NEW HORIZONS IN INDIAN COUNTRY?

WHAT LIES AHEAD
Tribal Disenrollment Demands a Tribal Answer
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ew topics in Indian law carry more weight or import than the issues around tribal membership—enrollment and disenrollment. The question of tribal membership and affiliation is not only determinative for many federal questions such as criminal jurisdiction and eligibility for programs made available only to Indians, but it lies at the very heart of indigeneity and the racial aspects of Indian affairs, but it lies at the very heart of Indian Country, as tribes nationwide are still struggling with in order to provide services to tribal members. Agura v. Jewell, 827 F.3d 1213 (9th Cir. 2016). Primacy of Tribal Sovereignty Demands Tribal Exclusivity in Enrollment Discussions The U.S. Supreme Court stated in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978), that “[a] tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.” See also Cahuilla Tribe of Lakeview Rancheria v. Deutsche Bank National Trust Co., 715 F.3d 1225, 1226 (9th Cir. 2013). Federal courts have steadily recognized that tribal membership decisions are beyond their jurisdiction to reach, and repeatedly reject cases asking them to intervene in tribal disputes. See Lewis v. Norton, 424 F.3d 938, 941 (9th Cir. 2005). It is appropriate that they do so, partly due to the fact that the federal courts are ill-equipped to make identity-constituting decisions for communities rather than the courts are not a part, but also that enabling non-tribal institutions to mold tribes themselves—tribal courts’ most central power of self-definition. The “high-water mark” for formal recognition of tribal constitutions that are not self-defined is arguably the 2008 U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) (www.un.org/en/esa/socdev/unidxd/undrip Pdf), which recognizes indigenous peoples’ rights to self-determination and autonomy in internal affairs and the right to deter- mine their own identity of membership. See arts. 4, 12, 13, 20, 31, and 33 regarding primacy of tribal membership rights. The rights described in the UNDRIP were how those recognized to be reserved to tribes in U.S. case law as
well, see, e.g., United States v. Wheeler, 435 U.S. 313, 322-28 (1978), citing Cherokee Intermarriage Cases, 230 U.S. 76 (1913) and Roff v. Burney, 468 U.S. 218 (1987) to note, unless limited by treaty or statute, a tribe has the power to determine tribal membership. Equal Employment Opportunity Comm’n v. Karuk Tribe determined that a tribe was not an employer and could not be held liable for discriminatory activity. (9th Cir. 2001) (holding that a dispute between a tribal member and a tribal institution is “purely internal” and therefore not subject to applicable federal laws do not apply when touching on “exclusive rights of self-governance.”) The tribals must also be considered alongside other rights, like those in UNDRIP Article 9, which states that indigenous peoples and individuals have the right to belong to their own indigenous community or nation, in accordance with the traditions of the community. The question then becomes, which institution or entity must adjudicate rights in questions of membership?

It is our assertion that only the tribe itself, as a sovereign, may consider and decide who is a member of their own community, and that no other institution should, in fact, even try. This is not to say that disenrollments are not problematic or that tribes have never disenrolled their members. As a matter of fact, some tribes have decided that the process is inappropriate for their community, and have banned its use. The Puyallup Tribe of Washington, the Geroni Rancheria has amended its Tribal Constitution to prohibit disenrollment (except in limited cases), and explicitly states that the Tribal Council may not terminate citizenship rights, www.gratonrancheria.com/disenrollment. Note that recently the Robinson Rancheria in California re-enrolled more than 60 members who had been disenrolled eight years prior and is now in the process of documents to present future disenrollments, www.willitnews.com/general-news/20170214/robinson-rancheria-reverses-disenrollment. Other tribes have used the disenrollment process to reverse errors or malfeasance, such as the San Pasqual Band of Mission Indians, which disenrolled members because the BIA had enrolled an individual with no blood ties to the band. Alto v. Jewell, No. 15-56527 (9th Cir., Sep. 20, 2016) (memo. op.), Alto v. Black, 738 F.3d 1111, 1124 (9th Cir. 2013). There are many tribal courts that review disenrollment and membership decisions, coming down on both sides of the issue. These cases define how tribes can deal with disenrollment. In some cases that are capable of handling these questions internally, but there are a few recent headlines—because the issue is so central to individual and group identity. In this collection, some are calling for outside intervention of international human rights against tribal governments. See Galanda & Dreveskracht, 435. At the heart of arguments examining federal litigation or administrative review of disenrollment is the idea that the power of the state to define membership is tribal, disenrollment is a federal construct that should be available for federal review or control, and thus subject to due process and other constitutional limitations. As we explain above, membership questions are the central questions of tribal identity, and the federal government has shown an inability to handle these questions in ways that are informed by tribal culture and tribal priorities and thus appropriate for tribes. Even considering that some problems are of federal making, we argue that the recent trend towards federalism, on the one hand, and “new wave of geno-cide” on the other hand, is not yet comprehensive enough.