

Supplementary Material

Chapter 10: The Reagan Era – Equality/Native Americans

Duro v. Reina, 495 U.S. 676 (1990)

Albert Duro was a member of the Torres-Martinez Band of Cahuilla Mission Indians. While Duro was residing on land owned by the Salt River Pima–Maricopa Indian Community, he was arrested and charged with illegally firing a weapon. Duro filed a habeas corpus lawsuit against Edward Reina, the Chief of Police of the Salt River Indian Community. He claimed that the Salt River Indian community had no jurisdiction to try a Native American who was not a member of the Salt River Tribe. The local federal district court agreed that no jurisdiction existed, but that decision was vacated by the Court of Appeals for the Ninth Circuit. Duro appealed to the Supreme Court of the United States.

The Supreme Court by a 7–2 vote granted the writ of habeas corpus. Justice Kennedy’s majority opinion ruled that Native American tribal courts could only try members of the local tribe of Native Americans, that one tribe’s courts could not try a member of another tribe. If you were to commit a crime in Spain (or in Kentucky), everyone would recognize that you could be tried by a Spanish court (or a Kentucky state court). Why did Justice Kennedy nevertheless deny Native American sovereignty over non-tribal members? What was his theory of Native American sovereignty? Why did Justice Brennan disagree? Who had the better of the argument? Why did Duro pit the two most liberal justices on the early Rehnquist Court against the seven more conservative justices?

JUSTICE KENNEDY delivered the opinion of the Court.

...
A basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign’s territory, whether citizens or aliens. [T]he tribes can no longer be described as sovereigns in this sense. Rather, the retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique customs and social order. The power of a tribe to prescribe and enforce rules of conduct for its own members “does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.”

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The distinction between members and nonmembers and its relation to self-governance is recognized in other areas of Indian law. Exemption from state taxation for residents of a reservation, for example, is determined by tribal membership, not by reference to Indians as a general class. We have held that States may not impose certain taxes on transactions of tribal members on the reservation because this would interfere with internal governance and self-determination. But this rationale does not apply to taxation of nonmembers, even where they are Indians.

...
It is true that our decisions recognize broader retained tribal powers outside the criminal context. Tribal courts, for example, resolve civil disputes involving nonmembers, including non-Indians. . . . As distinct from criminal prosecution, this civil authority typically involves situations arising from property ownership within the reservation or “consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” The exercise of criminal jurisdiction

subjects a person not only to the adjudicatory power of the tribunal, but also to the prosecuting power of the tribe, and involves a far more direct intrusion on personal liberties.

. . . In the area of criminal enforcement, however, tribal power does not extend beyond internal relations among members. Petitioner is not a member of the Pima-Maricopa Tribe, and is not now eligible to become one. Neither he nor other members of his Tribe may vote, hold office, or serve on a jury under Pima-Maricopa authority. For purposes of criminal jurisdiction, petitioner's relations with this Tribe are the same as the non-Indian's.

. . .
Whatever might be said of the historical record, we must view it in light of petitioner's status as a citizen of the United States. Many Indians became citizens during the era of allotment and tribal termination around the turn of the century, and all were made citizens in 1924. That Indians are citizens does not alter the Federal Government's broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits. In the absence of such legislation, however, Indians like other citizens are embraced within our Nation's "great solicitude that its citizens be protected . . . from unwarranted intrusions on their personal liberty."

Criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States. 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. As full citizens, Indians share in the territorial and political sovereignty of the United States. The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members. Indians like all other citizens share allegiance to the overriding sovereign, the United States. A tribe's additional authority comes from the consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority.

The special nature of the tribunals at issue makes a focus on consent and the protections of citizenship most appropriate. While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often "subordinate to the political branches of tribal governments," and their legal methods may depend on "unspoken practices and norms." It is significant that the Bill of Rights does not apply to Indian tribal governments. The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts. There is, for example, no right under the Act to appointed counsel for those unable to afford a lawyer.

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. We have approved delegation to an Indian tribe of the authority to promulgate rules that may be enforced by criminal sanction in federal court, but no delegation of authority to a tribe has to date included the power to punish non-members in tribal court. We decline to produce such a result through recognition of inherent tribal authority.

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. . . .

. . .
JUSTICE BRENNAN with whom JUSTICE MARSHALL joins, dissenting.

The powers of Indian tribes are "'inherent powers of a limited sovereignty which has never been extinguished.'" . . . When the tribes were incorporated into the territory of the United States and accepted the protection of the Federal Government, they necessarily lost some of the sovereign powers they had previously exercised. By becoming "domestic dependent nations," Indian tribes were divested of any power to determine their external relations. Tribes, therefore, have no inherent power to enter into direct diplomatic or commercial relations with foreign nations. . . .

By contrast, we have recognized that tribes did not “surrender [their] independence—[the] right to self-government, by associating with a stronger [power], and taking its protection.” Tribes have retained “the powers of self-government, including the power to prescribe and enforce internal criminal laws.” I agree with the Court that “[a] basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign’s territory, whether citizens or aliens.” [I]t does not follow that because tribes lost their power to exercise criminal jurisdiction over non-Indians, they also lost their power to enforce criminal laws against Indians who are not members of their tribe.

In 1790, when Congress first addressed the rules governing crimes in Indian country, it made crimes committed by citizens or inhabitants of the United States against Indians punishable according to the laws of the State in which the offense occurred and directed the state courts to take jurisdiction of such offenses. Congress withdrew that jurisdiction from the States and provided for federal jurisdiction (and the application of federal enclaves law) over crimes committed within Indian country. Congress made an explicit exception for crimes committed by an Indian against another Indian, however. . . .

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The Court also concludes that because Indians are now citizens of the United States, the exercise of criminal jurisdiction over a nonmember of the tribe is inconsistent with the tribe’s dependent status. Stated differently, the Court concludes that regardless of whether tribes were assumed to retain power over nonmembers as a historical matter, the tribes were implicitly divested of this power in 1924 when Indians became full citizens. . . .

...
If tribes were implicitly divested of their power to enforce criminal laws over nonmember Indians once those Indians became citizens, the tribes were also implicitly divested of their power to enforce criminal laws over their own members who are now citizens as well. The Court contends, however, that tribal members are subject to tribal jurisdiction because of “the voluntary character of tribal membership and the concomitant right of participation in a tribal government.” But we have not required consent to tribal jurisdiction or participation in tribal government as a prerequisite to the exercise of civil jurisdiction by a tribe. . . . Nor have we ever held that participation in the political process is a prerequisite to the exercise of criminal jurisdiction by a sovereign. If such were the case, a State could not prosecute nonresidents, and this country could not prosecute aliens who violate our laws. The commission of a crime on the reservation is all the “consent” that is necessary to allow the tribe to exercise criminal jurisdiction over the nonmember Indian.

More understandable is the Court’s concern that nonmembers may suffer discrimination in tribal courts because such courts are “influenced by the unique customs, languages, and usages of the tribes they serve.” But Congress addressed this problem when it passed the ICRA, which extended most of the Bill of Rights to any person tried by a tribal court. . . .

This country has pursued contradictory policies with respect to the Indians. Since the passage of the Indian Reorganization Act of 1934, however, Congress has followed a policy of promoting the independence and self-government of the various tribes. The Court’s decision today not only ignores the assumptions on which Congress originally legislated with respect to the jurisdiction over Indian crimes, but also stands in direct conflict with current congressional policy. I respectfully dissent.