

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 11: The Contemporary Era—Equality/Native Americans

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

Billy Jo Lara was a member of a Chippewa tribe, but lived with his wife and children among the Spirit Lake Sioux Tribe. While on tribal lands, Lara struck a federal officer. He was tried and convicted in the Spirit Lake Tribal Court, and served ninety days in prison. The federal government then charged Lara with assaulting a federal officer. Lara claimed trying him for the federal crime violated the double jeopardy clause of the Fifth Amendment. All parties agreed that if Lara's previous conviction had occurred in federal court, the assault charge would violate the double jeopardy clause. The parties also agreed that no double jeopardy problem would exist if Lara's previous conviction had taken place in a state court. Distinct sovereignties may punish persons for the same offense. Persons who strike a federal official may be punished for assault under state law and for interfering with a federal investigation under federal law. The crucial question in Lara's case was whether a tribal court was an independent tribunal (no double jeopardy) or was exercising delegated federal power (double jeopardy). A federal district court and a panel of the Court of Appeals for the Eighth Circuit ruled that the tribal court that convicted Lara was an independent tribunal. That decision was reversed by the entire Eighth Circuit, sitting en banc. The United States appealed the reversal to the Supreme Court.

The Supreme Court by a 7–2 vote held that the federal prosecution did not violate the double jeopardy clause. Justice Breyer's majority opinion held that the tribal council had inherent sovereign power to try offenders and, for that reason, the subsequent trial by a federal court was constitutional. Why did Justice Breyer conclude that tribal power is inherent and not sovereign? Why did Justice Souter disagree? Who had the better of the argument? Should Congress be able to determine whether tribes have inherent sovereignty or is this decision mandated by the Constitution? If the latter, what is the correct constitutional mandate?

JUSTICE BREYER delivered the opinion of the Court.

...
... Lara's double jeopardy claim turns on the answer to the "dual sovereignty" question. What is "the source of [the] power to punish" nonmember Indian offenders, "inherent tribal sovereignty" or delegated federal authority?

We also believe that Congress intended the former answer. The statute [amending the Indian Civil Rights Act] says that it "recognize[s] and affirm[s]" in each tribe the "inherent" tribal power (not delegated federal power) to prosecute nonmember Indians for misdemeanors. And the statute's legislative history confirms that such was Congress' intent.

Thus the statute seeks to adjust the tribes' status. It relaxes the restrictions, recognized in [*Duro v. Reina* (1990)], that the political branches had imposed on the tribes' exercise of inherent prosecutorial power. The question before us is whether the Constitution authorizes Congress to do so. Several considerations lead us to the conclusion that Congress does possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians as the statute seeks to do.

First, the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as "plenary and exclusive." ...

Second, Congress, with this Court's approval, has interpreted the Constitution's "plenary" grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority. . . .

...

Fourth, Lara points to no explicit language in the Constitution suggesting a limitation on Congress' institutional authority to relax restrictions on tribal sovereignty previously imposed by the political branches.

Fifth, the change at issue here is a limited one. It concerns a power similar in some respects to the power to prosecute a tribe's own members—a power that this Court has called "inherent." In large part it concerns a tribe's authority to control events that occur upon the tribe's own land. . . .

...

Lara makes several additional arguments. First, he points out that the Indian Civil Rights Act of 1968, lacks certain constitutional protections for criminal defendants, in particular the right of an indigent defendant to counsel. And he argues that the Due Process Clause forbids Congress to permit a tribe to prosecute a nonmember Indian citizen of the United States in a forum that lacks this protection.

...

. . . Showing Lara's tribal prosecution was invalid, however, does not show that the source of that tribal prosecution was federal power (showing that a state prosecution violated the Due Process Clause does not make that prosecution federal). But without that "federal power" showing, Lara cannot win his double jeopardy claim here. Hence, we need not, and we shall not, consider the merits of Lara's due process claim.

Second, Lara argues that Congress' use of the words "all Indians," in the statutory phrase "inherent power . . . to exercise criminal jurisdiction over all Indians," violates the Equal Protection Clause. He says that insofar as the words include nonmember Indians within the statute's scope (while excluding all non-Indians) the statute is race based and without justification. Like the due process argument, however, this equal protection argument is simply beside the point, therefore we do not address it. At best for Lara, the argument (if valid) would show, not that Lara's first conviction was federal, but that it was constitutionally defective. And that showing cannot help Lara win his double jeopardy claim.

Third, Lara points out that the *Duro* Court found the absence of certain constitutional safeguards, for example, the guarantee of an indigent's right to counsel, as an important reason for concluding that tribes lacked the "inherent power" to try a "group of citizens" (namely, nonmember Indians) who were not "include[d]" in those "political bodies." In fact, *Duro* says the following: "We hesitate to adopt a view of tribal sovereignty that would single out another group of citizens, nonmember Indians, for trial by political bodies that do not include them." But this argument simply repeats the due process and equal protection arguments rejected above in a somewhat different form. Since precisely the same problem would exist were we to treat the congressional statute as delegating federal power, this argument helps Lara no more than the others.

For these reasons, we hold that the Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians. . . .

JUSTICE STEVENS, concurring.

While I join the Court's opinion without reservation, the additional writing by my colleagues prompts this comment. The inherent sovereignty of the Indian tribes has a historical basis that merits special mention. They governed territory on this continent long before Columbus arrived. In contrast, most of the States were never actually independent sovereigns, and those that were enjoyed that independent status for only a few years. Given the fact that Congress can authorize the States to exercise—as their own—inherent powers that the Constitution has otherwise placed off limits, I find nothing exceptional in the conclusion that it can also relax restrictions on an ancient inherent tribal power.

JUSTICE KENNEDY, concurring in the judgment.

The amendment to the Indian Civil Rights Act of 1968 (ICRA) enacted after the Court's decision in *Duro v. Reina* (1990), demonstrates Congress' clear intention to restore to the tribes an inherent sovereign power to prosecute nonmember Indians. Congress was careful to rely on the theory of inherent sovereignty, and not on a delegation. . . . I would take Congress at its word. Under that view, the first prosecution of Lara was not a delegated federal prosecution, and his double jeopardy argument must fail. That is all we need say to resolve this case.

The Court's analysis goes beyond this narrower rationale and culminates in a surprising holding: "For these reasons, we hold . . . that the Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians." The Court's holding is on a point of major significance to our understanding and interpretation of the Constitution; and, in my respectful view, it is most doubtful.

. . .
Lara, after all, is a citizen of the United States. To hold that Congress can subject him, within our domestic borders, to a 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. Their consent depends on the understanding that the Constitution has established the federal structure, which grants the citizen the protection of two governments, the Nation and the State. Each sovereign must respect the proper sphere of the other, for the citizen has rights and duties as to both. 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 the limited extent that a member of a tribe consents to be subjected to the jurisdiction of his own tribe. . . .

. . . The political freedom guaranteed to citizens by the federal structure is a liberty both distinct from and 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. Perhaps the Court's holding could be justified by an argument that by enrolling in one tribe Lara consented to the criminal jurisdiction of other tribes, but the Court does not mention the point. And, in all events, we should be cautious about adopting that fiction.

The present case, however, does not require us to address these difficult questions of constitutional dimension. Congress made it clear that its intent was to recognize and affirm tribal authority to try Indian nonmembers as inherent in tribal status. The proper occasion to test the legitimacy of the Tribe's authority, that is, whether Congress had the power to do what it sought to do, was in the first, tribal proceeding. There, however, Lara made no objection to the Tribe's authority to try him. . . .

JUSTICE THOMAS, concurring in the judgment.

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

. . . In my view, the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously.

In response to the Court's decision in *Duro v. Reina* (1990), Congress amended the Indian Civil Rights Act of 1968 (ICRA). Specifically, through this "Duro fix," Congress amended ICRA's definition of the tribes' "powers of self-government" to "recogniz[e] and affir[m]" the existence of "inherent power . . . to exercise criminal jurisdiction over all Indians." There is quite simply no way to interpret a recognition

and affirmation of inherent power as a delegation of federal power, as the Court explains. Delegated power is the very antithesis of inherent power.

But even if the statute were less clear, I would not interpret it as a delegation of federal power. The power to bring federal prosecutions, which is part of the putative delegated power, is manifestly and quintessentially executive power. Congress cannot transfer federal executive power to individuals who are beyond “meaningful Presidential control.”

...
... [I]t makes sense to conceptualize the tribes as sovereigns that, due to their unique situation, cannot exercise the full measure of their sovereign powers.

But I do not see how this is consistent with the apparently “undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government.” It is quite arguably the essence of sovereignty not to exist merely at the whim of an external government.

To be sure, this does not quite suffice to demonstrate that the tribes had lost their sovereignty. After all, States retain sovereignty despite the fact that Congress can regulate States qua States in certain limited circumstances. But the States (unlike the tribes) are part of a constitutional framework that allocates sovereignty between the State and Federal Governments and specifically grants Congress authority to legislate with respect to them. ...

The tribes, by contrast, are not part of this constitutional order, and their sovereignty is not guaranteed by it. ...

...
The Court should admit that it has failed in its quest to find a source of congressional power to adjust tribal sovereignty. Such an acknowledgment might lead the Court to ask the logically antecedent question whether Congress (as opposed to the President) has this power. A cogent answer would serve as the foundation for the analysis of the sovereignty issues posed by this case. We might find that the Federal Government cannot regulate the tribes through ordinary domestic legislation and simultaneously maintain that the tribes are sovereigns in any meaningful sense. But until we begin to analyze these questions honestly and rigorously, the confusion that I have identified will continue to haunt our cases.

JUSTICE SOUTER, with whom JUSTICE SCALIA joins, dissenting.

... Our precedent is that any tribal exercise of criminal jurisdiction over nonmembers necessarily rests on a “delegation” of federal power and is not akin to a State’s congressionally permitted exercise of some authority that would otherwise be barred by the dormant Commerce Clause. It is more like the delegation of lawmaking power to an administrative agency, whose jurisdiction would not even exist absent congressional authorization.

...
[O]ur previous understanding of the jurisdictional implications of dependent sovereignty was constitutional in nature, certainly so far as its significance under the Double Jeopardy Clause is concerned. ...

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

I would therefore stand by our explanations in *Oliphant and Duro* and hold that Congress cannot reinvest tribal courts with inherent criminal jurisdiction over nonmember Indians. It is not that I fail to appreciate Congress's express wish that the jurisdiction conveyed by statute. . . . I would therefore honor the drafters' substantive intent by reading the Act as a delegation of federal prosecutorial power that eliminates the jurisdictional gap. Finally, I would hold that a tribe's exercise of this delegated power bars subsequent federal prosecution for the same offense.



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