but only as long as they are Indians, without violating the equal protection and due process provisions of the Indian Civil Rights Act, Title 25 U.S.C. § 1302(8)?

2. Can Indian tribes exercise criminal jurisdiction over nonmember Indians, who are citizens of the United States, outside of the United States Constitution without violating due process of law?

3. Did Congress, by amending the Indian Civil Rights Act to provide Indian tribes with criminal jurisdiction over nonmember Indians abrogate the Navajo Treaty of 1968, which explicitly provides for federal jurisdiction over intertribal offenses?

4. Does Congress possess the power to grant criminal jurisdiction to Indian Tribes over nonmembers under the Indian Commerce Clause, Art. 1, § 8, cl. 3, even though Tribes are not bound by the United States Constitution?

PARTIES TO THE PROCEEDINGS

In addition to the Petitioner, Russell Means and the Respondents, the Navajo Nation, a federally

recognized Indian Tribe, and Honorable Ray Gilmore, Judge, Navajo Nation District Court, Chinle, Navajo Nation, Arizona, the United States intervened in this matter as a Defendant before the Court of Appeals for the Ninth Circuit.

Please also be informed that similar issues have been presented to this Court in the pending petition of *Morris v. Tanner,* No. 05-1285.

TABLE OF CONTENTS

Questions Presented ... i

Parties to the Proceedings ... ii

Table of Contents ... iii

Table of Authorities ... iv

Opinions Below ... 1

Jurisdiction ... 1

Constitutional and Statutory Provisions Involved ... 2

Statement of the Case ... 3

Arguments Amplifying the Reasons Relied Upon for Allowance of the Writ ... 7

I. Indians Constitute An Ethnic Or Racial Class Entitled to Equal Protection of Law ... 7

II. Nonmember Indians Cannot Be Subject To The Jurisdiction of A Foreign, Domestic Tribe Without the Full Panoply of the U.S. Constitution ... 16

III. The Navajo Treaty of 1868 Expressly Provides For Federal Jurisdiction Over Intertribal Offenses ... 18

IV. The Indian Commerce Clause Does Not Provide Congress With The Power to Bestow Criminal Jurisdiction On Indian Tribes Over Nonmembers ... 20

Conclusion ... 21

TABLE OF AUTHORITIES

Cases

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) ... 10, 11, 14

Agostini v. Felton, 521 U.S. 203 (1997) ... 6, 14

Asakura v. Seattle, 265 U.S. 332 (1929) ... 19

Babbitt v. Oglala Sioux Tribal Public Safety, 194 F.3d 1374 (Fed. Cir. 1999) ... 19

Dawavendewa v. Salt River Project, 154 F.3d 1117 (9th Cir. 1998) ... 13

Duro v. Reina, 495 U.S. 676 (1990) ... 7, 8, 11, 17

Ex Parte Crow Dog, 109 U.S. 556 (1883) ... 18

Ex Parte Pero, 99 F.2d 28 (7th Cir. 1938) ... 12

Kinsella v. U.S. ex rel. Singleton, 361 U.S. 234 (1960) ... 17, 18

Kornhass Construction, Inc. v. Oklahoma, 140 F. Supp. 2d 1232 (W. Dist. Okla. 2001) ... 13, 15

Malabed v. North Slope Borough, 42 F. Supp. 2d 927 (Dist. Alaska 1999) ... 13, 15

Means v. District Court, No. SC-CV-61-98, slip op. at p. 19 (Nav. Nat. S. Ct. 5/11/99) ... 5

Means v. Navajo Nation, 432 F.3d 924 (9th Cir. 2005) ... 6, 14

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) ... 19

Morton v. Mancari, 417 U.S. 535 (1974) ... 6, 12, 13, 14

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) ... 7

Reid v. Covert, 354 U.S. 1 (1957) ... 7, 17, 18

Rice v. Cayetano, 528 U.S. 495 (2000) ... 11, 12, 14

Spokane Tribe of Indians v. Washington, 28 F.2d 991 (9th Cir. 1994) ... 20

Tafoya v. City Albuquerque, 751 F. Supp. 1527 (Dist. N.M. 1990) ... 13, 15

United States v. Dodge, 538 F.2d 770 (8th Cir. 1976) ... 12

United States v. Ives, 504 F.2d 935 (9th Cir. 1974) ... 12

United States v. Lara, 541 U.S. 193 (2004) ... *passim*

United States v. Lopez, 514 U.S. 549 (1995) ... 20

United States v. Mazurie, 419 U.S. 544 (1975) ... 7

United States v. Rogers, 45 U.S. 567 (1846) ... 12

United States v. Wirans, 198 U.S. 371 (1905) ... 19

Western States Paving Co. Inc. v. Washington State DOT, 407 F.3d 983 (9th Cir 2005) ... 15

Williams v. Babbit, 115 F.3d 657 (9th Cir. 1997) ... 13

Federal Authorities

1 N.N.C. § 701-03 ... 4

18 U.S.C. § 1153 ... 12

25 U.S.C. § 1301 ... 2, 7, 15

25 U.S.C. § 1303 ... 6

28 U.S.C. § 1254 ... 1

28 U.S.C. § 2241 ... 6

136 Cong. Rec. H. 13556, H. 13596 (Oct. 24, 1990) ... 12

Article I, Navajo Treaty of 1868, 15 Stat. 668 ... 3

H. R. Conf. Rep. No. 101-938 pt. 2 (1990) ... 12

U.S. Const. amend. V ... 1, 2, 6, 7, 8

U.S. Const. amend. XIV ... 6, 7, 8

U.S. Const. Art. 1, § 8, cl. 3 ... 10

U.S. Const. Art. 1, § 8, cl. 14 ... 18

Publications

American Indian Areas and Alaska Native Villages: 1980 census Populations, Supplementary Report, U.S. Dept. of Commerce, Bureau of Census ... 13

David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples,* 38 U.C.L.A.L. Rev. 759, 761-62 (Apr. 1991) ... 13, 15

Eugene Doherty, *Equal Protection Under the Fifth and Fourteenth Amendments: Pattern of Congruence, Diversions, and Judicial Deference*, 16 Ohio N.U.L. Rev. 591, 618 (1989) ... 13, 15

K.J. Erhart, *Jurisdiction Over Nonmember Indians on Reservations*, 1980 Ariz. State L.J. 727 ... 19

L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes,* 101 Colum. L. Rev. 702, 709-17 (May 2001) ... 13, 15

R.N. Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective,* Vol. 17 Ariz. L.R. 951 (1975) ... 18

Russell Means petitions this Court for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals was first reported on August 23, 2005, but later amended by the Ninth Circuit after Mr. Means filed a petition for rehearing. The amended decision was filed by the Ninth Circuit on December 13, 2005 and is reported at 432 F.3d 924 (9th Cir. 2005). The Opinion filed on August 23, 2005 was withdrawn. Mr. Means then filed a subsequent petition for rehearing *en banc* which was denied by the Ninth Circuit on March 22, 2006. The judgment by the Ninth Circuit was entered on December 13, 2005. The final decision for the Court of Appeals for the Ninth Circuit is reproduced in the Appendix at App. 1.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on December 13, 2005. A timely petition for rehearing *en banc* was denied on March 22, 2006. The jurisdiction of the United States Supreme Court is invoked under Title 28 U.S.C. § 1254(1) and Rule 13(1)(3), Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. *Fifth Amendment:* The Fifth Amendment to the United States Constitution provides that: "No person shall be ... deprived of life, liberty, or property, without due process of law .... "U.S. Const. amend. V.

B. Title *25 U.S.C. § 1301:* For purpose of this title [25 U.S.C. §§ 1301, et seq.], the term -
1) "Indian Tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;
2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;
3) "Indian court" means any Indian tribal court or court of Indian offense; and
4) "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, United States Code, if that person were to commit an offense listed in that section in Indian country to which that section applies.
Title 25 U.S.C. § 1301. [FN1] [Emphasis added].

> FN1. The act of Congress specifically at issue is the amendment to Title 25 U.S.C. § 1301 embodied in the Act of November 5, 1990, §§ 8077(b)-(d), 104 Stat. 1892-1893 (temporary legislation until September 30, 1991), as made permanent by the Act of October 28, 1991, 105 Stat. 646, which added the Congressional recognition and affirmation of a tribe's inherent power to prosecute "all Indians," in subsection (2), and added subsection (4). They are referred to herein as the 1990 Amendments.

C. *Navajo Treaty of 1868:* 15 Stat. 668
If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the Untied States, and also to reimburse the injured persons for the loss sustained.

If the bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian; subject to the authority of the Untied States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws....

Article I, Navajo Treaty of 1868, 15 Stat. 668, which is reproduced in the Appendix at App. 26-38.

STATEMENT OF THE CASE

Russell Means is a citizen of the United States. He is a member of the Oglala-Sioux tribe of Indians. He is a permanent resident of Porcupine on the Pine Ridge Sioux Indian Reservation. Russell Means is not a member of nor is he eligible for membership in the Navajo Nation or Navajo Tribe of Indians. Membership within the Navajo Nation is conditioned upon no less than one-fourth degree of Navajo blood, may not take place by adoption or custom, and does not exist for a person who is a member of another Indian Nation or Tribe. *See* Title 1 N.N.C. § 701-03.

On December 28, 1997, the Navajo Nation charged Russell Means with three offenses: (1) threatening Leon Grant, his father-in-law and a member of the Omaha tribe of Indians; (2) committing a battery upon Leon Grant, and (3) threatening Jeremiah Bitsue, a Navajo Indian. The three charges were filed against Mr. Means before the Chinle District Court, Navajo Nation. Mr. Means filed a motion to dismiss the charges due to constitutional violations and lack of jurisdiction. Judge Ray Gilmore held a hearing on the motions, and Mr. Means testified as the only witness. Based upon substantial ethnological research, Mr. Means testified that American Indians constitute a separate race. Mr. Means was married to Gloria Grant, a Navajo Indian and lived on the Navajo Indian Reservation from 1987 through most of 1997. Mr. Means moved from the reservation shortly before the incident involving Mr. Grant and Mr. Bitsue occurred.

As a nonmember Indian living on the Navajo Indian Reservation, Mr. Means could not start a business or obtain employment. He was treated the same as a nonIndian. As a nonmember, Mr. Mesns could not run for political office on the Navajo Nation, could not become a judge within the Navajo Nation, could not become a council delegate, etc. Mr. Means could not vote in tribal elections. He could not participate in the democratic processes of the Navajo Nation.

Judge Gilmore denied the pretrial motions filed by Mr. Means. The Navajo Nation Supreme Court accepted jurisdiction to review the issue of jurisdiction and affirmatively decided that the Navajo Nation had criminal jurisdiction to prosecute Russell Means in a written decision issued on May 11, 1999. The Navajo Nation found that it had criminal jurisdiction over both nonmember Indians and non-Indians who reside on the Navajo Nation despite this Court's decisions in *Duro v. Reina,* 495 U.S. 676 (1990). The petitioner [Russell Means] belongs to the classification *hadane* [in-law] and not that of nonmember Indian. One can be of any race or ethnicity to assume tribal relations with Navajos.
Means v. District Court, No. SC-CV-61-98, slip op. at p. 19 (Nav. Nat. S. Ct. 5/11/99).

Mr. Means initiated a Verified Petition for Writ of Habeas Corpus and/or for Writ of Prohibition with the United States District Court on June 15, 1999. Judge Carroll granted a preliminary injunction in favor of Mr. Means.

On September 20, 2001, Judge Carroll issued an order approving the Second Report and Recommendation of Magistrate Verkamp and denied Mr. Means' Petition. A judgment was issued denying the habeas petition. Mr. Means filed a timely notice of appeal on October 18, 2001.

The basis for federal jurisdiction in the *habeas corpus* proceeding filed by Mr. Means was based upon explicit provisions of the Indian Civil Rights Act, Title 25 U.S.C. § 1303 and Title 28 U.S.C. § 2241(c)(1)(3).

The Court of Appeals for the Ninth Circuit found that the amendments to the Indians Civil Rights Act, expressly including "all Indians," really only "means all of Indian ancestry who are also Indians by political affiliation, not all who are racially Indians." *Means,* 432 F.3d 924, 930 (9th Cir. 2005). The Court then recognized that "Means' equal protection argument has real force," but concluded that it was "bound" to reject it because of this Court's decision in *Morton v. Mancari,* 417 U.S. 535 (1974) (employment preference that favored Indians under Trust obligation of federal government allowed) and "under the doctrine of *Agostini v. Felton,*" 521 U.S. 203, 237 (1997) (U.S. Supreme Court direct precedent applies even if it has been discredited by another line of cases from this Court). *Means,* 432 F.3d 924, 932. The Court then concluded that a mere "rational tie" standard under *Mancari* allowed discriminatory legislation against Indians. *Means,* 432 F.3d at 933. Besides, the Ninth Circuit noted, Indians are not entitled to equal protection under the U.S. Constitution because "Indian tribal identity is political rather than racial...." *Id.* at 933.

The Ninth Circuit summarily rejected and virtually ignored the weighty "due process" arguments of Mr. Means, which was recognized by this Court in *United States v. Lara,* 541 U.S. 193 (2004), as well as, the fact that the Navajo Treaty of 1868 expressly provides for federal criminal jurisdiction over intertribal offenses.

ARGUMENTS AMPLIFYING THE REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

I. Indians Constitute An Ethnic Or Racial Class Entitled to Equal Protection of Law

In *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978), the United States Supreme Court held that Indian tribal courts do not possess criminal jurisdiction over nonIndians. More than a decade later, the United States Supreme Court held that *Oliphant* and other authority "compels the conclusion that Indian tribes lack jurisdiction over persons who are not tribe members." *Duro v. Reina,* 495 U.S. 676, 691 (1990).

Congress then amended the Indian Civil Rights Act (ICRA) ostensibly to provide that Indian tribal courts shall possess criminal jurisdiction over nonmember Indians, but not over nonmember non-Indians. *See* Title 25 U.S.C. § 1301(2) (1990). The grant of criminal authority over U.S. citizens to Indian governments without constitutional protection is an unlawful delegation of authority without adequate standards. It is not authorized under the "commerce" clause applicable to Indian tribes.

Our cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right. Cf. *Reid v. Covert,* 354 U.S. 1 (1957). We have approved delegation to an Indian tribe of the

authority to promulgate rules that may be enforced by criminal sanction in *federal* court, *United States v. Mazurie,* 419 U.S. 544 (1975), but no delegation of authority to a tribe has to date included the power to punish nonmembers in *tribal* court. We decline to produce such a result through recognition of inherent tribal sovereignty.

Tribal authority over members, who are also citizens, is not subject to these objections. Retained criminal jurisdiction over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent. This principle finds support in our cases as decided under provisions that pre-date the present federal jurisdictional statutes. *Duro v. Reina,* 495 U.S. 676, 693-94 (1990).

In *United States v. Lara,* 541 U.S. 193 (2004), four Supreme Court Justices joined in the opinion by Justice Breyer, concluding that Congress has the power to "relax" historical and legal restrictions on tribal sovereign authority to try nonmember citizens of the United States as long as they are only "Indians." Justice Breyer expressly deduced that the power to prosecute nonmember Indians was an aspect of the tribes' "external relations and hence part of the sovereignty that was divested by treaties and by Congress" *Id.* Justice Breyer reaffirmed that *Duro v. Reina,* 495 U.S. 676 (1990), reviewed historic practices, including published opinions of the Department of the Interior, Indian treaties, views of experts, etc., which revealed that tribes did not historically possess the power to try nonmember Indians. "Congressional legislation constituted one such important source." *Lara,* 541 U.S. 193, 205- 06. Justice Breyer concluded that the past position of Congress, however, "was subject to change." *Id.*

Justice Breyer forcefully and repeatedly stated that the Supreme Court did not consider "whether the Constitution's Due Process or Equal Protection Clauses prohibit tribes from prosecuting nonmember citizens of the United States." *Id.* at 206. According to Justice Breyer, Mr. Lara's "double jeopardy" claim leaves other defendants facing tribal court proceedings free to raise issues of Equal Protection and Due Process of law. *Id.* at 206.

Justice Kennedy, concurring only in the judgment, found merit in both the Equal Protection and Due Process arguments against the lawful prosecution of Mr. Lara in tribal court as a nonmember Indian. Lara, after all is a citizen of the United States. To hold that Congress can subject him, within our domestic borders, to sovereignty outside the basic structure of the Constitution is a serious step. The Constitution is based on a theory of original, and continuing, consent of the governed ... Here, contrary to this design, the National Government seeks to subject a citizen to the criminal jurisdiction of a third entity to be tried for conduct occurring wholly within the territorial borders of the Nation and one of the states. This is unprecedented. There is a historical exception for Indian tribes, but only to limited extent that a member of a tribe consents to being subjected to the jurisdiction of his own tribe.

***

The terms of the statute are best understood as a grant or cession from Congress to the tribes, and it should not be doubted that what Congress has attempted to do is subject American citizens to the authority of an extraconstitutional sovereign to which they had not been previously subject. *Lara,* 541 U.S. 193, 212 (2004). Justice Kennedy, the previous author of the *Duro* decision, noted that it would be

pure "fiction" to contend that a nonmember Indian has somehow consented to the jurisdiction of other Indian tribes. *Lara,* 541 U.S. 193, 213.

Justice Thomas also concurred in the judgment of the Court, but expressly noted that Indian policy and federal Indian law is either confusing or schizophrenic. 541 U.S. 193, 218-19. Justice Thomas noted that the majority opinion by Justice Breyer contained an "inadequate constitutional analysis." *Id.* at 215-16. Justice Thomas interestingly noted that the Indian Commerce Clause, Art. 1, § 8, cl. 3, provided an inadequate legal basis for Congress to assert plenary power over all Indians and Indian tribes. According to Justice Thomas, it is impossible to simultaneously conclude that Indian tribes are sovereigns, yet also conclude that they are subject to plenary power and legislative displacement by Congress at will. Nevertheless, Justice Thomas concluded that Indian tribes did not historically possess criminal jurisdiction over nonmember Indians, which is consistent with the past views of both Congress and the executive branch, as well as, Indian treaties, statutes, Interior Department opinions, etc. *Lara,* 541 U.S. at 220-21. Justice Thomas noted that serious Constitutional issues remain. *Id.* at 222.

Of course, we also know that a new era of equal protection has largely been ignored or misconstrued by the Ninth Circuit. In *Adarand v. Pena,* 515 U.S. 200 (1995), the Supreme Court considered a bid on a federal construction project from a minority subcontractor. Justice O'Connor expressly declared that a federal, racial classification must serve a compelling governmental interest and must be narrowly tailored to further the compelling governmental interest in order to survive equal protection scrutiny. 515 U.S. 200, 235. Justice O'Connor emphasized that the most exacting connection between the justification and the racial classification must be scrutinized, even if the Court was reviewing remedial race-based governmental action or otherwise benign classifications. The *Adarand* case clearly establishes that equal protection challenges under the Fifth Amendment and Fourteenth Amendment to the United States Constitution are analyzed precisely the same way, by applying strict scrutiny analysis.

Any argument that "Indians" can be defined in such a creative fashion to avoid the issue of race or ethnicity or nation origin in order to promote contemporary political objectives, should be laid to rest by considering two majority decisions authored by Justice Kennedy. Of course, we know that Justice Kennedy, writing for the majority in *Duro v. Reina,* expressly stated that the Supreme Court would decline to single out nonmember Indians for detrimental treatment. 485 U.S. 676, 692. In *Rice v. Cayetano,* 528 U.S. 495 (2000), Justice Kennedy focused upon statutes that accorded preferential treatment to native Hawaiians. To be sure, the state argued that no racial classification existed because Polynesian ancestors were excluded unless they resided in Hawaii in 1778 while, on the other hand, persons received voting rights if they could trace ancestry to Hawaii in 1778 even if they demonstrated only one sixty-fourth Hawaiian ancestry. Justice Kennedy quickly disposed of the argument that ancestry is distinguishable from race. To the contrary, Justice Kennedy concluded that ancestry can be a proxy for race. Moreover, native Hawaiians have a common culture. 528 U.S. 495 at 518-20. It is simply impossible to find that the same conclusions do not apply to Indian members of each tribe. Yet, the Ninth Circuit ignored the *Cayetano* case.

Indians have always been recognized and classified according to their "race." *United States v. Rogers,*

45 U.S. 567 (1846). This Court recognized that Title 18 U.S.C. § 1153 (Major Crimes Act) only applies to Indians, "who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak to members of a tribe, but of the race generally ... of the family of Indians." 45 U.S. at 572-73. *Also see United States v. Ives,* 504 F.2d 935, 953 (9th Cir. 1974) (Enrollment or lack of enrollment is not determinative as one's status of an Indian); *Ex Parte Pero*, 99 F.2d 28, 31 (7th Cir. 1938) (same); *United States v. Dodge,* 538 F.2d 770, 786 (8th Cir. 1976) (An individual must have some degree of Indian blood and must be recognized as an Indian). Congressional history behind the 1990 Amendment to the Indian Civil Rights Act also reveals the intent of Congress to make a racial, not a political distinction. *See* H. R. Conf. Rep. No. 101-938 pt. 2 (1990), 136 Cong. Rec. H. 13556, H. 13596 (Oct. 24, 1990).

Justice Kennedy focused directly upon Indian tribes in the *Cayetano* case. Justice Kennedy once again underscored the "preferential" treatment that must be accorded Indians under the *Mancari* case. 528 U.S. 495, at 518. Moreover, Justice Kennedy carefully noted that any preference to be accorded to Indians was confined to the authority of the BIA under the government's unique trust obligation. 528 U.S. 485, 520. Justice Kennedy expressly noted that Congress could not authorize schemes that limit voting rights to a particular class of tribal Indians to the exclusion of all Indian citizens. *Also see Williams v. Babbit,* 115 F.3d 657 (9th Cir. 1997). Special treatment must be tied rationally to the trust obligation carried out by the BIA to Indians. Otherwise, *Mancari* does not apply. *Dawavendewa v. Salt River Project,* 154 F.3d 1117 (9th Cir. 1998). (An Indian tribe cannot discriminate against nonmember Indians through hiring preferences without violating Title VII); *Malabed v. North Slope Borough,* 42 F. Supp. 2d 927, 939 (Dist. Alaska 1999) (strict scrutiny applied to Native American employment preference); *Tafoya v. City Albuquerque,* 751 F. Supp. 1527, 1531 (Dist. N.M. 1990) (strict scrutiny); *Kornhass Construction, Inc. v. Oklahoma,* 140 F. Supp. 2d 1232, 1249 (W. Dist. Okla. 2001) (strict scrutiny for State bidding preference for Indians); Eugene Doherty, *Equal Protection Under the Fifth and Fourteenth Amendments: Pattern of Congruence, Diversions, and Judicial Deference*, 16 Ohio N.U.L. Rev. 591, 618 (1989); David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 U.C.L.A.L. Rev. 759, 761-62 (Apr. 1991); L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 Colum. L. Rev. 702, 709-17 (May 2001).

The three Judge panel from the Ninth Circuit avoided many of the critical issues in the case by over-simplifying them. First, the Court of Appeals noted that the Navajo Nation possessed a "need to exercise criminal jurisdiction" over nonmember Indians from the Reservation because of violence. Of course, far more non-Indians reside on Indian Reservations then the relatively small group of nonmember Indians. *See* American Indian Areas and Alaska Native Villages: 1980 census Populations, Supplementary Report, U.S. Dept. of Commerce, Bureau of Census.

Second, the Court of Appeals for the Ninth Circuit shockingly took the position that Congress could discriminate against Indians as long as they categorized Indians as enrolled members of federally recognized tribes, rather than as ethnic Indians. In other words, the Ninth Circuit reasoned that treating enrolled Indians as a "political" group, as opposed to all ethnic Indians (enrolled and nonenrolled Indians), avoided any equal protection issue whatsoever. The analysis of the Ninth Circuit is a bit like saying that Congress could not discriminate against blacks, but could discriminate against all members

of the NAACP because the latter is only a political group of citizens!

Unfortunately, the Ninth Circuit reached its conclusion without analyzing or even citing the lead case on equal protection from the United States Supreme Court, namely *Rice v. Cayetano,* 528 U.S. 495 (2000). This Court has ruled that any ethnic or cultural aspect of identity is a proxy for race!

While avoiding the *Rice v. Cayetano* case, the Ninth Circuit did recognize that it's expansive reading of *Morton v. Mancari,* 417 U.S. 535 (1974) was admittedly inconsistent with this Court's decision in *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200 (1995). Nevertheless, the Ninth Circuit resolved the inconsistency by simply noting that it was bound to follow its' expansive reading of *Mancari* because it had direct application to the *Means* case even though it recognized that *Mancari* appears to have been rejected by the Supreme Court in another line of cases beginning with *Adarand.* The Ninth Circuit cited this Court's decision in *Agostini v. Felton,* 521 U.S. 203, 237 (1997). Yet, *Morton v. Mancari* is logically limited to "preference legislation" by the BIA in favor of Indians, not discriminatory legislation that subjects only nonmember Indians, rather then nonmember non-Indians, to the criminal jurisdiction of foreign Indian tribes.

The Court of Appeals for the Ninth Circuit, in other circumstances, has expressly found that discrimination against Indians, enrolled or ethnic, violates equal protection. The three Judge panel in this case crafted a different result in an apparent attempt to reach what it perceived as a politically correct decision. In *Western States Paving Co, INC. v. Washington State DOT,* 407 F.3d 983 (9th Cir. 2005), the Ninth Circuit concluded that Indians were a racial minority for federal contracting purposes. The Ninth Circuit then determined that "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." It is inexplicable that the same standard did not apply when "all Indians" (Title 25 U.S.C. § 1301(2)) are subjected to the criminal jurisdiction of a foreign tribe outside of the federal Constitution. *Also see Malabed v. North Slope Borough,* 42 F. Supp. 2d 927, 939 (Dist. Alaska 1999) (strict scrutiny applied to Native American employment preference); *Tafoya v. City of Albuquerque,* 751 F. Supp. 1527, 1531 (Dist. N.M. 1990) (strict scrutiny); *Kornhass Construction, Inc. v. Oklahoma,* 140 F. Supp. 2d 1232, 1249 (W. Dist. Okla. 2001) (strict scrutiny for State bidding preference for Indians); Eugene Doherty, *Equal Protection Under the Fifth and Fourteenth Amendments: Pattern of Congruence, Diversions, and Judicial Deference*, 16 Ohio N.U.L. Rev. 591, 618 (1989) (equal protection article); David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 U.C.L.A.L. Rev. 759, 761-62 (Apr. 1991) (equal protection article); L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 Colum. L. Rev. 702, 709-17 (May 2001) (equal protection article).

II. Nonmember Indians Cannot Be Subject To The Jurisdiction of A Foreign, Domestic Tribe Without The Full Panoply Of The U.S. Constitution

Russell Means was never allowed to participate in the political processes of the Navajo Nation even though he was domiciled on the Navajo Nation as an Indian for a number of years. He was excluded because he held the blood of an Oglala Sioux rather than a Navajo Indian. Tribal courts have always

been allowed to operate on a member-friendly basis because external jurisdiction has been historically and philosophically inconsistent with the status and practices of Indian tribal courts.

Justice Breyer, writing for the majority in the *Lara* case, noted that Lara's due process argument, if valid, "would show that any prosecution of a nonmember Indian under the statute is invalid." *Lara,* 541 U.S. at 434.

Lara, after all, is a citizen of the United States. To hold that Congress can subject him, within our domestic borders, to sovereignty outside the basic structure of the Constitution is a serious step. The Constitution is based on a theory of original, and continuing, consent of the governed.... Here, contrary to this design, the national government seeks to subject a citizen to the criminal jurisdiction of a third entity to be tried for conduct occurring wholly within the borders of the territorial borders of the Nation and one of the states. This is unprecedented.
Lara at 436. Justice Kennedy certainly framed the issue far differently than the panel decision in *Means.*

The terms of the statute are best understood as a grant or cession from Congress to the tribes, and it should not be doubted that what Congress is attempting to do is subject American citizens to the authority of an extra constitutional sovereign to which they had not previously been subject.
Lara at 437 (J. Kennedy, concurring in the judgment). Justice Kennedy also noted that the basic structure of the Constitution was in place before the Fifth and Fourteenth Amendments were adopted. "The political freedom guaranteed to citizens by the federal structure is a liberty both distinct from and as every bit as important as those freedoms guaranteed by the bill of rights ... the individual citizen has an enforceable right to those structural guarantees of liberty, a right which the majority ignores." *Id.*

The Ninth Circuit panel discussion ignored Mr. Means' argument predicated upon *Reid v. Covert,* 354 U.S. 1 (1957), and its progeny. In *Reid*, the Supreme Court reviewed the constitutionality of agreements with foreign governments requiring civilian dependents of military personnel to be tried by military tribunals. *Also see Kinsella v. U.S. ex rel. Singleton,* 361 U.S. 234 (1960). The Ninth Circuit did not cite nor acknowledge *Reid v. Covert.* Yet, *Reid* was cited favorably by this Court in *Duro.*

We contend that the power of Congress to regulate commerce among Indian tribes provides no greater authority than the power of Congress under Art. 1, § 8, cl. 14, to make rules for the government and to regulate the land and naval forces, the latter falling short of the mark needed by Congress to provide for military trial of civilian dependents accompanying armed forces in foreign countries. *Reid v. Covert, supra.* If military dependents could not be subjected to tribunals administrated by military justice, then surely Congress cannot subject nonmember Indian citizens to a trial by a foreign government that is not controlled by the United States Constitution. [FN2] It was noted by Justice Clark in *Kinsella:*

FN2. Only Indians, the ultimate minority in this country, could be subject to jurisdiction by a foreign power within the geographic limits of the United States, yet outside the protection of the United States Constitution.

> We therefore hold that Mrs. Dial is protected by the specific provisions of Article III and the Fifth and Sixth Amendments and that her prosecution and conviction by court-martial are not constitutionally permissible.

361 U.S. 234, 249.

III. The Navajo Treaty of 1868 Expressly Provides For Federal Jurisdiction Over Intertribal Offenses

The Navajo Treaty of 1868 provides for Navajo Nation jurisdiction over its own members but not over nonmembers. *Ex Parte Crow Dog*, 109 U.S. 556, 566-67 (1883). R.N. Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, Vol. 17 Ariz. L.R. 951, 959-60 and n.157 (1975), K.J. Erhart, *Jurisdiction Over Nonmember Indians on Reservations*, 1980 Ariz. State L.J. 727, 738.

Congress did not purport to alter existing treaties when it amended the IRCA with the so-called "Duro fix." Congress did not even recognize the conflict, let alone choose "to resolve that conflict by abrogating the treaty." *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 202-203 (1999). The panel decision from the Ninth Circuit reduces Indian treaties to nothing more than mild, yet irrelevant legal distractions.

Indians treaties do not explore "a grant of rights to the Indians, but a grant of rights from them," *United States v. Wirans,* 198 U.S. 371 (1905). A treaty cannot deprive a citizen of any right guaranteed by the U.S. Constitution. *Asakura v. Seattle,* 265 U.S. 332 (1929). Nor, of course can an act of Congress. Although treaty ambiguities must be resolved in favor of Indians (including Russell Means) the language and intent of treaties cannot be disregarded. *Babbitt v. Oglala Sioux Tribal Public Safety,* 194 F.3d 1374 (Fed. Cir. 1999). The Ninth Circuit creatively concluded that, while the Navajo Treaty of 1868 confers jurisdiction over intertribal offences to the United States, concurrent jurisdiction with the Navajo Tribe exists by silence! Yet, the entire purpose of removing tribal, criminal jurisdiction over U.S. citizens and nonmembers was to promote peace on the frontiers by limiting tribal authority.

The "plenary power" of Congress should not be extended to the point that any legislation is upheld either as consistent with Indian Treaties (by twisting their meaning into alignment) or by automatically changing the meaning of treaties without little more than a hint that Congress expressly considered the conflict and resolved it properly. The record in this case does not allow the Navajo Treaty of 1868 to so easily fall.

IV. The Indian Commerce Clause Does Not Provide Congress With The Power to Bestow Criminal Jurisdiction On Indian Tribes Over Nonmembers

We suggest that the expansive interpretation of the Indian Commerce Clause beyond its true meaning is belied by the fact that the United States Supreme Court has repeatedly pulled in the reins on such expansive interpretation of the same clause referring to "commerce ... among the several states." *See,*

e.g., United States v. Lopez, 514 U.S. 549 (1995) (possession of a gun in local school zone was not economic activity that substantially affected interstate commerce; "commerce" is commercial intercourse). *Also see Spokane Tribe of Indians v. Washington,* 28 F.2d 991, 997 (9th Cir. 1994) (roughly equating interstate commerce and Indian commerce powers).

CONCLUSION

Fundamental issues of Indian law, fairness, and equal protection remain following this Court's decision in *United States v. Lara,* 541 U.S. 193 (2004), which should be resolved in the context of the *Means'* case. Indians should finally be recognized as a racial/ethnic minority and be entitled to equal protection of our laws.Date: July 5, 2006 No. of Pages: