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Santa Clara Pueblo v. Martinez: Twenty-five Years of Disparate Cultural Visions

An Essay Introducing the Case for Re-argument Before the American Indian Nations Supreme Court

Gloria Valencia-Weber*

I. INTRODUCTION

In 1978, the Supreme Court decided in Santa Clara Pueblo v. Martinez\(^1\) that it was constitutionally permissible for the Pueblo to enforce a membership ordinance that expressly treated female members in a disabling and different way than male members. The ordinance denied membership in the tribe to children of female members who marry outside the tribe, while extending membership to children of male members who similarly “outmarry.” The decision was a startling contrast to the jurisprudence of equal protection in the Constitution. While the dominant society in the United States (U.S.) was experiencing outspoken discourse on feminism and legal challenges to gender discrimination,\(^2\) the Court deferred to the culturally and politically distinct needs of the Pueblo. Thus, it seemed anomalous that the Court permitted intentional discriminatory treatment of women among similarly situated members.

From the time the case was filed, Martinez engendered conflict in cultural perspectives. As the first and only Supreme Court case to interpret and apply the Indian Civil Rights Act of 1968 (ICRA), Martinez has significance. Filing the case required the Santa Clara plaintiffs to reach to external law -- the federal power that had enacted the law invoked -- the ICRA.\(^3\) The federal courts involved in the case expressed different perspectives about what federal constitutional and statutory law required. The district court in New Mexico attempted to comprehend the customary law underlying the ordinance and held for the Pueblo. The District Court used its outsider interpretation of the Pueblo’s customs and traditions as a basis for the decision. However, the Tenth Circuit Court of Appeals reversed because the undeniable gender discrimination had substantive import greater than what the Pueblo argued as customary principle. Ultimately, the Supreme Court, without making the inquiry into cultural specifics, accommodated the tribal customary law and practices. Martinez has roiled among non-Indians who cannot accept this gender discrimination as constitutionally permissible, even though anchored in the unique tribal-federal political relationship long established in constitutional law.\(^4\)
Valencia-Webber

*Martinez* nakedly presents a conflict between the individual rights norm of equality and the communal or collective political right of the first sovereigns within U.S. borders. The conflict underlies the discourse in law scholarship and reflects disparate cultural visions between mainstream society and American Indians. In Indian law the decision has saliency with positive and negative force injected into different arenas besides equal protection, gender, and membership qualifications. It is a major fortification for the federally recognized tribal sovereigns to exclude external law and forums, the federal law and courts, in how tribes exercise self-government. The case continues to provoke criticism for the Santa Clara Pueblo people who have not changed the ordinance that discriminates against female members who outmarry.

Numerous people want a world of law with constitutional equality as the norm. Yet some of these people are also sympathetic to the need to correct the unfair historical treatment suffered by tribes and support efforts to protect the indigenous culturally and politically distinct way of life. The desire to reconcile the two perspectives is frustrated by reality, what Justice John Marshall called the "actual state of things." Understanding Pueblo life "then," when *Martinez* was decided, and "now" does not make the dissonance disappear, but it can inform a wider perception of the issues at stake.

II. MARTINEZ AND DIFFERENCES IN THE COURTS IN THE TENTH CIRCUIT

Julia Martinez and her daughter, Audrey, sued as individuals and as representatives of the classes affected, Santa Clara member-mothers and their children. They sought declaratory and injunctive relief against Santa Clara Pueblo and its Governor. They alleged that a Pueblo ordinance that denied tribal membership to the children of female members who marry outside the tribe, but not to similarly situated children of male members who outmarry, violated the ICRA. This ordinance remains unchanged in Santa Clara. The relevant ICRA part provides that "[n]o Indian tribe in exercising powers of self-government shall -- deny to any person within its jurisdiction the equal protection of its laws . . . ." The ICRA's only express remedial provision extends the writ of habeas corpus to any person, in a federal court, "to test the legality of his detention by order of an Indian tribe." The ICRA substance and remedy were applied to the Pueblo's law.

The ordinance imposed specific losses on Julia and Audrey Martinez. Julia Martinez claimed the loss of equal protection and deprivation of her property without due process of law. The ordinance "necessarily restrict[ed] her land use rights and other material benefits and rights, which she could give to her children if they were recognized as members." Audrey and the children in her class would be denied three sets of rights reserved for members. Political rights of a member would entitle her to
vote and qualify for a secular office. A member would also share in the material benefits of the Pueblo, the most important being land use rights. Other member entitlements include fishing and hunting rights, irrigation water, and any pecuniary benefits. Lastly, the right to reside on Pueblo land in the family home is contingent on membership. Under the ordinance, when Mrs. Martinez died, her family would not have the right to continue living on the Pueblo.

In this internal dispute, the district court held that jurisdiction was conferred by 28 U.S.C. § 1343(4) and 25 U.S.C. § 1302(8), apparently concluding that the substantive provisions of the ICRA impliedly authorized civil actions for declaratory and injunctive relief. The district court also held that the tribe was not immune from such a suit. Then the court decided for the Pueblo, finding that criteria for qualifying for membership that had been traditionally used by the tribe did not violate the ICRA and its equal protection provision.

The Tenth Circuit Court of Appeals agreed on the jurisdictional issue but reversed on the merits because the ordinance violated the ICRA. According the circuit court, Santa Clara Pueblo did not justify that tribal, cultural and ethnic survival would suffer and offered insufficient facts to establish a compelling interest. The ordinance of such "relatively recent origin" did not "merit the force that would be attributable to venerable tradition." While it was not necessary to apply the Fourteenth Amendment standards with full force, the circuit court found that if the equal protection clause of the ICRA "is to have any consequence, it must operate to ban invidious discrimination of the kind present in this case."

The appeal of Martinez to the Supreme Court set the stage for resolving disparate cases on the substance of the ICRA. Prior cases in the federal courts had not subjected tribes "to identical compulsions as those which are exacted under the equal protection clauses under the Fourteenth and Fifth Amendments." The Tenth Circuit reviewed the preceding cases. It reminded that blood quantum or ancestry requirements for tribal membership were not subject to the constitutional norm that prohibits racial discrimination. Yet, in cases on election requirements for voting and holding office, the federal courts had looked to the fourteenth amendment as a guide. With this law backdrop, the case proceeded to the ultimate resolution of some uncertainties existing since the act had been passed.

III. THE SUPREME COURT PROTECTS CULTURALLY DISTINCT SOVEREIGNS

Justice Marshall wrote the Supreme Court's decision in Martinez and fortified the framework of the ICRA as an act protective of tribal sovereignty. The Pueblo's exercise of its law-making and judicial authority, sheltered in sovereign immunity, remained intact and in conformance with Congress' purpose in enacting the ICRA.
Valencia-Weber

Only a limited use of habeas corpus could intrude on tribal self-determination. The specific holdings are building blocks that affirmed tribal sovereignty and set legal boundaries that shield the tribal use of authority that is distinct from the states and the federal model under the Constitution.

The most critical holding of Martinez was the affirmation of tribal sovereignty and that sovereign immunity had not been waived in the ICRA. The Court found that nothing on the face of the ICRA purported to subject the tribes to the jurisdiction of the federal courts in civil actions for declaratory or injunctive relief. Nor did the ICRA §1302 impliedly authorize a private cause of action for declaratory and injunctive relief against the Pueblo's Governor. Congress could have expressly authorized civil actions against tribal officers, as it had in §1303 for habeas corpus, but the Court’s respect for tribal sovereignty and the plenary authority of Congress warranted caution in absence of legislative intent. Congress' choice to not provide remedies other than habeas corpus in §1303 for enforcement of the ICRA was deliberate, manifested in the structure of the statute and the legislative history.

The ICRA has two distinct and competing purposes: strengthening the position of individual tribal members vis-à-vis the tribe and promoting the well-established federal policy of furthering Indian self-government. In Martinez, the latter ultimately was weightier and determinative. The Congressional purpose to protect tribal sovereignty from “undue or precipitous interference” resulted in only habeas corpus as the remedy “to prevent injustices perpetrated by tribal governments.” In the ICRA Congress tailored the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments. Thus, the Bill of Rights was selectively incorporated; some rights were modified and others omitted, e.g., there is no prohibition on the establishment of religion. Thus, tribes are the only constitutionally-permitted theocracies within the U.S.

Creating a federal cause of action would displace the tribal government’s authority, including the tribal courts as the forums for adjudicating internal disputes involving important interests of both Indians and non-Indians. In criminal prosecutions in tribal court, Congress provided habeas corpus to adequately protect the individual interests at stake. For convictions in a tribal court, Congress rejected the de novo review in federal court that was originally proposed in the legislation. However, for alleged violations of ICRA rights in the civil context, Congress considered and then rejected proposals for Attorney General, Department of Interior, and federal court review of civil actions. The statute’s purpose was to not expose tribal officials to the full array of federal remedies available to redress actions of federal and state officials.

The Court then connected the statutory design to a respect for tribal tradition and custom that underlie tribal law. According to the Court, Congress may have considered that the resolution of the issues involving the rights listed in §1302,
especially in a civil context, will depend on the tribal tradition and custom. These tribal forums may be in a better position than federal courts to evaluate the issues in contest. If the federal courts adjudicate these civil actions, the federal judiciary “may substantially interfere with a tribe’s ability to maintain itself as a culturally and politically distinct entity.” Therefore, the federal courts should be restrained in adjusting relations between and among tribes and their members.

Thus, the Supreme Court did not reach whether the tribal ordinance on membership requirements violated the equal protection in the ICRA. Whatever the cultural foundation for the ordinance, the Pueblo had authority to enact the ordinance for the internal matter of qualifications for membership in 1939.

IV. THE POST MARTINEZ WORLD: SOME SNAPSHOTS

This discussion cannot cover the entire landscape of reactions to Martinez, in and out of the law world. However, one can appreciate the continuing saliency of the decision in the sources and ideas that social and legal discourses generate in response to the cultural and theoretical conflicts inherent in the case.

A. Feminist Discourse and Discontents

Feminists immediately reacted to Martinez, and their discontent with the decision continues to fuel discourse about gender equality and whether tribal law should be force-fit into an external norm. The prominent criticism of Catharine MacKinnon manifests two conceptual foundations that resound in the critiques of Martinez. First is a presumption of a universal essential identity as female as the most important characteristic in experiencing and evaluating what happens in the lives of women. Second is the political viewpoint anchored in individual rights and how equality is measured, e.g., this individual woman should be treated with the same manner or means as a similarly situated individual man. MacKinnon stated in her essay:

I find Martinez a difficult case on a lot of levels, and I don’t usually find cases difficult . . . . Why is excluding women always an option for solving problems men create between men?” . . . . I want to suggest that cultural survival is as contingent upon equality between women and men as it is upon equality among peoples.

MacKinnon’s statements provoked response from some minority feminists who chastised her for “essentialism” grounded in White women’s experiences.
Some feminists within minority communities pointed out that numerous majority feminists, especially at that time, ignored that the lives of ethnic or racially identified women have produced other commitments and difficulties as well as benefits. Undeniably, MacKinnon's contributions to legal theory have value in building law regimes that would, in MacKinnon's terms, overcome the force of male dominance that illegitimately controls the lives of many women. However, the voices of American Indian feminists have too often been missed or overlooked in the feminist discourse.

An established feminist thinker, Rayna Green (Cherokee) captures the cultural and political viewpoint that is missed by many mainstream feminists.

For Indian feminists, every women's issue is framed in the larger context of Native American people. The concerns which characterize debate in Indian country, tribal sovereignty and self-determination, for example, put Native American tribes on a collision path with regulations like Title 9 and with Equal Opportunity and Affirmative Action. Tribes insist that treaty-based sovereignty supersedes any other federal mandate.

While Green acknowledges that Indian women experience difficulties within their tribal communities, she prefers that special external exceptions, such as federal affirmative action law, not intrude in how the use of tribal sovereignty is debated internally.

Indian feminist writing reminds us that the creation stories of many indigenous peoples start with a feminine force with power to manifest itself in male form. These creative forces, such as Thought Woman, conceived of and made the earth, creatures, plants and light; without this quintessential spirit's blessing, nothing is sacred. Recently, American Indian feminists have emerged among law scholars. The law discourse can only benefit from indigenous women who value both tribal sovereignty and women and understand the complementary roles customary in many tribes.

B. Indigenous Law and Its Non-fit with External Law

Incorporating or reconciling indigenous law with external norms, especially the constitutional standards, is a daunting task for those who try. This task inherently involves recognizing the cultural viewpoint and historical experiences, in this instance, of the Santa Clara Pueblo that inform how the Pueblo constructed its law. The trial record of Martinez reveals the gulf separating Pueblo experience in everyday life from theoretical or conceptual descriptors.
Twenty-Five Years of Disparate Cultural Visions

During the trial all the attorneys, the expert witnesses, and lay witnesses struggled but were unable to construct consistent content for terms like “patrilineal.” Patrilineal principles were argued to justify the Pueblo ordinance that preferentially treated male members who outmarried and their children. Florence Hawley Ellis, a non-Indian renowned anthropologist, was the expert witness for the Pueblo. Given the district court decision favoring the Pueblo, her testimony was significant. Ellis testified that the patrilineal principal was critical because a child’s participatory role as well as membership were controlled by the father’s status. The trial in numerous ways manifested a presumption that Western concepts such as matriarchy and patriarchy would accurately describe the Pueblo world as it is actually lived. The litigation process and critiques of the decision operate with the assumption that somehow outsiders can determine the “set point” at which tribal practices are genuinely cultural. Collaterally, there is the assumption that one can determine when practices are not tradition or custom and, therefore, due less deference.

Ellis and experts outside the trial described Santa Clara society as organized around the Summer and Winter people, with three moieties or societies for each set of people, who exercise their duties at the requisite season. Ellis insisted that patrilineal was the appropriate conceptual descriptor for this system. However, two respected scholars, Alfonso Ortiz (a member of San Juan Pueblo) and Edward P. Dozier (a member of Santa Clara Pueblo) had rejected this terminology. They describe a Pueblo world organized around six moieties or societies, not on parental lineage. For Ortiz and Dozier, a “bilateral” or “dual organization” world ensured that the requisite responsibilities and ceremonies occurred with roles for men, women, and children. Ellis’ testified that the child’s moiety affiliation, with few exceptions, was obtained from a member father and rarely could be changed. However, a religious elder with expansive testimony stated that he had changed his affiliation when life circumstances made it appropriate. He also stated that which “people” a child becomes is an initial decision made between the mother and father. Testimony also stated that it was not unusual that women members who outmarried or bore illegitimate children had their children initiated and became members of a moiety. This discourse on patriarchy and patrilineal consequences should be compared with the companion article in this law review by Rina Swentzell. She discusses gia and the model person who is neither exclusively male nor female. Swentzell affirms the difficulty of trying to “box” non-Western cultural experiences into Western conceptual containers.

Law scholars wrestling with the non-fit problem reach different outcomes, and the scholar’s sensitivity to tribal culture is reflected in the process and conclusions. Judith Reskin wrote a thoughtful analysis with awareness of Indian law as jurisprudence outside the usual constitutional landscape. Like others, she raised the enduring question of how much differences in cultural law and governance will be
Valencia-Weber
tolerated in a federalist scheme. Charles F. Wilkinson has raised the question of how long will the dominant society tolerate “an island” of uniqueness within the U.S. 64

Reskin, however, concluded that the Santa Clara’s membership rule was not culturally sufficient. Pueblo law had become so intertwined with U.S. rules and patriarchal culture, the discrimination against women built into federal law made it easier for the Supreme Court to validate the Pueblo’s rule. 65 Other scholars see Pueblo law as a “mistfit” that should be “force-fit” into a constitutional norm of equal protection for all citizens. For instance, Robert C. Jeffrey reaches to a natural rights theory and charges that the Supreme Court “itself became guilty of . . . ‘ancestral discrimination’ in direct contradiction to the founding principle of human equality.” 66

Operating in some of these critiques is the presumption that generalizes Santa Clara’s rule to all tribes and offers a global cure, such as an amendment to the ICRA that would guarantee a federal forum for tribal discrimination against women. 67 This presumption overlooks the diversity among the tribes because their cultural story and systems require appropriate practices to maintain customary principles. The Onondaga of New York exercise their sovereignty with a clan system that allocates governing authority between clan mothers and the male faith keepers who serve as the governing council. 68 These are complementary roles and a feature of many tribes. To continue their customary principles and practices, the Onondaga have the reverse rule from Santa Clara, it is the male members who outmarry that suffer the loss of membership rights with their children. 69

Another approach comes from Robert Laurence who offers a statutory proposal that would have Congress overrule Martinez while enacting a law that would also protect tribal authority. 70 He is aware of the historical experience of tribal sovereigns, where their governmental authority has been removed and damaged. Laurence states a corrective is needed so tribes can be successful governments. 71 His proposal would preserve sovereign immunity against damages and sets requirements, such as exhaustion of tribal remedies, among the elements of an amended ICRA. 72

The Pueblos’ long historical struggle to retain its land, the source of culture and identity, has not been included in the available analysis of why the Santa Clara Pueblo passed its ordinance. The concern for communal retention of land as a source for all members, now and in the future, emerged in the district court trial but was not developed in testimony. 73 The critical value of land, not as property but for cultural continuity, was not acknowledged in the three Martinez decisions. It does not appear in the law literature surrounding the case. Through the three “foreign” sovereigns in New Mexico -- Spain in the 16th century, then Mexico in 1821, and the U.S. in 1846-1848 -- all the pueblos had to resist outsiders’ schemes to obtain Pueblo lands. 74 These schemes included marriage with Pueblo women; unconsented occupancy by outsiders; led to adverse possession claims, enabled by the 1924 Pueblo Lands Act; 75 counterfei
documents; and other forms of trickery allowed outsiders to extract fee simple pieces of land. The Santa Clara struggle clearly affected how it structured its membership laws, even though over time Pueblo practice has allowed flexibility in how persons without "official" membership can use land and participate in the community. Outsiders who critique the Santa Clara people and their laws should at least appreciate how the losses of land as a threat to culture have animated the Pueblo’s choices.

C. Martinez as Protector of Tribal Sovereignty and Contemporary Law

The *Martinez* decision created a bulwark against external law intruding into tribal law in internal matters. When the Supreme Court sought to preclude "undue or precipitous interference," it strengthened the tribes. They exercise their sovereignty in an everyday world, using the theoretical structure to regulate members and others acting within the tribe’s jurisdiction. The increasingly visible exercise of governmental power contributes to *Martinez* being one the most cited Supreme Court cases. Of course, the tribes have the choice to adopt the ICRA as compatible tribal law and some have so that their tribal courts enforce the rights.

The Department of Interior as the primary federal actor in relations with the tribes has affirmed the power of *Martinez* to define its role and respect the “non-interference” principle. When addressing “leadership disputes” in tribes, Aurene M. Martin, Deputy Assistant Secretary-Indian Affairs stated:

> To the extent that the Department does have a role in leadership disputes, its role is defined principally by the Supreme Court decision in Santa Clara Pueblo v. Martinez, where the Court cautioned federal agencies to "tread lightly" when taking actions that might intrude on tribal sovereignty.

The non-interference principle has also influenced the federal courts in the Tenth Circuit’s articulation that in an “intra-tribal dispute” the court should constrain itself so that the tribe can resolve its own disagreements.

The non-interference principle has not influenced some political actors who have concertedly tried to end or alter the tribes’ sovereign status and immunity. For example, Senator Slade Gorton continuously proposed legislation, such as the American Indian Equal Justice Act, introduced in 1998. This bill would have, among its provisions, waived the sovereign immunity of Indian tribes to suits in federal courts for alleged Indian Civil Rights violations and subjected tribes to state court jurisdiction for torts and contract actions.
Valencia-Weber

In response to Senator Gorton’s 1998 proposal, the New Mexico Pueblos repeated their historical role in vigorously objecting as they had to the ICRA when it was proposed. In 1998 Roy W. Bernal, Chairman of the All Indian Pueblo Council, testified:

[Between enactment of the ICRA in 1968 and the *Martinez* decision in 1978] there was a proliferation of cases in Federal Courts which assumed immediate jurisdiction (the plaintiff not having first to proceed through any other court system, including tribal court, the logical forum). These matters included contract disputes, routine personnel issues, brief incarcerations by police, and tribal membership questions. Even tribal judges were sued, notwithstanding the doctrine protecting the judiciary dating from English common law. The proposed American Indian Equal Justice Act would open those doors again. As an example, non-tribal courts have dealt from time to time with membership issues. It is hard to imagine a forum less equipped to deal with such questions than the courts of the United States. Each tribe varies in its criteria for membership. Most are based largely on heritage; others on clan membership and moieties. Some questions turn on paternal ancestry, and others on maternal lineage. Tribal religious leaders are reluctant to share this culturally-based information with outsiders. Based on partial and inaccurate information, non-tribal courts make jarringly erroneous decisions, but ones with long-lasting, lingering effects.

Chairman Bernal’s statement captures the entire set of concerns shared by tribes when *Martinez* was filed and the subsequent resistance to reducing the case’s protection that enabled the development of tribal governments.

Tribes face the twenty-first century task confronting all governments: how to govern fairly over all within their power. They do this by following the principles of both conservation and innovation, which made it possible for them to adapt to many new experiences. The outsider perspective that seeks a “set point” of what is genuinely Indian, akin to looking at artifacts in museum cases, misses the living and evolving nature of tribal life. The old customary values can be retained while making internal changes that are in accord with long held culture. For instance, the Pueblos of New Mexico are often seen as the most traditional and conserving among the tribes. Yet, they also have changed from within. Both Nambé Pueblo and Isleta Pueblo have elected women as Governors. Likewise, Laguna Pueblo, in order to tap the
leadership talents of its female members, has changed its laws so that women can hold public offices previously not available to them.

The formidable challenge for the tribal sovereigns today ironically comes from the source of *Martinez*, the Supreme Court. Scholars such as David H. Getches and Sarah Krakoff have substantively demonstrated that the current Supreme Court's project to re-build state power in the majority's view of federalism has clearly invaded the borders of tribal authority. Especially destructive of tribal jurisdiction over events within reservation borders are the recent decisions in *Atkinson Trading Co. v. Shirley* and *Nevada v. Hicks*.

In response to this Court pattern to eviscerate tribal jurisdiction, the tribes have drafted a legislative proposal for Congress to restore their authority. The tribes have included federal court review of tribal court decisions in their 2003 Legislative Proposal on Tribal Governance and Economic Development:

**Federal judicial review of tribal court decisions.** Legislation should provide for federal judicial review of tribal court decisions that will guard the civil rights of non-Indians, while also protecting the right of tribes to create and maintain their own forms of government and their traditions, religions, cultures, languages and ways of life.

This proposed submission to federal court review covers only non-Indians, included in the “persons” language of the ICRA. However, the tribes’ willingness to reduce the barricade of *Martinez* reveals the hardship tribes face with the Court and others who demand less tribal sovereignty.

Underlying the *Martinez* case and the current situation of tribes is the inability of non-Indians to accept that the tribes are unique cultural and political entities in the Constitution. The external world’s demand for individual equality cannot be satisfied while tribes simultaneously struggle to protect their consensual values and political autonomy. Accepting the legitimacy of the first sovereigns in the U.S. would aid the dialogue within society and the courts. Tribal nations must be accepted for what they are: politically organized communities in continuity with values not anchored in individualistic rights. Certainly, tribes aim to protect individuals, but it is in the context of their relationships to other people and the environment. Such an understanding could reduce efforts to force fit Indian law into the usual federal or state law regime, but treat it as sui generis. This is only appropriate for the unique peoples who, despite wars and other policies to terminate them, maintained their distinct political identity during the 600 some years since the Europeans arrived.
Notes

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Title II--Rights of Indians

Definitions

Sec. 201. For purposes of this title, 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
(3) "Indian court" means any Indian tribal court or court of Indian offense.

Indian Rights

Sec. 202. No Indian tribe in exercising powers of self-government shall—
(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
(3) subject any person for the same offense to be twice put in jeopardy;
(4) compel any person in any criminal case to be a witness against himself;
(5) take any private property for a public use without just compensation;
(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;
(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of
liberty or property without due process of law;
(9) pass any bill of attainder or ex post facto law; or
(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

See generally, Donald L. Burnett, Jr., An Historical Analysis of the 1968 'Indian Civil Rights' Act, 9 HARV. J. ON LEGIS. 557 (1971).


5. Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 68 FR 68180 (Dec. 5, 2003) is the latest annual listing with some 562 tribal governments.


7. The ordinance is as follows:

Be it ordained by the Council of the Pueblo of Santa Clara, New Mexico, in regular meeting duly assembled, that hereafter the following rules shall govern the admission to membership to the Santa Clara Pueblo:

1. All children born of marriages between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo.

2. All children born of marriages between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo.

3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo.

4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances.


9. See Rina Swentzell, Testimony of A Santa Clara Woman, 14 KAN. J.L. & PUB. POL'Y 97, (discussing the Pueblo Membership Committee, an ongoing means for reconsidering the membership qualifications in the ordinance).

10. See Constitutional Rights of Indians Generally, 25 U.S.C. § 1302(8), (2004). In Martinez, the Supreme Court called attention to the text on equal protection, “its laws”, the tribe’s laws rather than the more general, “the laws.” Santa Clara Pueblo, 436 U.S. at 63 n.14. Senator Sam Ervin led the legislative effort to pass the act and adopted recommendations from the Department of Interior. However, on the equal protection provision, Senator Ervin rejected the Interior proposal to limit the application to “members of the tribe located within its jurisdiction.” Instead, the ICRA provision applies to any person within the tribe’s jurisdiction. Burnett, supra note 3, at 602.


13. Id. at 14. The qualifications for secular office are not complete as the District Court stated for any member. The ICRA does not have a prohibition against the establishment of religion because “it would endanger the continued existence of Pueblo theocracies.” Martinez v. Santa Clara Pueblo, 540 F.2d 1039, 1044 (10th Cir. 1976). Testimony at the district court trial established that the religious factions of the Pueblo, in practice, endorsed or approved the candidates for the secular government positions. Record on Appeal, U.S. Court of Appeals, 10th Cir., Transcript of Trial,


15. **Id.**

16. **Martinez**, 540 F.2d 1039.

17. **Id.** at 1048.

18. **Id.**

19. **Id.** at 1045.

20. **Id.** at 1046. See also Burnett, *supra* note 3, at 617-20 (discussing cases that first applied the ICRA, which used pendant jurisdiction and constitutional analogues to expand federal court power).

21. **Id.**

22. **Santa Clara Pueblo**, 436 U.S. at 49. Marshall’s opinion was joined by Justices Burger, Brennan, Stewart, Powell, Stevens; Rehnquist also joined, but not as to Part III holding that the Pueblo had sovereign immunity. Justice White dissented. Justice Blackmun did not participate.

23. **Id.** at 58-59.

24. **Id.** at 65-68.

25. **Id.** at 55-56.

26. **Id.** at 58-59.

27. **Id.** at 59-60. While the Pueblo Governor Paul Tafoya, who was succeeded as Governor and defendant Lucario Padilla was not protected by the Pueblo’s immunity, this did not end the Court’s consideration. Congress could, as it had in §1303 of the ICRA, authorize civil actions against tribal officers.

28. **Id.** at 60. The Court voiced concern that intratribal disputes resolved in a “foreign” forum, the federal court, would unsettle a tribal government’s ability to maintain authority.

29. **Id.** at 61. The legislative history is discussed at 62-70.

30. **Id.** at 62.

31. **Id.** at 66-67.

32. **Id.** at 63-64. Omitted are the First Amendment on establishment of religion, the Seventh Amendment requirement for jury trials in civil cases, the Sixth Amendment requirement of appointment of counsel for indigents in criminal cases, the Second Amendment on bearing arms and a well regulated militia, and the Third Amendment on quartering soldiers in private homes. Modifications include the §1302 (8) guarantee of equal protection of its [tribal] laws, not “the laws” in the Fourteenth Amendment, §1; no Fifth Amendment requirement of a grand jury indictment for a tribal criminal prosecution while most of this Amendment’s protections were retained; and §1301(7), which invokes the Eighth Amendment by prohibiting cruel or unusual punishments and excessive bails, but sets a limit of six months imprisonment and a $500 fine on tribally imposed penalties. These limits were subsequently amended to sentences not exceeding one year’s imprisonment and a $5000 fine or both. *Indian Civil Rights Act of 1968*, Pub. L. No. 90-284, § 202, 82 Stat. 73, 77-78 (1968).


34. **Id.** at 67.

35. **Id.**

36. **Id.** at 67-68. Proposals included authorizing the Attorney General to review deprivations of
constitutional rights and bring criminal or other actions to secure the rights of individual Indians. Another rejected proposal would have authorized the Department of Interior to adjudicate civil complaints with review of the Department’s decisions in the federal district court.

37. Id. at 71.
38. Id.
39. Id.
40. Id. at 72.
41. Id.
42. The author and Rina Swentzell (who has an article in this volume) have embarked on a project to obtain fuller information and perspectives on the Martinez decision from varied sources, including the trial record and persons from Santa Clara Pueblo. This article uses some of the sources.
44. See, e.g., Angela Harris’ response to MacKinnon’s gender essentialism. “I have argued in this article that gender essentialism is dangerous to feminist legal theory because in the attempt to extract an essential female self and voice from the diversity of women’s experiences, the experiences of women perceived as “different” are ignored or treated as variations on the (white) norm.” Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 615 (1990). See also Mari J. Matsuda, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, 14 WOMEN’S RTS. L. REP. 297, 300 (1992). Here, the author states: “In arguing for multiple consciousness as jurisprudential method, I don’t mean to swoop up and thereby diminish the power of many different outsider traditions. Our various experiences are not co-extensive.”
45. See Gloria Valencia-Weber & Christine P. Zuni, Domestic Violence and Tribal Protection of Indigenous Women in the United States, 69 ST. JOHN’S LAW REVIEW, 69, 83-96 (1995). The authors discussed the indigenous worldview and the Martinez decision. They injected the voices of numerous American Indian feminists, such as Reyna Green, Paula Gunn Allen, Clara Sue Kidwell, and Bea Medicine, who had been overlooked in mainstream feminist theory.
46. Rayna Green, Native American Women, 6 SIGNS 248, 264 (1980) (contending that Indian feminist writing bears very little resemblance to non-Indian feminist analysis)[hereinafter SIGNS]; see also, Rayna Green, NATIVE AMERICAN WOMEN: A CONTEXTUAL BIBLIOGRAPHY (1983); Rayna Green, The Pocahontas Perplex: The Image of Indian Women in American Culture, 16 MASS. REV. 698 (1975).
47. Green, supra note 46, at 264-265.
48. PAULA GUNN ALLEN, THE SACRED HOOP: RECOVERING THE FEMININE IN AMERICAN INDIAN TRADITION 17 (Beacon Press 1986). “The primary power -- the power to make and to relate -- belongs to the preponderantly feminine powers of the universe;” see also Swentzell, supra note 9, (discussing gia in Santa Clara Pueblo, a female force who can also be manifested in males).
49. ALLEN, supra note 48, at 13-16 (discussing other female creators such as Spider Woman, Corn Woman, Earth Woman, and White Buffalo Woman).
51. Valencia-Weber & Zuni, supra note 45, at 91-95 (discussing complementary roles).
52. Tim Vollmann, Revisiting Santa Clara Pueblo v. Martinez: What Can We Learn Thirty Years Later? Address Before the 29th Federal Bar Association, Indian Law Conference, (April 15-16, 2004), in COURSE MATERIALS, April, 2004 at 65. (describing the trial, especially problems of confusion, arising because the first language of most witnesses was Tewa. Vollmann was an attorney for the Martinez plaintiffs in the District Court trial and provides a retrospective view of the trial experience).


54. Id. at 238, see also ALFONSO ORTIZ, THE TEWA WORLD: SPACE, TIME, BEING AND BECOMING IN PUÉBLO SOCIETY 9, 13-16 (The University of Chicago Press 1969) (describing pueblo origins and division into Summer and Winter People).

55. Record On Appeal at 245, Martinez (No. 9717 Civil).

56. EDWARD P. DOZIER, THE PUÉBLO INDIANS OF NORTH AMERICA 162 (Waveland Press 1970), (describing the Tanoan Pueblos in New Mexico that represent three linguistic families, Tiwa, Tewa, and Towa. Santa Clara is one of the northern Tewa Pueblos); “While the individual pueblos and linguistic subgroups show considerable variation in details, there is a basic similarity in the overall pattern of Tanoan political and ceremonial organization.”

57. ORTIZ, supra note 54, at, 31. Ortiz and Dozier are in agreement on “dual organization.” Id. at 4-5. DOZIER, supra note 56, at 166-68.During the trial Ellis acknowledged her difference with “dual organization” and with Dozier, who had been her student, with whom she shared numerous views but not on this conceptual category. Record On Appeal at 245-246, 248, 282, 293-296, Martinez (No. 9717 Civil). While the trial testimony included the work and interpretations of numerous eminent anthropologists and scholars of Pueblo culture, Ortiz and Dozier stand out because their scholarly achievements earned them high regard in the field and their “insider” knowledge and ability to speak Tewa provided access and insights not available to others; see Fred Eggan, Introduction, in EDWARD P. DOZIER, THE PUÉBLO INDIANS OF NORTH AMERICA, ix (1970).


59. Record On Appeal, Vol. II at 361, 383, Martinez (No. 9717 Civil); see also Swentzell, supra note 9.

60. Record On Appeal, Vol. II, at 367-68, Martinez (No. 9717 Civil); see Vollman supra note 52, at 69.


62. Swentzell, supra note 9; see also ORTIZ, supra note 54, at 36 (describing the Winter and Summer moieties as identified with both maleness and femaleness and the Chief of the Winter moiety is referred to as father and mother at different periods of the yearly cycle).

63. Judith Reskin, Dependent Sovereigns: Indian Tribes, States, and the Federal Courts, 56 U. CHI. L. REV. 671, 701-702 (1989) “As a non-Indian, I am conscious of what Mari Matsuda has called the dangers of ‘invasion and preemption.’ But I cannot share the ease with which the Supreme Court in Santa Clara Pueblo assumed the 1939 ordinance to be an artifact of Santa Clara sovereignty.” Id. at 725.

64. Charles F. Wilkinson, Shall the Islands be Preserved, in THE EAGLE BIRD: MAPPING A NEW WEST 22 (Pantheon Books 1992) “Indians are more interested in separatism than in equality. The reservations are islands where tribal culture and religion are protected from an encroaching dominant society. They serve as the last outposts against a debilitating racism that shows few signs
of abating. Separatism is possible because Indian tribes are sovereigns. *Id.* at 26.


66. Robert C. Jeffrey, Jr., *The Indian Civil Rights Act and the Martinez Decision: A Reconsideration*, 35 S.D. L. REV. 355, 371 (1990); *see also* Lucy A. Curry, *A Closer Look at Santa Clara Pueblo v. Martinez: Membership by Sex, by Race, and by Tribal Tradition*, 16 WIS. WOMEN’S L. J., 161 (2001). “Anglo-American and native American governments have accepted sexist and racist criteria for constructing one’s identity. For those who remain feminists and race critics, we can only hope that tribes exercise their sovereign powers in ways that avoid the disastrous effects of such prejudice and recognize most all the connection between an individual and her tribal community.” *Id.* at 214.

67. *See, e.g.*, Carla Christofferson, *Tribal Court’s Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act*, 101 YALE L. J. 169, 170 (1991), “[T]he Santa Clara ruling has left Native American Women virtually paralyzed within a system that subordinates women.” Christofferson includes text for a proposed amendment of the ICRA.


69. *Id.; see also* THE WINDS OF CHANGE: A MATTER OF PROMISES (PBS 1990) (an informative presentation on this Onondaga law and the cultural principles it maintains).


71. *Id.* at 427-428.


73. Record On Appeal Vol. I at 166, 17, 188 Martinez (No. 9717 Civil).


77. *See* Swentzell, *supra* note 9; *see also* Record on Appeal at 60-66, Martinez v. Santa Clara Pueblo, 402 F. Supp 5 (D.C.N.M. 1975) (testimony of Julia Martinez that she and her family had access to Pueblo schools, firewood, housing, hunting and fishing).

78. Cited in twenty Supreme Court cases, approximately 472 federal court cases, and approximately 457 law reviews. Westlaw Keycite Search, September 16, 2004.


83. Id; see McCarthy, supra note 79, at 488-489.
84. See Burnett, supra note 3, at 589-594.
86. DOZIER, supra note 57, at 131 (quoting Fred Eggan, scholar in anthropology, “[S]ocial structures change more often from internal adjustments than from external contacts. Borrowing may take place, but innovation and remodeling of existing structures are more common”).
89. Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) (Navajo Nation does not have authority to place a hotel tax on guests at a non-Indian owned hotel located on fee simple land surrounded by the Navajo reservation).
90. Nevada v. Hicks, 533 U.S. 353 (2001) (Tribal authority to regulate state officers in executing process related to violation, off reservation, of state laws is not essential to tribal self-government or internal relations, to the right to make laws and be ruled by them).