

1-1-2011

Three Stories in One: The Story of Santa Clara Pueblo v. Martinez

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Recommended Citation

Valencia-Weber, Gloria. "Three Stories in One: The Story of Santa Clara Pueblo v. Martinez." *Indian Law Stories* (2011): 451-488.
https://digitalrepository.unm.edu/law_facbookdisplay/29

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Gloria Valencia-Weber

Three Stories in One: The Story of *Santa Clara Pueblo v. Martinez*

Introduction

*Santa Clara Pueblo v. Martinez*¹ is an especially rich case that intermingles three stories: one is about Julia Martinez and her family; a second features Santa Clara Pueblo itself; and a third highlights dynamics within the United States Supreme Court. Decided in 1978, the *Martinez* case denied Julia Martinez access to federal court to challenge a Pueblo membership ordinance treating female members who marry outside the Pueblo differently from male members who marry outside. The case has long attracted attention from feminists and human rights advocates, because they see a woman's claim of gender discrimination pitted against a Pueblo's claim of tribal sovereignty. What has been missing in all of this commentary, however, is an internal Santa Clara Pueblo viewpoint on the case. What follows is an account of these three stories in their cultural context.²

Fundamentally, *Martinez* presents the conflict between American Indians and the mainstream non-Indian world about what values should guide when law is made for a society. Describing the case as a contest between western individual rights and the consensual principles of indigenous peoples does not capture the depth of the conflicting cultural perspectives involved. *Martinez* revealed the chasm between two cultural frameworks. Whereas the non-Indian world perspective values individual autonomy, the indigenous perspective prescribes how human beings should fit in the natural world in a collective way. The non-Indian world perspective supports a civil order structured on the basis of individual

¹ Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

² Through the generosity and friendship of Santa Clara Pueblo people for some decades, the writer has learned to appreciate their perspective. Only the information from Santa Clara members who have published or consented to disclosure has been used. The writer does not claim to speak for Santa Clara Pueblo, but has tried to respect the members' desire to protect cultural knowledge.

rights. In contrast, indigenous peoples protect the individual through the relational obligations and benefits created in a community.³

The perspective voiced in Santa Clara, a Tewa-speaking Pueblo, is anchored in life as coexistence in the natural world, with other life forms, and the elements of the world such as land and water. This is a common view among the indigenous peoples of the world. Edward P. Dozier, a renowned scholar and member of Santa Clara Pueblo, stated:

Foremost in traditional Tewa beliefs and values is a conception of the world as an orderly phenomenon and a conviction that it is the responsibility of all to work together in secular and religious activities to keep the universe functioning smoothly. Unanimous effort is emphasized, and an individual or group of individuals who violate this principle can bring disastrous consequences upon themselves and the community as a whole.⁴

Another Santa Claran and scholar, Rina Swentzell, has added:

[O]ne should be part of the whole within which society operates—the natural world. That is why we wear cloud and mountain *tablitas* on our heads, skunk skins on our ankles, branches around our necks as we honor the forces of nature of which we are part. The ultimate effort is to see the interactive quality of the world, of society, of family, of self. It is believed that every person has feminine and masculine, warm and cold, dark and light qualities. And, living is about acknowledging the other, the opposite, and balancing those forces within us and within our society because that is what the natural world does.⁵

Considering these Santa Clara perspectives, it is not surprising that the governing structures and law emerging from the Pueblo's cultural norms might diverge from the federal constitutional value of context-free individual rights.

The Pueblo's ordinance and the federal statute in the case demonstrate the conflict in cultural values that underlies the controversy. Santa Clara Pueblo passed an ordinance in 1939 that expressly treats female members who marry non-members in a different way from male members who "outmarry." The ordinance denied membership in the Tribe to children of female members, but granted membership to the children of similarly situated male members. This membership law ran contrary to the jurisprudence of equal protection in the Fourteenth and Fifth Amendments of the United States Constitution. The Supreme Court, in the 1970s, had begun to take a skeptical view of all types of

³ Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 Ariz. St. L.J. 889 (2003) provides an insightful analysis of how individual rights standards can affect or defeat federal laws to revitalize tribal governments.

⁴ Edward P. Dozier, *Factionalism at Santa Clara Pueblo*, 5 Ethnology 172, 174 (1966).

⁵ Rina Swentzell, *Testimony of a Santa Clara Woman*, 14 Kans. J. L. & Pub. Pol'y 97, 98 (2004) (*tablitas* are headdresses in tablet form and worn during Tewa ceremonial dance).

gender discrimination. Moreover, the Indian Civil Rights Act of 1968 ("ICRA"),⁶ a federal statute, had incorporated the language of equal protection from the Bill of Rights and obligated tribal governments to provide this equality to persons within their jurisdiction.

Three opinions from the federal district court, the Tenth Circuit, and the Supreme Court engaged the facts and situation to resolve the obvious cultural conflict. The three courts confronted the singular body of Indian law, as well as more general principles of federal jurisdiction. The Supreme Court decision is particularly noteworthy because it was written by Justice Thurgood Marshall, the first African-American Justice on the Court and a renowned advocate for civil rights before joining the federal bench.⁷ How Justice Marshall navigated the political dynamics and internal culture of the Court to arrive at the *Martinez* decision is a fascinating story itself, revealing the Justices' different responses to the gap between Santa Clara Pueblo and United States worldviews. To understand *Martinez*, one must start with the personal story, where Julia and Myles Martinez sought medical care for their daughter with severe health problems. Then, from the personal to the institutional level of the Pueblo and the Supreme Court, one can grasp how events led to the broad impact of the decision.

Social and Factual Background: The Martinez Plaintiffs

The controversy arose when Julia and Myles Martinez needed specialized medical care for their daughter, Audrey, that was unavailable at the local Indian Health Service facility. Mrs. Martinez attempted to get a Pueblo membership card for Audrey, which presumably would have provided access to the more specialized care that her daughter needed. Audrey was one of eight children of Julia and Myles Martinez, who had married in 1941, two years after the membership ordinance of the Pueblo. At trial Julia testified that, before her marriage, an uncle had discussed the ordinance with her, including the fact that it would apply to her if she married an outsider. Julia had lived her entire life on the Pueblo and after their marriage, so had Myles except for time in military service. At trial Julia explained that her sickly mother needed her, so the Martinez family had not attempted to live elsewhere, including the Navajo Nation where Myles was a member.⁸

The problem in this family's quest for the membership card was that Myles Martinez was Navajo and the ordinance and general cultural practice required a Santa Clara father for a child's membership to be recognized. In the history of the Pueblo, non-member males married to

⁶ 25 U.S.C. §§ 1301–1303.

⁷ See generally Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice Thurgood Marshall's Indian Law Jurisprudence*, 26 Ariz. St. L. J. 495 (1994).

⁸ See generally Record on Appeal, Vol. I 34–76 [hereinafter Record on Appeal, Vol. I], *Martinez v. Santa Clara Pueblo*, 402 F.Supp. 5, 11 (D. N.M. 1975), (Testimony of Julia Martinez).

Santa Clara females had been offered the option of accepting membership in the Pueblo. However, Pueblo members on more than one occasion report that Myles Martinez had refused the offer.⁹ In the Pueblo's practices various informal arrangements were made so that children fathered by non-members could be treated as members and be taken into a moiety. If the Pueblo mother was unwed or left as a widowed mother, then relatives and the Pueblo Council protected the child and provided membership status.¹⁰ Rather than accept these options, Myles and Julia Martinez, chose to challenge the ordinance.

Audrey and the Martinez children grew up in the Pueblo, spoke Tewa, and participated in the Pueblo's religious ceremonies. Audrey testified that she considered herself to be Santa Claran. Her history and characteristics, as facts, were strongly argued in the briefs, oral argument, and accepted by the trial court in its opinion denying her relief.¹¹ The Martinez family participated in the formal and informal social events at the Pueblo. The non-membership status of Audrey did not deny her the ordinary services and opportunities of members. At trial Julia Martinez testified that her family had access to the Pueblo schools, firewood, housing, hunting, and fishing. However, Audrey and her siblings could not vote or run for elective secular office as these required formal membership.¹² Julia Martinez was dissatisfied with this membership rule. Her frustration was known in the community and raised tensions with some Pueblo members, but this did not curtail the family's participation in Pueblo events. Myles was a hunting and fishing friend for some Pueblo members, including members of the Pueblo Council. It was this Council that ultimately refused to act on the numerous requests by Mrs. Martinez to bestow membership on Myles or the children. Myles continued in the companion activities after the Supreme Court decision, so these social relations were not terminated.¹³

Julia Martinez used internal Pueblo processes in attempts to obtain a membership card, including procedures not explicitly provided in the Pueblo's constitution. Even though Pueblo law expressly prohibited naturalization, she tried to have Myles adopted as a member of the

⁹ Interview with Tito Naranjo, Santa Clara Pueblo Elder, Sept. 16, 2008 [hereinafter Interview with Elder Naranjo]. While the author has been told that Myles Martinez refused membership by various members of Santa Clara, it was specifically stated in Interview with Tito Naranjo. At trial, Myles Martinez described an effort to begin naturalization that remained inchoate. Record on Appeal Vol. I, *supra* note 8, at 12–13.

¹⁰ Record on Appeal, Vol. I, *supra* note 8, at 160 (Testimony of Santa Clara Pueblo Elder Jose Gene Naranjo); *Id.* at 144 (Testimony of Governor Paul Tafoya); *Id.* at 189–192 (Testimony of Elder Amarante Silva), stated that Julia Martinez' mother had outmarried and when widowed returned to the Pueblo where she and her children were "taken in." *Id.* at 93–94 (Testimony of Audrey LaRose Martinez, describing Audrey's maternal grandmother's return to Santa Clara Pueblo).

¹¹ *Martinez v. Santa Clara Pueblo*, 402 F.Supp. 5, 14 (D. N.M. 1975).

¹² Record on Appeal Vol. I, *supra* note 8, at 60–66 (Testimony of Julia Martinez); *Id.* at 78 (Testimony of Audrey Rose Martinez).

¹³ Interview with Elder Naranjo, *supra* note 9.

Pueblo so that their children would be automatically recognized as members. She asked her representative to the Pueblo Council to present to this body a request that Audrey be enrolled. When her representative refused, she addressed the Council herself, after she obtained special permission from the Governor. She formed a committee comprised of women in her situation and that committee petitioned Council representatives and the Council itself. Again the group obtained special permission to go outside the process usually provided in the Pueblo Constitution. Julia Martinez and the committee succeeded in having a special meeting for the entire Pueblo to discuss the situation. Mrs. Martinez attempted in repeated meetings with her Council Representative, the Council, and the Governor to secure membership for her daughter. In addition, Mrs. Martinez and the Committee met in Albuquerque with Bureau of Indian Affairs (BIA) officials and the All Pueblo Agency.¹⁴

Ultimately, the Federal agencies provided a means for Audrey to obtain medical care. A Pueblo or tribal membership card is not the only way to establish that one qualifies for the health services that the United States promised to provide in treaties or because of the trust relationship with tribes. Indian Health Service does require documentation that one is eligible by descent for health services. The BIA issues a document that certifies the degree of Indian blood, commonly called the CDIB, which is not intended to function as a tribal membership card. In 1968 Tribal officials, including the Governor (and defendant in the litigation) accompanied Julia Martinez to the BIA office where Audrey and the other Martinez children obtained the requisite CDIB cards. At this point Audrey could access Indian Health Service care for the health problems that worried her parents.¹⁵

The document from the BIA did not satisfy Julia Martinez, so she went outside the Pueblo and the federal agencies that exercise the nation-to-nation relationship with tribes. Among the venues she pursued were her Senator in the New Mexico Legislature (though states have no authority over tribal membership) and the Congressional hearings held by the Subcommittee on Constitutional Rights of the U.S. Senate Committee on the Judiciary, where she sought the help of Senator Sam Ervin, Jr., who had pushed the Indian Civil Rights Act through Congress.¹⁶

This issue of membership for children born in marriages involving non-Pueblo husbands was of concern to members who saw the inequality, yet who felt the Pueblo had to resolve this matter internally. Pueblo members knew Mrs. Martinez had taken her dispute to outside federal sources and that litigation was a possibility. This external reach for an internal Pueblo issue threatened more of what many members had

¹⁴ Martinez v. Santa Clara Pueblo, 402 F.Supp. 5, 10 (D. N.M. 1975), *See generally* Record on Appeal, Vol. I, *supra* note 8, at 34-53 (Testimony of Julia Martinez).

¹⁵ Martinez v. Santa Clara Pueblo, 402 F.Supp. 5, 11, 14 (D. N.M. 1975); Record on Appeal, Vol. I, *supra* note 8, at 50-51 (Testimony of Julia Martinez).

¹⁶ Martinez v. Santa Clara Pueblo, 402 F.Supp. 5, 11 (D. N.M. 1975).

experienced as external federal authority interfering in their self-government. The Pueblo Lands Act and repeated conflicts over water and natural resources had made members and officials wary of when to invoke external laws and litigation. The members were made especially uneasy that an internal matter such as requirements for membership would be subjected to external authority. So far, the three foreign sovereigns had historically reserved membership for Pueblo self-governance.

In 1971 Myles and Julia Martinez sought legal help and became a client of DNA Legal Services, a federally funded non-profit agency that pioneered in providing legal services to American Indians.¹⁷ Julia and Audrey Martinez sued as individuals and each as representatives of the class of similarly affected individuals. They sued the Pueblo and the Governor at the time, Lucario Padilla, individually and in his capacity as Governor. The Pueblo members were now sidelined, whether they sympathized with mother and daughter because the membership ordinance caused hardship to individuals and losses to the Pueblo, or they feared interference with the Pueblo's self-governing authority. As in the outside world, the lawsuit in *Martinez* signaled that the societal resources for resolving disputes without litigation had failed.

***Historical and Social Background:
The Pueblo, the Land, and the Three Sovereigns***

Santa Clara Pueblo, located north of Albuquerque, is one of the nineteen pueblos in New Mexico, the original sovereigns in that area. These nineteen pueblos share a history of contact and struggles with Spain, Mexico, and ultimately the United States. At the time of the *Martinez* case, Santa Clara Pueblo had existed for approximately seven hundred years. The Spanish entered the area that is now New Mexico in 1540–1542, when Francisco Coronado made contact with the pueblos and tribes. The New Mexican pueblos have retained their distinct identities and are often described as among the most tradition-bound among the federally recognized sovereigns. Their resistance to the colonial authority of the Spanish crown led to the Pueblo Revolt of 1680. A coalition of pueblos killed Spanish clerics, leaders, and colonists and drove the Spanish out of New Mexico. Unwilling to give up the colonial dream of expropriating pueblo lands and resources, the Spanish organized their military forces in 1692 and managed to regain power over the pueblos. In some historical accounts, the Spanish are described as trying to govern

¹⁷ DNA Legal Services was among the first organizations funded by the Legal Services Corporation for this purpose. The attorneys for Julia and Audrey Martinez were Alan R. Taradash, Richard B. Collins, and Tim Vollmann. All three continued as specialists in Indian law: Taradash with the Nordhaus law firm in New Mexico, Collins as a professor at the University of Colorado School of Law, and Vollmann as the Southwest Regional Solicitor for the Department of Interior, and later in private practice. Marc Prelo of Albuquerque represented the Pueblo defendants. See Tim Vollmann, *Revisiting Santa Clara Pueblo v. Martinez: What Can We Learn Thirty Years Later*, 29 Fed. B. Ass'n Indian L. Conf. 65 (2004).

with less repression than in their prior regime.¹⁸ During this period, Spain confirmed and recognized the title of the pueblos to their communal lands.

The Spanish empire in the west included Mexico, which ultimately rebelled and obtained its independence. In 1821, Mexico became the next external sovereign in the pueblos' region, promising them that they would retain their prior rights under Spanish governance. But while the Mexican authorities formally acknowledged pueblo land rights, they did little to protect pueblo lands against trespass and occupation by outsiders.¹⁹ The Mexican regime was short-lived, ending with the Mexican-American War. Through the Treaty of Guadalupe Hidalgo, made between the United States and Mexico in 1848, the United States obtained the major portion of the southwest, including present-day Arizona, California, western Colorado, Nevada, New Mexico, parts of Texas, and Utah.²⁰

The Treaty also promised that Mexican citizens who chose to be incorporated into the United States would be entitled "to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution."²¹ The tribes and pueblos were not specifically mentioned in the Treaty. However, Indians were considered citizens and formally equal to other Mexicans, *e.g.*, they could vote in Mexican elections.²² As such, they should have been able to enjoy full personal and property rights under the United States regime. Nonetheless, Santa Clara and all the pueblos had to continuously fight against the greed of individual non-Indians, first the Spanish, then the Mexicans and Americans who used various devices to obtain pueblo lands. Marriage to Santa Clara women, trickery such as counterfeit official documents, and adverse possession claims by trespassers onto pueblo lands, became the routes of outsiders wanting Santa Clara land.²³

¹⁸ Regis Pecos, *Foreword* to Joe S. Sando, *Pueblo Nations: Eight Centuries of Pueblo Indian History* (1992); Laura E. Gomez, *Manifest Destinies, the Making of the Mexican-American Race* (2007); *See generally, Latinos in the United States, Historical Themes and Identity: Mestizaje and Labels* (Antoinette Sedillo Lopez ed., 1995).

¹⁹ Joe S. Sando, *Pueblo Nations: Eight Centuries of Pueblo Indian History* 83–84 (1992).

²⁰ Treaty of Peace, Friendship, Limits and Settlement, U.S.–Mex., Feb. 2, 1848, 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo].

²¹ *Id.* at art. IX.

²² *See* Guillermo Floris Margadant, *Official Mexican Attitudes Toward the Indians: An Historical Essay*, 54 Tul. L. Rev. 964 (1980); *see also* United States v. Lucero, 1 N.M. 422 (N.M. Terr. 1869) (discussing Indians' citizenship rights under the Plan of Iguala adopted by the Mexican Government in 1821 and the pueblos' members as "civilized Indians" qualifying for the rights recognized and protected by the Treaty of Guadalupe Hidalgo).

²³ *See* W.W.Hill & Charles H. Lange, *An Ethnography of Santa Clara Pueblo*, 154–157 (1982) (discussing exogamic marriages, historically forbidden and ranks of undesirable or forbidden non-Santa Clara husbands and wives); Sando, *supra* note 19, at, 83–90, 105–122 (discussing corrupt administrators and fraudulent documents used with "trickery" to obtain titles to Pueblo lands).

During the American period, courts at first declined to apply statutory restrictions against alienation of Indian land to pueblo lands, which were held under communal fee title since the Spanish colonial era. Inaction by federal officials opened the door to non-Indians acquiring pueblo lands. Eventually, the federal government changed its view, and treated pueblo lands as protected against alienation. In the meantime, approximately three thousand non-Indian claims had been lodged for lands within the boundaries of pueblo grants. Congress enacted the Pueblo Lands Act of 1924 to review these contested claims. Advocates for the 1924 Act had argued it was needed to resolve title disputes and provide certainty for the state's economic development.²⁴

The pueblos' view of the issues differed from the non-Indians' view. First, land is the source of identity and culture for pueblo people, not real estate as it was to outsiders; so the cultural perspectives conflicted immediately. Alienation of pueblo lands to private individuals and interests was outside of core pueblo beliefs about being stewards, not owners of the lands. Second, the pueblos saw injustice in the administration of the Pueblo Lands Act. The federal agency established to review contested claims, the Pueblo Lands Board, ignored or denied the pueblos' historical land tenure, and refused to apply long existent doctrines denying adverse possession claims on Indian lands. By the time the Pueblo Lands Board completed its work in 1938, 80% of the non-Indian claims within the pueblos of New Mexico, involving some 50,000 acres, had been approved.²⁵ This result from the Pueblo Lands Board process aggravated the historical concern of the Pueblos, from the Spanish period onward, that the external sovereigns did not protect their lands and communal title. One year later, dissatisfaction with this outcome certainly contributed to Santa Clara Pueblo enacting the membership ordinance that sparked the *Martinez* litigation.

The legal relationships that emerged from Santa Clara Pueblo's interactions with the three external sovereigns must also be understood in the context of how the Pueblo organized itself as a culturally distinct society. Over centuries, individuals formed their identity as a Santa Claran and then behaved as productive members of the collective in ways that were distinctly non-western. Specifically, gender-based roles have not been defined or exercised in the terms that non-Indian western societies use to frame how men and women function, such as patriarchy and matriarchy. In *The Tewa World*, Alfonso Ortiz set out the communal values that have structured how Santa Clara individuals establish their place in the world and live their everyday lives. "[T]he basic feature of the Tewa social organization was a division into 'Summer People' and 'Winter People' and a further tendency to fit various aspects of Tewa culture into this dual pattern." Swentzell, after providing an account of

²⁴ See Sando, *supra* note 19, at 114 (discussing the Congressional report); G. Emlen Hall, *The Pueblo Grant Labyrinth in Land, Water, and Culture: New Perspectives on Hispanic Land Grants* 120–121 (Charles I. Briggs & John R. Van Ness eds., 1987).

²⁵ Sando, *supra* note 19, at 114–122; Hall, *supra* note 24, at 120–121.

Santa Clara's creation story, notes that the resulting "social order was not traditionally either/or/not matriarchical or patriarchal. It was both. Even today, a child is born as a Winter person or a Summer person with the option to become the other if sensibilities are of the others."²⁶ The Tewa system at Santa Clara seasonally shifted authority between Summer and Winter peoples and structured the role, responsibilities, and benefits of men, women, and children. This is the context from which the *Martinez* lawsuit arose.

Prior Proceedings

The lawsuit filed by DNA attorneys representing Julia and Audrey Martinez challenged parts two and three of the 1939 Ordinance:

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.²⁷

Their claim was that the ordinance, on its face and as applied, violated the equal protection promised in ICRA. According to the text of that Act, "No Indian tribe in exercising powers of self-government shall . . . (8) deny to any person within its jurisdiction the equal protection of its laws . . ."²⁸ The case was filed as a class action on behalf of all mothers and daughters in the situation of Julia and Audrey Martinez. The remedies sought were a declaratory judgment and an injunction against the further enforcement of the ordinance.²⁹

²⁶ Alfonso Ortiz, *The Tewa World* xii (1969); Swentzell, *supra* note 5, at 98; Record of Appeal Vol. II at 383 (Testimony of Elder Arcario Tafoya) (discussing his change from Summer to Winter person); *see generally*, Gloria Valencia-Weber, *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*, 14 Kan. J. L. & Pub. Pol'y 49 (2004).

²⁷ *Martinez v. Santa Clara Pueblo*, 402 F.Supp. 5, 11-12 (D. N.M. 1975).

²⁸ Indian Civil Rights Act of 1968, Publ. L. No. 90-284, 82 Stat. 77 (codified as amended in 25 U.S.C. §§ 1301-1302).

²⁹ *Martinez v. Santa Clara Pueblo*, 402 F.Supp. 5 (D. N.M. 1975).

The initial response from the Pueblo defendants was a motion to dismiss. The federal court lacked subject matter, they claimed, because ICRA did not authorize federal courts to hear intratribal matters. Alternatively, the Pueblo and its officials were protected against suit by sovereign immunity, a quasi-jurisdictional defense. From its inception, the *Martinez* lawsuit attracted attention for its potential to become the first Supreme Court case construing ICRA. Prior ICRA decisions had involved a broad range of issues from election procedures to exclusion.³⁰ The history of ICRA had itself involved conflicting views among tribal members and officials and the congressional advocates for its passage.³¹ It is impossible to understand how the issues were presented and resolved in *Martinez* without appreciating the events that led to the passage of ICRA.

The Indian Civil Rights Act passed in 1968 as a rider to the Civil Rights Act of 1968, best known for its ban on housing discrimination. Senator Sam Ervin was the political force that pushed and succeeded in passing ICRA during the period when non-Indian activists were demanding affirmative protection of civil rights. Ervin, a southerner, carefully attempted to distinguish his interest in rights for Indians from his opposition to civil rights for African-Americans and others. In his thorough legislative history of ICRA, Donald L. Burnett, Jr. reveals an observer's statement describing Ervin as having the "romantic" southern affection for the Indian and Indian heritage. In the Senator's office Indians were known as "the minority group most in need of having their rights protected by the national government."³² He later stated, "Even though the Indians are the first Americans, the national policy relating to them has been shamefully different from that relating to other minorities."³³

Ervin was the Chair of the Subcommittee on Constitutional Rights, and his sustained campaign to achieve ICRA began with hearings in 1961.³⁴ The proposed legislation proceeded with limited input from the tribal governments, though the process did allow some tribal members to provide testimony of abusive treatment they had suffered under tribal authority. There was concern on all sides about the extent of the tribes' sovereignty and whether immunity attached to their actions. The tribes' claim to sovereignty had been treated in divergent ways in the federal

³⁰ See Alvin J. Zions, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S. D. L. Rev. 1, 20-21 (1975) (Zions's argument for how the Supreme Court should review and decide the *Martinez* case, with summary of prior ICRA cases).

³¹ *Martinez v. Santa Clara Pueblo*, 402 F.Supp. 5, 9 (D. N.M. 1975).

³² Donald J. Burnett, Jr., *An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 Harv. J. on Legis. 557, 574-575 (1971-72) (quoting letter from Arthur Lazarus, Jr., counsel to the Association on American Indian Affairs).

³³ 114 Cong. Rec. 393 (1968).

³⁴ *Hearings on Constitutional Rights of American Indians Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., at 1 (1961).

courts in a period with shifts in federal Indian policy. It was clear from United States Supreme Court precedent, however, that the Bill of Rights in the United States Constitution did not bind tribal governments.³⁵ Senator Ervin's staff inquiries and reports from the Fund for the Republic³⁶ and the Department of Interior Task Force³⁷ pointed to tribal government practices that failed to meet federal constitutional norms. Each report "advanced the conventional thesis that deviations from constitutional government in the United States were improper in themselves and required eventual correction."³⁸ These reported views informed Ervin's decision to proceed with the Legislation.

Thus began a six-year cycle of hearings and proposed legislation that involved more than Indians. Senator Ervin and the Subcommittee began with field hearings in Indian Country that ended in 1963, and then continued with hearings in 1963 and 1965 in Washington, D.C. Three issues emerged from the hearings to guide the drafting: Indians encountered violations of their individual rights by tribal courts and councils; the BIA provided inadequate support for tribal legal systems; and non-Indian authorities off the reservation violated Indians' constitutional rights or failed to provide law enforcement services on the reservation when empowered to do so.³⁹ Then in 1965 Senator Ervin began introducing bills as the proposed ICRA. The proposals provoked responses from some Indian tribes, the Department of the Interior, the Department of Justice, other federal agencies, members of Congress, various associations of non-Indians, and state governments. Only seventy to eighty of the 247 federally recognized tribes of that time participated.

The 1965 bills did not pass, but the related hearings revealed a number of schisms, including between tribes and the federal agencies (Departments of Interior and Justice) that had trustee duties and other obligations to the tribes. Internal divisions also emerged between some tribes and some of their members. And among the tribes, only some would accept specific proposed federal services, protection, and funding for their justice systems. The stand-alone pueblos of New Mexico resolutely rejected external interference with their systems of government. Burnett, in his study, summarized tribal reactions to the bills as four types: no response or reaction; strong endorsement of the Subcommittee's work as welcome attention to Indian matters; acceptance of the

³⁵ *Talton v. Mayes*, 163 U.S. 376 (1896).

³⁶ Commission on the Rights, Liberties, Responsibilities, and Responsibilities of the American Indian, *A Program for Indian Citizens* (1961).

³⁷ Task Force on Indian Affairs, *Report to the Secretary of the Interior* (1961).

³⁸ See Burnett, *supra* note 32, at 571-574 (covering the period and federal cases before the Act); William C. Canby, Jr., *American Indian Law* 31 (5th ed. 2009) (commenting that while the Act was a federal intrusion on the independence of the tribes, it "seemed to contemplate the continued existence of these governments . . . a thrust quite inconsistent with the earlier termination policy").

³⁹ The field hearings produced voluminous records and questionnaires. Burnett *supra* note 32, at 577.

legislative purpose accompanied by apprehension about tribal preparedness and financial capability; and the pueblos of New Mexico, who resisted all externally imposed change as destructive of their culture and authority. Particularly troubling to the pueblos was the prospect of a federally imposed ban on mixing religion and governance. It was longstanding practice at the pueblos, often written into their constitutions, that spiritual leaders would function as well as heads of government.

The legislative process that created ICRA shows the critical differences and accommodations that later figured into the *Martinez* decision. In 1967 Senator Ervin introduced S. 1843 through 1847 and its companion, S.J. Res. 87, which modified earlier versions of ICRA in response to issues raised in the hearings. One of those changes was to eliminate de novo federal court review of tribal court decisions on matters of civil rights.⁴⁰ The Mescalero Apache Tribal Council had argued that such intrusion “could disrupt the whole of a tribal government.”⁴¹ The only federal claim expressly authorized in ICRA was habeas corpus.⁴² This legislative history on federal court jurisdiction critically informed the Supreme Court’s ruling in *Martinez*. The final bill also did not incorporate wholesale the United States constitution’s Bill of Rights as the requirement for Indian governments. How the transplanted constitutional rights would be construed—within the standards of constitutional rights jurisprudence or within the special frame of Indian law—became the issue preoccupying the lower courts. Significantly, under the bill as enacted, federal courts could interpret and apply ICRA’s substantive rights only if the plaintiff could surmount the threshold issues of jurisdiction and the existence of a claim for which relief could be granted. These two issues received different treatment by the three courts in the *Martinez* case.

Martinez was assigned to Albuquerque Federal District Court Judge Edwin L. Mechem, a four-time former Governor of New Mexico, appointed to the bench by Richard M. Nixon in 1970. In a “Supplemental Memorandum Opinion on Jurisdiction,” Judge Mechem noted that the defendants “vigorously contest[ed]” jurisdiction, and conceded there was no authority on point from the Tenth Circuit. He was impressed, however, by the fact that three other federal Circuits and several other United States District Courts had found jurisdiction to hear ICRA challenges in suits involving civil matters such as reapportionment, eligibility for elective office, and lease revocation. Interestingly, none of these cases had seriously engaged the question of implying an affirmative claim or cause of action from the prohibitions in ICRA. Notably, none of these earlier ICRA decisions engaged the body of Supreme Court precedent dealing with implication of federal claims from statutory

⁴⁰ 113 Cong. Rec. 13473–8 (1967); Burnett, *supra* note 32, at 602–614 (discussing the final drafting and tactics of enactment).

⁴¹ *Hearings on S. 961–968 and S. J. Res. 40 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess., 343 (1965).

⁴² 25 U.S.C. § 1303.

prohibitions outside the civil rights realm. Judge Mechem further observed that Mrs. Martinez and her daughter had "exhausted all remedies reasonably, or even conceivably available to them," and thus exhaustion within the Pueblo's system was not a barrier to reaching the merits.⁴³

The trial court then focused on the core issue of whether the cultural, social, and governmental traditions of Pueblo were the foundation for the membership rule and whether the membership ordinance complied with the equal protection requirement of ICRA. The Indian Civil Rights Act was a relatively new law, and the meaning of its equal protection clause was unclear at that time. As enacted, ICRA did not interfere with tribes' power to govern as theocracies, as the Act did not include an establishment clause separating church and state. Thus, the governance role of the religious or sacred culture leaders of Santa Clara Pueblo was not a violation of ICRA. The integrated role, where the moieties nominate the secular leaders for the Governor and Council positions, meant religious and political structure were key elements of the situational facts.

Judge Mechem began with a discussion of the social and political organization of the Pueblo. The case was an opportunity to educate non-Indians about the Pueblo world. His summarized history began with the founding of the Pueblo around 1300 A.D. Judge Mechem noted that the modern state covers roughly 48,000 acres and at time of trial had approximately 1,200 recognized members and some 150-200 non-members residing in the Pueblo. Contact with the Spanish in the 17th century produced a "secular" government "to distract Spanish attention from the caciques (religious leaders) who were the real authorities in the Pueblo." Judge Mechem then presented the structure of the "moieties," specifically the Winter and Summer people, who are led by caciques.⁴⁴ His summary tracked the general story told in scholarly studies of the Santa Clara Pueblo.

Missing from Judge Mechem's history, however, was the role of two elements in Santa Clara past that had impact on the formation of the Pueblo's government. One was the focused study of the Pueblo since the turn of the 20th century by anthropologists and other scholars. Renowned anthropologists and others studying the Pueblo took up residency among the Santa Clarans for their field studies. These studies, when published, brought external attention and pressures upon Santa Clara Pueblo.⁴⁵ The second element was the factionalism among the moieties

⁴³ *Martinez v. Santa Clara Pueblo*, 402 F.Supp. 5, 7, 10 (D. N.M. 1975).

⁴⁴ *Id.* at 12-13; see also Margadant, *supra* note 22 (describing the "two republics" theory of the Spanish, where the "Indian republics" were allowed to self govern in ways different from the colonial areas of New Spain).

⁴⁵ As some members tell it, these outsiders subjected the Pueblo members to obsessive and intrusive inquiry, what one Santa Claran called "being loved too much." Past intensive collection of information on Santa Clara motivates the members' protective behavior to restrict or control what information about the internal life of the community is revealed to outsiders, especially disclosures on religion or sacred culture.

that occurred in the 1920s. The Summer and Winter peoples each developed a conservative and progressive group, and coalitions were created, across the moieties, along the conservative and progressive outlooks. The functional relationships and orderly transfer of authority between the Summer and Winter people were disrupted by the intense feelings.⁴⁶ To stop the dysfunctional relationships, the resolution of their differences included the Pueblo organizing its government under the Indian Reorganization Act ("IRA") of 1934⁴⁷ with a Constitution and By-Laws in 1935. The Pueblo's Constitution includes some traditional Santa Clara institutions as well as some Anglo-American innovations, *e.g.*, voting for the secular officials. Thus the District Court described modern Santa Clara government as "neither wholly traditional nor wholly anglicized." It was after the IRA restructuring of the Pueblo government, formally separating the secular and religious leadership, that the Ordinance on membership was adopted. These political events preceded the marriage of Julia and Myles Martinez.

After stating the facts of the Martinez marriage, Judge Mechem focused on the status of Audrey and what rights she had at stake. "She was raised in the culture of Santa Clara, speaks Tewa, the traditional language, and clearly considers herself to be a Santa Claran." At stake was Audrey's status as member. If she were a recognized member she would have three distinct types of rights.

First, with a member's political rights she could vote, take matters to the Pueblo Council and qualify to hold office as a secular officer. Second, a member would be entitled to share in the Pueblo's material benefits, the most important being land use rights. The Court acknowledged the Pueblo's system of assigning land for individual families to use. Rights of succession and the right to rent and sell use rights are reserved for members and for transactions among members. There are also rights to hunt and fish on the land, use irrigation water, and share in any pecuniary benefits arising from the Pueblo's activities or programs. Third, Audrey needed to be a member to be able to continue living at the Pueblo. Technically, a non-member would not have the right to continue living at Santa Clara after her mother's death. The Court noted that as a fact, the Martinez family and other similarly situated families were living in the Pueblo, even though they could not do so as a matter of right. Testimony at trial indicated that the Martinez family enjoyed many of the material benefits listed by Judge Mechem. While some facts about Audrey and her mother might differ, Judge Mechem said they presented the same legal question: whether the 1939 Ordinance violated their rights to equal protection of tribal laws, as secured to them by ICRA.⁴⁸

⁴⁶ See generally Dozier, *supra* note 4; Interview with Elder Naranjo, describing the incomplete or improper transfer of authority between the Summer and Winter peoples and the individuals who pushed organizing under the Indian Reorganization Act as a solution.

⁴⁷ 25 U.S.C. § 461.

⁴⁸ *Martinez v. Santa Clara Pueblo*, 402 F.Supp. 5, 14 (D. N.M. 1975).

In his analysis, the Judge Mechem followed the constitutional approach of recognizing the individual rights at issue, and then weighing them against the interests of the government. His next task was thus to identify Santa Clara Pueblo's interests in applying the membership rule. First, he noted, the Pueblo has an interest in operating under its own criteria for identity and belonging. This is an interest caught in the "tension in the life of the Pueblo between traditional Pueblo customs and values and the 'modern' customs and values of Anglo-American society." In an important statement, he wrote that the Pueblo's membership policy is:

no more or less than a mechanism of social and to an extent psychological and cultural self-definition. The importance of this to Santa Clara or to any other Indian tribe cannot be overstressed. In deciding who is and who is not a member, the Pueblo decides what it is that makes its members unique, what distinguishes a Santa Clara Indian from everyone else in the United States.

If the Pueblo's authority to establish its own qualifications for membership were restricted by an external authority, then a new definition of Santa Clara identity would be imposed and the Pueblo's culture would be inevitably changed.⁴⁹

The second major interest served by the Pueblo's membership policy was the economic survival of the unit. The Pueblo defendants had argued and demonstrated that the 1939 membership ordinance was in response to a sudden increase in mixed marriages. These marriages had strained the economic resources of the tribe. The Pueblo, like all tribes, had to control the use and distribution of its resources, especially land, in order to maintain its cultural autonomy. While the *Martinez* plaintiffs did not challenge the power of the Pueblo, through its council, to make and enforce rules on membership, they contested the criteria used for children of mixed marriages. In defending the ordinance, the Pueblo claimed that it was the written embodiment of ancient custom, or alternatively, that the ordinance regulated membership for religious as well as secular purposes. Judge Mechem immediately rejected the Pueblo's argument that the ordinance regulates religious membership. The secular and religious divide had occurred some 400 years ago during the Spanish period. Audrey was allowed to participate in religious ceremonies to the same extent as others recognized as members. Moreover, "In 1968, Mr. and Mrs. Martinez obtained BIA census numbers for their children, and since then the children have received all federal benefits generally available to Indians, including educational and medical benefits." According to the Court, the question presented "is one of membership in the Pueblo for purposes of purely internal, secular, rights and privileges."⁵⁰

⁴⁹ *Id.* at 15; see also Valencia-Weber, *supra* note 26.

⁵⁰ *Martinez v. Santa Clara Pueblo*, 402 F.Supp. 5, 14-15 (D. N.M. 1975).

The Pueblo and its officials argued that the 1939 membership ordinance was built on the principle of a traditional patrilineal and patrilocal cultural system. Their attorney, Marc Prelo, presented testimony from an expert witness, Florence Hawley Ellis, a non-Indian anthropologist whose scholarly reputation had come from her studies of the pueblos. Additionally, there was testimony from Santa Clara members, including individuals who had status as knowledgeable leaders and elders in the secular government and in leadership of the moieties.

The expert witness Ellis set a firm line that the social and cultural system rested on having a Santa Clara father and that, absent this parent, a child would face exclusion from a moiety. Her years of experience of direct contact studying the pueblo peoples of New Mexico and scholarly credentials gave authority to her insistence that patrilineal was the appropriate conceptual descriptor for the Santa Clara Pueblo's system. Given that District Court decision gave weight to this patrilineal account of pre-ordinance customary rule and practices of the Pueblo, Ellis' testimony was significant.

Ellis maintained this viewpoint in her testimony, despite challenging questions about the differing views of two equally renowned scholars of the Pueblo culture that were also Tewa, Alfonso Ortiz (Ohkey Owingah, formerly San Juan Pueblo) and William Dozier (Santa Clara Pueblo). Both Ortiz and Dozier had described the Santa Clara world as a "bilateral" or "dual organization" in which requisite responsibilities and ceremonies occurred with roles for men, women, and children. In an interesting dialogue with plaintiffs' counsel, Ellis discussed the views of Dozier who had been her student. She stated that Dozier's chart of the social organization of the Pueblo was the best source for this information. All three experts similarly described a Pueblo world organized around the Winter and Summer people and their six moieties. The difference between Ellis' view and that of Ortiz and Dozier centered on the role of gender and parental lineage.⁵¹

Judge Mechem's opinion discusses the Pueblo's values and practices that appeared to be "traditionally patrilineal and patrilocal—in other words, that kinship, name, and location of residence generally were expected to follow the male rather than the female line." Yet he found it is "less clear" that the 1939 membership ordinance arose from those

⁵¹ Record on Appeal, Vol. II 241–245, 248, 282, 293–296 [hereinafter Record on Appeal, Vol. II] *Martinez v. Santa Clara Pueblo*, 402 F.Supp. 5, 11 (D. N.M. 1975), (Testimony of Florence Hawley Ellis) (on patrilineality); Ortiz, *supra* note 26, at 4–5 (agreeing with Dozier on dual organization). While the trial testimony included the work and interpretations of other scholars of Pueblo culture, Ortiz and Dozier stand out because their scholarly achievements earned them high regard in the field. Their "insider" knowledge and ability to speak Tewa provided access and insights not available to others. At time of trial Dozier had died and Ortiz refused to serve as a witness. See Fred Eggan, *Introduction*, in Edward P. Dozier, *The Pueblo Indians of North America* ix (1970). Within the Pueblo world they were valued as scholars and members of the indigenous community. See Sando, *supra* note 19, at 211 (biographical essay on Edward Pasqual Dozier); Joe S. Sando, *Pueblo Profiles: Cultural Identity Through Centuries of Change* 271 (1998) (biographical essay on Alfonso Ortiz).

ancient Santa Clara customary practices. His uncertainty is understandable when one reviews the trial testimony from the Santa Clara members. The Pueblo's expert, Florence Hawley Ellis, testified that with few exceptions a child's moiety affiliation was obtained from the father and was generally unchangeable. A number of Pueblo witnesses affirmed this view of a patrilineal system. However, in expansive testimony a Santa Clara religious elder stated that he had changed his affiliation, from Summer to Winter people, when life circumstances made it appropriate. Moreover, this religious leader testified that which "people" a child becomes is an initial decision made between the mother and father. Testimony from this elder also pointed out that it was not unusual that some women members who outmarried or bore illegitimate children had their children initiated and made members of a moiety. Governor Paul Tafoya, in discussing the children born out of wedlock, stated, "[T]hey have no other place to go, that we do recognize them to be half Santa Clara on the mother's side . . . the fact is that we are responsible for our people and, in this respect, we open membership to them." The Pueblo's concern about children resulted in flexible practices, including taking in member women who outmarried, but became widows. They could return and their children would be taken in as members, as happened to the mother of Julia Martinez.⁵²

Testimony from Ellis and Pueblo members established that prior to the 1939 ordinance mixed marriages were rare, and that the increase led to pressures to limit who would benefit from the Pueblo's resources. The increasing number of outmarriages led to the end of the naturalization of non-Pueblo husbands.⁵³ Shortage of land, not enough for outsiders, became a concern and in the words of one member witness, this shortage pushed the elders to act to protect the Tribe's interests through the membership ordinance.⁵⁴

After all the testimony was over, Judge Mechem simply had not heard a consistent account of how the patrilineal principle controlled when one qualified for initiation into a moiety, for membership, and for access to the Pueblo's finite resources. Under the circumstances, he did his best to reconcile the conflicting accounts:

It appears that Santa Clara was traditionally patrilineal and patrilocal—in other words, the kinship, name and location of residence generally were expected to follow the male rather than the female

⁵² Record on Appeal Vol. II, *supra* note 51, at 361, 383, 364–68, 370–73 (Testimony of Alcario Tafoya); *id.* at 249–250 (Testimony of Florence Hawley Ellis); Record on Appeal Vol. I at 144–45 (Testimony of Paul Tafoya); *id.* at 189–191 (Testimony of Amarante Silva) (on widows).

⁵³ Record on Appeal Vol. I, *supra* note 8, at 156–57 (Testimony of Jose Gene Naranjo); *Id.* at 87–89 (Testimony of Audrey LaRose Martinez). Naranjo's testimony described the requirements for pre-1939 naturalization including a form of invitation from the community and then approval by the Governor and Pueblo Council. The invited member had to demonstrate knowledge of Santa Clara Pueblo's culture and rules by daily life activities.

⁵⁴ Record on Appeal Vol. I, *supra* note 8, at 187–88 (Testimony of Amarante Silva); *Id.* at 166–171 (Testimony of Jose Gene Naranjo).

line. These cultural expectations have lost much of their force, but they are not entirely vitiated. . . . Furthermore, it is apparent that membership of the parents and marriage, either within or out of the Pueblo, has always been considered a highly significant factor in membership determinations as opposed to other possible criteria such as degree of Santa Clara ancestry.”⁵⁵

Having determined that both sets of parties had important interests at stake, Judge Mechem turned to Indian law jurisprudence as a guide to construing ICRA’s equal protection provision. He recited the oft-repeated statement of Chief Justice Marshall in his 1832 opinion, *Worcester v. Georgia*, that Indian tribes “are unique aggregations possessing attributes of sovereignty over both their members and their Territory.”⁵⁶ A body of case law built upon this premise had established that tribes can regulate their internal and social relations, including membership. Yet the Supreme Court had also proclaimed the plenary power of Congress to terminate, limit, or expand the authority of tribes. Thus, the question for Judge Mechem was whether in adopting ICRA, Congress had exercised its power of control over membership determinations.

After accounting for the legislative history of ICRA, Judge Mechem concluded that the equal protection requirement in ICRA is not identical to the United States constitutional guarantee of equal protection. The Act and its equal protection guarantee, he observed, must be read against the background of tribal sovereignty and interpreted within the context of tribal law and custom. A tribe’s laws must generally be applied with an even hand, not enforced arbitrarily; but so long as tribal laws are applied to all who qualify, their substantive requirements should not be invalidated. To support his analysis, he noted that the federal courts have upheld blood quantum requirements for membership even though in a non-Indian context this would have questionable validity under constitutional standards. Given this interpretation of ICRA and the fact that the Pueblo’s membership rule rested on criteria that had been traditionally employed by the Tribe in considering membership questions, Judge Mechem ruled for the Pueblo. The 1939 ordinance, he concluded, did not deny Julia and Audrey Martinez the equal protection of the laws within the meaning of the ICRA.⁵⁷

Judge Mechem pointed out two points of accord for the plaintiffs and defendants regarding ICRA: (1) it should not be interpreted to impose an Anglo-American equal protection standard on tribes in derogation of their traditional values, and (2) it should be interpreted to preserve the cultural identity of Indian tribes in general and Santa Clara Pueblo in particular. The *Martinez* plaintiffs had differed from the Pueblo in arguing that the gender of the parent who is a member has little or no relationship to the strength of a parent’s identification with

⁵⁵ *Martinez v. Santa Clara Pueblo*, 402 F.Supp. 5, 16 (D. N.M. 1975).

⁵⁶ *Worcester v. Georgia*, 31 U.S. 515, 557 (1832) (see Chapter 2, this volume).

⁵⁷ *Martinez v. Santa Clara Pueblo*, 402 F.Supp. 5, 17–18 (D. N.M. 1975).

Santa Clara culture. They pointed to the male members living away from Pueblo whose children had no participation, language skill, or cultural knowledge of the Pueblo. The Court acknowledged these situations, described by the plaintiffs as destructive of the cultural identity of the Pueblo. However, these circumstances would not determine how the Court construed this Act. Instead, Judge Mechem seemed impressed by the fact that considerably more female members than male members lived away from the Pueblo.⁵⁸

Most significantly, Judge Mechem refused to deviate from the past jurisprudence in Indian law that recognizes and protects the culturally distinct governments of tribes. The equal protection language of ICRA, he wrote,

should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and therefore should be preserved and which of them are inimical to cultural survival and should therefore be abrogated. Such a determination should be made by the people of Santa Clara; not only because they can best decide what values are important, but also because they must live with the decision every day.⁵⁹

Thus the Court decided that Santa Clara Pueblo could make and enforce its own governmental decision without regard to whether an external authority, the federal government, considered the membership law a wise policy. The reach and imposition of external authority to abrogate a tribal decision, especially in the delicate area of membership, "for whatever 'good' reasons, would destroy cultural identity under the guise of saving it." To Judge Mechem, Congress had not intended that the ICRA be interpreted in this destructive manner, despite the hardships endured by persons like the *Martinez* plaintiffs.⁶⁰

Julia and Audrey Martinez appealed Judge Mechem's decision to the Tenth Circuit Court of Appeals, where it was assigned to a panel consisting of Judge William E. Doyle, Judge James Barrett, and Kansas District Court Judge Arthur Stanley sitting by assignment. Judge Doyle, who wrote the opinion in the case, was best known for his forceful opinions as a federal trial court judge in the politically charged Denver school desegregation litigation. Even after suffering a bomb explosion at his home, he continued to find that the Denver school district had intentionally discriminated against African-Americans, and that a wide-ranging desegregation remedy was required. He had also participated in a controversial three-judge court decision that reapportioned the Colorado Senate. A Democrat appointed to the Tenth Circuit by President Nixon, Judge Doyle wrote opinions supporting civil rights claimants in a

⁵⁸ *Id.* at 16.

⁵⁹ *Id.* at 17-18.

⁶⁰ *Id.* at 19.

variety of settings.⁶¹ It would not be surprising if he saw the *Martinez* litigation through that lens. Indeed, just a few months before the oral argument in *Martinez*, Judge Doyle had authored an opinion in *Dry Creek Lodge, Inc. v. United States*, which had approved jurisdiction under ICRA over a non-Indian's claim that a tribe had denied him access to his property on the reservation.⁶²

In considering the *Martinez* appeal, the Tenth Circuit Court panel appropriately focused on three questions of law:

- the sovereign immunity of the Pueblo and whether the court had jurisdiction;
- the legal standard applicable to claims of denial of equal protection under ICRA;
- whether the 1939 ordinance conflicted with ICRA, and what the consequences of such a conflict would be.

Judge Doyle's opinion dispatched the sovereign immunity/jurisdiction issue in a scant paragraph. He didn't even bother to address the two legal issues separately. Based on the *Dry Creek Lodge* precedent, Judge Doyle found for jurisdiction and against sovereign immunity. Since Congress designed the Act to provide protection against tribal authority, he wrote, allowing suits was essential. Otherwise, the Act would be an unenforceable declaration of principles.⁶³

With jurisdiction resolved, Judge Doyle moved on to the issue of the meaning of equal protection under ICRA. The primary question was whether Congress intended the equal protection provision in ICRA, as it affects the rights of Indian people in relationship to their tribal government, to be "coextensive" with the federal Constitution and the Fourteenth Amendment guarantee of equal protection for all citizens, including Indians. If the answer to that question was "no," then a further issue would be exactly how much protection ICRA affords against discrimination. Turning to the legislative history of ICRA, Judge Doyle described the advocacy for the Act as well as the objections, and foreseeable complications that mandated tailoring. Some individual Indians offered testimony of deprivations, such as denial of religious freedom. Congress had ultimately removed any mandate that tribal governments be fully subject to all constitutional restraints and requirements, however, as this conflicted with blood quantum requirements in some tribes for membership and for voting. Furthermore, imposing the non-establishment clause would endanger the continuation of the pueblo theocracies. Judge Doyle noted the insistent opposition of the New Mexico pueblos, who regarded the proposed ICRA as a tool to import into

⁶¹ For biographical information about Judge Doyle, see *The Federal Courts of the Tenth Circuit: A History* (James K. Logan, ed., 1992).

⁶² *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 932-34 (10th Cir. 1975).

⁶³ *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039, 1042 (10th Cir. 1976).

their laws the standards of United States constitutional law, which would undermine their customary tribal law.⁶⁴

While the federal courts had upheld tribal blood quantum requirements for membership or voting as not violating ICRA's equal protection provision, the question of discrimination against Indian women had not arisen in prior cases. In the ICRA cases, Judge Doyle observed, "[i]nvariably the courts look to the Fourteenth Amendment to the Constitution as a guide," but Fourteenth Amendment standards do not apply with full force. Under the earlier ICRA cases, the interest of the tribe in retaining its integrity and culture has been entitled to due consideration. Evaluating and weighing such an interest in a gender discrimination context was not a simple task. As of 1976, the Fourteenth Amendment equal protection doctrine was a work in progress. A plurality of the Supreme Court had applied strict scrutiny in *Frontiero v. Richardson*, decided in 1973. Under that standard, only a "compelling" government interest is capable of sustaining a challenged classification. Just a few months after the Tenth Circuit decided *Martinez*, in *Craig v. Boren*, 429 U.S. 190 (1976), the Supreme Court specified an intermediate review, where the classification need only be substantially related to the achievement of some important government purpose. Lacking the guidance from *Craig v. Boren*, Judge Doyle required the Pueblo to demonstrate a "compelling" interest.⁶⁵

The Tenth Circuit panel considered the facts of the Martinez children who are "100 percent Indian and 50 per cent Santa Clara. They speak the language of the Santa Clara Pueblo namely Tewa. They practice the customs of the Tribe and are accepted into the Tribe's religion . . ." Yet they are denied membership, while a male member can marry outside the tribe, possibly a non-Indian, live away from the Pueblo's territory, and nonetheless his offspring are entitled to tribal membership. This argument, made by the *Martinez* plaintiffs, swayed the Court. As Judge Doyle wrote, "The Tribe has not shown how such an incongruous and unreasonable result fosters and promotes cultural survival."⁶⁶

Next the panel considered the Pueblo's contention that its culture was a patrilineal, patrilocal, or patricultural system. While this was the Pueblo's strongest argument, Judge Doyle wrote that it fell short of justifying sex discrimination since there could have been a solution without discrimination. The evidence indicated that prior to the 1939 membership ordinance, mixed marriage situations were dealt with on an individual basis, allowing naturalization for the non-Pueblo husband; so claiming a Santa Clara tradition based on paternal lineage was not

⁶⁴ *Id.* at 1044-47.

⁶⁵ *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Craig v. Boren*, 429 U.S. 190 (1976). In argument at the Supreme Court, the attorney for Mrs. Martinez and Audrey urged the Court to use a high standard of review and that the ordinance could not pass the new intermediate review standard of *Craig v. Boren*.

⁶⁶ *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039, 1047 (10th Cir. 1976).

sustainable. Moreover, the Tribe's policy and law were of relatively recent origin and could not be given the force of long established, venerable tradition.⁶⁷ For the Court there was evidence that the ordinance was really a product of economics and pragmatics. Yet even pressing needs could have been resolved without resorting to discrimination. The Pueblo could exclude the offspring of both sexes when the parent, male or female, marries outside the Pueblo. While restating that the power to control and define tribal membership is important to preserving a tribe's culture and identity, Judge Doyle's opinion returned to the individual member's interest in tribal membership. Ultimately, the appellate panel concluded 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 here."⁶⁸ The ordinance was an arbitrary and expedient solution to economic need. So the Tenth Circuit reversed Judge Mechem and remanded for further consideration. Santa Clara Pueblo was able to convince the United States Supreme Court to take the case, which came up for oral argument on November 29, 1977.

The Supreme Court Argument and Decision

Once the *Martinez* case reached the Supreme Court, groups and interests on both sides of the issue decided to weigh in. The United States and the ACLU filed amicus curiae briefs on behalf of the Martinez family. Several tribes and tribal organizations, including the National Congress of American Indians and the National Tribal Chairmen's Association, filed amicus briefs on behalf of the Pueblo.

The position of the United States, urging affirmance of the appeals court, was put forward by two strong civil rights advocates within the Jimmy Carter administration, Solicitor General Wade McCree, Jr. and Assistant Attorney General Drew Days.⁶⁹ The Solicitor's brief⁷⁰ stated that "any question concerning the powers or obligations of Indian tribes, or the rights of individual Indians with respect to those tribes, is of substantial concern to the United States."⁷¹ The brief presented the case for an implied right of action under analogous civil rights statutes, employing the Court's established method for finding the private right of action and remedy, set forth in *Cort v. Ash*.⁷² Citing the four factors identified in that case, the Solicitor advocated that in *Martinez* the

⁶⁷ *Id.*

⁶⁸ *Id.* at 1048.

⁶⁹ Wade McCree was one of the first African-American appointees to a federal appellate court. He left the bench to assume the position of Solicitor General in 1977, becoming only the second African-American (after Thurgood Marshall) to hold that post. Drew Days joined the faculty of Yale Law School in 1981, and is a highly regarded scholar in the field of antidiscrimination law, among others.

⁷⁰ Brief for the United States as Amicus Curiae, *Santa Clara Pueblo v. Martinez*, No. 76-682, 1977 WL 189113 (U.S.), April 26, 1977.

⁷¹ *Id.* at *1.

⁷² 422 U.S. 66 (1975).

plaintiffs had established (1) that they were the class for whose special benefit the ICRA had been enacted; (2) that the intention to provide a private remedy was implicit in the statute's language and purpose; (3) that it was consistent with the underlying purpose of the legislative scheme to imply such a remedy for Julia and Audrey Martinez; and (4) that the cause of action is not one traditionally relegated to the states as they lack jurisdiction where the plenary power over tribal relations rests with the federal authority.⁷³

The ACLU, with its long established advocacy for constitutional rights, entered its amicus voice on the side of the *Martinez* plaintiffs after an intense organizational process.⁷⁴ The contest internally at the ACLU pitted the organization's well-established policy favoring gender equality against its recently developed policy to support the right of Indian people to self-government, their rights in treaties, land, natural resources, and retention of cultural heritage and values. Alvin J. Ziontz, an Indian law attorney who served on the ACLU Indian Rights Committee, has described the "debate" he had with Ruth Bader Ginsberg, a member of the ACLU Executive Committee and founder of its Women's Rights Project. She was "unyielding" in their lawyerly debate on the equal protection claim of a woman, and Ziontz notes that she had little understanding or sympathy for tribal values.⁷⁵

Ziontz himself submitted an amicus brief for the Confederated Tribes of the Colville Indian Reservation in support of the Pueblo.⁷⁶ He essentially argued the approach ultimately adopted by the Supreme Court, which he had previously developed in a law review article that preceded the Court's decision.⁷⁷ The Colville brief reminded the Justices that tribes stand in a different relationship to their members than states to their citizens. "Indian communities are based on extended family principles and tribal government is a part of that system." Ziontz espoused as the better principle or rule for civil rights claims: "A classification made by an Indian tribe will be overturned only when it clearly appears that it results in a deprivation of individual liberty guaranteed by the Indian Civil Rights Act." This approach would curtail expanding notions of individual liberty that are not grounded in express statutory provisions.⁷⁸

At oral argument, the Supreme Court returned to jurisdiction, focusing on whether a federal court could act, given the Pueblo's status

⁷³ Brief for the United States as Amicus Curiae, *supra* note 70, at 18–25.

⁷⁴ Brief for the American Civil Liberties Union as Amicus Curiae, *Santa Clara Pueblo v. Martinez*, No. 76–682, 1977 WL 189112 (U.S.), August 26, 1977.

⁷⁵ See Alvin J. Ziontz, *A Lawyer in Indian Country: A Memoir* 172–179 (2009).

⁷⁶ Brief of Amicus Curiae Confederated Tribes of the Colville Indian Reservation in Support of Petitioners, No. 76–682, 19–21, 1977 WL 189108 (U.S.), July 15, 1977.

⁷⁷ See Ziontz, *supra* note 30.

⁷⁸ Brief of Amicus Curiae Confederated Tribes of the Colville Indian Reservation in Support of Petitioners, *supra* note 76, at *19–21.

as a sovereign with immunity and the absence of any language in ICRA authorizing federal claims for declaratory or injunctive relief to enforce its provisions. In fact, the oral argument opened and closed on these issues. While the Justices discussed some of the facts of the case, they kept coming back to the Tribe's unique political status, and its implications for tribal immunity and federal jurisdiction to adjudicate internal tribal matters.⁷⁹ Justice Thurgood Marshall, who authored the majority opinion for himself and all but one other Justice, opened it with, "The threshold issue in this case is thus whether the Act may be interpreted to impliedly authorize such actions, against a tribe or its officers in the federal courts."

To resolve this issue, the Court delved into the legal history of tribes as "distinct, independent political communities, retaining their original natural rights" in matters of self-government. Building on the same cases that Judge Mechem had cited in his District Court opinion, Justice Marshall reprised the distinct law of indigenous peoples of the United States. "As separate sovereigns pre-existing the Constitution," he noted, "tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."⁸⁰ This principle underlies Indian law today as in the early days of the republic. Thus scholars, such as Charles Wilkinson, can state that tribal governments are pre-constitutional and extra constitutional in their international law status while having a constitutional status in the Indian commerce clause and other constitutional provisions.⁸¹ At the same time, Congress has asserted, and the Court has approved, power to modify or limit tribes' governmental authority.

Both sides in *Martinez* conceded that in ICRA Congress had modified the substantive law applicable to tribes. The Pueblo petitioners differed with the *Martinez* respondents on whether Congress had waived Santa Clara Pueblo's immunity. Absent a waiver of immunity, they argued, there was no federal jurisdiction or equitable relief available against the Pueblo and its officers in a federal court.

Justice Marshall's analysis of the Pueblo's sovereign immunity was brief and to the point. Prior Supreme Court decisions clearly announced the existence of such immunity, absent congressional action overriding it. What Marshall added was an extrapolation from decisions recognizing the sovereign immunity of the United States, requiring any congressional waiver to be clear and express. Looking at the text of ICRA, Justice Marshall found no unequivocal, express waiver, nor would he read such a waiver into § 1303, providing for habeas corpus.

⁷⁹ Transcript of Oral Argument, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 51 (1978) (No. 76-682), available at www.oyez.org/cases/1970-1979/1977/1977_76_682/argument.

⁸⁰ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-57 (1978) (citing *Worcester v. Georgia* (see Chapter 2, this volume), *Williams v. Lee* (see Chapter 11, this volume), and *Talton v. Mayes*, 163 U.S. 376 (1896)).

⁸¹ Charles F. Wilkinson, *American Indians, Time and the Law* 112-113 (1987).

Immunity of the individually named defendant, Governor Lucario Padilla, was another matter altogether. Justice Marshall turned to another precedent outside the Indian law realm, *Ex Parte Young*, which had allowed federal equitable claims against individual state officials despite state sovereign immunity under the Eleventh Amendment.⁸² A similar doctrine would make it possible to adjudicate challenges to tribal actions under federal law, without exposing the tribes themselves to crushing civil judgments. Thus the Court had to determine whether a cause of action for declaratory and injunctive relief is implicit in the terms of the Act so as to apply to the Governor Padilla. To decide this issue, Justice Marshall called upon a venerable Indian law doctrine that had escaped mention in either of the two lower court opinions—the Indian law canons of statutory construction. Dating back to the early opinions of Chief Justice Marshall, these canons direct courts to construe ambiguous statutes in favor of the Indians, whenever the laws affect tribal sovereignty or property.⁸³ Without actually reciting the canons by name, Justice Marshall invoked them by citing to several key cases on the subject. Unquestionably, providing a federal forum under § 1302 of ICRA would create an interference with tribal autonomy and self-government beyond that envisioned by changes in the substantive law. Marshall's opinion therefore reasoned: "[A] proper respect both for tribal sovereignty itself and for the plenary power of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."

The majority of Justices could find no such "clear indication." They were "unpersuaded that a judicially sanctioned intrusion into tribal sovereignty is required to fulfill the purpose of the ICRA, but to the contrary, the structure of the statutory scheme and legislative history . . . suggest that Congress" deliberately did not provide any remedy other than habeas corpus.⁸⁴ There were two distinct and competing purposes for the Act: to strengthen the position of individual tribal members vis-à-vis the tribe and to promote the well-established federal "policy of furthering Indian self-government."

Congress' continuing commitment to the goal of tribal self-determination was demonstrated by ICRA itself, where only parts of the Bill of Rights were incorporated. Congress selectively wrote the statute to fit the distinct political, cultural, and economic needs of tribal governments. Justice Marshall provided a chronological and substantive review of how the Act was passed, noting which changes in language or substantive omissions fit with the congressional goal to strengthen Indian self-governance. For instance, the Second and Third Amendments were entirely omitted; the equal protection clause of ICRA states "the equal protection of its [the tribe's] laws" rather than of "the laws" in the

⁸² *Ex Parte Young*, 209 U.S. 123 (1908).

⁸³ See Nell Jessup Newton et al., *Cohen's Handbook of Federal Indian Law* § 2.02 (2005 ed.).

⁸⁴ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59–62 (1978).

constitutional clause; and in criminal matters, grand jury indictments were not required and indigent defendants were not entitled to government-provided counsel.⁸⁵

Faced with two competing purposes in the Act, the Court acknowledged that allowing a civil claim for injunctive relief might serve the individual, but “plainly would be at odds with the congressional goal of protecting self-government.” Among other things, allowing such civil actions would create financial burdens on already “financially disadvantaged” tribes, as had been reported in a number of Congressional and Commission reports.⁸⁶ Furthermore, federal courts and remedies were not the only way to vindicate the rights provided in the ICRA. Tribal forums were available to vindicate the rights in ICRA, as the substantive law would still bind the tribe. As Justice Marshall observed, “Tribal forums have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.”⁸⁷

Justice Marshall’s opinion pointed out that Congress had chosen different approaches to criminal and civil proceedings under ICRA. For criminal prosecutions, habeas corpus would adequately protect the individual interests at stake. Congress had rejected one proposal to authorize *de novo* review in federal court of all convictions obtained in tribal courts. Tribal representatives had argued against *de novo* review and the Court interpreted the final Act as a way to avoid both the financial burdens on tribes and displacement of their courts. Congress had also rejected a proposal for federal review of all alleged violations of ICRA in a civil context, as well as proposals for Attorney General investigation of alleged civil violations and Department of Interior adjudication of all civil complaints. Tribal testimony against such provisions had been decisive. The Court also noted that New Mexico Pueblos had consistently testified in opposition to the habeas provision because it opened “an avenue through which Federal courts, lacking knowledge of our traditional values, customs, and laws, could review and offset the decisions of our tribal councils.”⁸⁸ Had they believed ICRA authorized federal civil claims for injunctive relief, surely they would have protested those as well.

Justice Marshall’s opinion concluded that neither the Tribe nor its officials should be exposed to the full array of federal remedies available against state and federal officers. Especially on issues likely to arise in the civil context, such as membership eligibility, “these will frequently depend on tribal tradition and custom which tribal forums may be in a

⁸⁵ *Id.* at 63–64.

⁸⁶ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 & n.19 (1978) (providing list of reports and studies on financial and other burdens on tribes for expanded litigation over ICRA rights).

⁸⁷ *Id.* at 65–66.

⁸⁸ *Id.* at 70, n. 30.

better position to evaluate than federal courts." A claim should not be allowed because applying the equal protection clause in § 1302 of ICRA would substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity. Until such time as Congress makes clear its intent to permit additional intrusion on tribal sovereignty, the Court would not impliedly authorize from the ICRA actions for declaratory or injunctive relief against a tribe or its officers.⁸⁹ The Court summarily addressed the *Cort v. Ash* factors where a cause of action is implicit when the statute does not expressly provide such. The plaintiffs clearly were the intended beneficiaries of the ICRA. However, the Court held that its precedents in civil rights and securities cases were "simply not dispositive here. Not only are we unpersuaded that a judicially sanctioned intrusion into tribal sovereignty is required to fulfill the purposes of the ICRA, but to the contrary, the structure of the statutory scheme and the legislative history . . . suggest that Congress' failure to provide remedies other than habeas corpus was a deliberate one." The explicit text of the ICRA demonstrated the intended limit that the Court would not expand.⁹⁰

The Supreme Court's Story Behind the Decision

For undisclosed reasons, Justice Harry Blackmun did not participate in the *Martinez* decision. Justice William Rehnquist joined in all of Justice Marshall's opinion except for the brief section on tribal sovereign immunity, and Justice Byron White was the lone dissenter, willing to reach the merits of the equal protection claim.

Although tribal sovereign immunity was not as critical to the outcome as the Court's ruling on implying a federal claim or cause of action,⁹¹ it was the greatest source of controversy among the Justices. Part III of the *Martinez* opinion dealt with how Indian tribes, as "sovereign powers," enjoy immunity from suit absent an express act of the tribe or of Congress to waive the immunity. The Justices' communications focused on this issue once the case was submitted after argument. On the day of oral argument, November 29, 1977, Justice Marshall's notes on his schedule for that day's cases show that Justices Burger, Stevens, Powell, Stewart, and Brennan were in agreement with him to decide for the Pueblo defendants. Justices White and Rehnquist

⁸⁹ *Id.* at 71-72.

⁹⁰ *Id.* at 61-62.

⁹¹ For several years preceding the *Martinez* case, the Justices had been engaged in a struggle over whether to supplement federal statutes creating criminal or administrative remedies by creating private federal civil claims. See, e.g., *Cort v. Ash*, 422 U.S. 66 (1975). The debate continued after *Martinez* in *Cannon v. University of Chicago*, 441 U.S. 677 (1979). Even Justices who normally did not favor tribal sovereignty, such as Justice Rehnquist, could support refusing to imply a private cause of action under ICRA if they did not want to expand federal jurisdiction and access to federal judicial remedies as a general matter.

are noted as dissents. On December 10, 1977, Justice Thurgood Marshall was assigned the majority opinion.⁹²

During the Justices' conversations and negotiations on tribal sovereign immunity, from March 28, 1978 to May 5, 1978 five drafts were produced and circulated. Justice Brennan's and Marshall's Supreme Court archives reveal how the conversations transpired. Justice Rehnquist stated a preference that Part III (tribal sovereign immunity) be omitted because it was not necessary given the portions of the opinion dealing with Congress' intent to limit remedies to habeas corpus. Justice Powell stated his "join" was not conditioned on withdrawing Part III. Justices Stevens joined him in this viewpoint. Then Justice Stewart joined, telling Marshall "Your opinion for the Court is very persuasive, and I am glad to join it." Justice White said that he would consider a lonesome dissent, as by then Justice Rehnquist had moved away from dissent.⁹³

Justices Marshall and Rehnquist worked out and stated their final position on the Part III on sovereign immunity. On March 31, 1978, Justice Marshall explained why he was inclined to leave in Part III.

The holding of Part III follows clearly from our prior decisions, and helps elucidate the background against which we decide the question whether to imply a cause of action against the individual officers. Moreover, I think it useful for the Court to make clear that if Congress decides to authorize additional actions under the ICRA, it must speak clearly if it chooses to make the tribe itself, as a sovereign entity, amenable to suits.⁹⁴

Justice Marshall stated also that if Part III continued to trouble Justices Powell and Stevens or others in the majority, he would be prepared to abandon it.

Justice Rehnquist followed the correspondence of Justices Powell, Stevens, and Marshall on the Part III. In his memo to Justice Marshall, Justice Rehnquist stated that eventually, in a proper case, the Court would have to take another look at the "somewhat casually considered" decision on sovereign immunity in *U.S. v. United States Fidelity and Guaranty Co.* in 1940.⁹⁵

I also feel there is a slight cross pulling between your Part III and my recent Opinion for the Court in *Oliphant v. Suquamish*, which is perhaps not surprising since you dissented in that case. I agree with

⁹² Justice Thurgood Marshall Archives, Box 195, folder 8, Collections of Manuscript Division, Library of Congress.

⁹³ Justice William T. Brennan Archives, Box I-439, Folder 3, Collections of the Manuscript Division, Library of Congress. All these letters are in this folder, respectively dated: Powell, Mar. 30, 1978; Stevens, Mar. 30, 1978; Powell, April 3, 1978; Stewart, Apr. 10, 1978; White, Mar. 30, 1978.

⁹⁴ Justice Marshall Archives, Box 195, Folder 12, Collections of Manuscript Division, Library of Congress.

⁹⁵ *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506 (1940).

the analysis contained in the rest of your opinion, and could probably join Part III with a few changes.⁹⁶

In *United States Fidelity*, the Court articulated the basic doctrine of sovereign immunity, requiring express consent of the sovereign or a congressional act to allow suits against the political entity. The controversial decision in *Oliphant* turned away from precedent cases as it removed jurisdiction from the tribes to decide criminal cases against non-Indian defendants.

As for the *Martinez* opinion, Justice Marshall did not omit Part III and obtained the support of Justices Burger, Brennan, Powell, Stevens, and Stewart. Justice Rehnquist did not join that part of the opinion. Justice White filed a lone dissent stating that the majority's decision had undermined the goal of ICRA by denying a federal forum to Indians who alleged their rights under the Act had been denied by their tribes. Implicit in the declaration of individual rights in the Act was the authorization for private civil actions in federal court against tribal officials. He did agree with the majority that the silence in ICRA could not constitute a waiver of the Pueblo's sovereign immunity. However, his review of the legislative history showed "Congress' desire to provide a means of redress to Indians aggrieved by their tribal leaders."⁹⁷ Injunctive actions against individual tribal officials would suffice for that purpose.

In later years, Justice Rehnquist tried to turn the Court away from the protection of tribal sovereign immunity. In its 1998 opinion in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, the Court described the tribes' common law immunity as well established, yet "developed almost by accident." When forced by *stare decisis* to affirm tribal immunity, the Rehnquist majority did not disguise its invitation to Congress to change if not eliminate the sovereign immunity of tribes. "There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. . . . [Some] considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule. . . . Although the Court has taken the lead in drawing the bounds of tribal immunity, Congress, subject to constitutional limits, can alter its limits through explicit legislation."⁹⁸

The Immediate Impact of Martinez at Santa Clara Pueblo

Before and after the *Martinez* decision the daily life experiences of the *Martinez* family were similar to other families in Santa Clara. No

⁹⁶ Justice Brennan Archives, I-439, Folder 3. *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506 (1940); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (see Chapter 8, this volume).

⁹⁷ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72-73 & 82-83 (1978).

⁹⁸ *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998).

efforts were made to eject the Martinez parents or children from the Pueblo. Sometimes outsiders assume ejectment followed from the decision. The formal difference remained the disqualification from voting or running for secular political office for families where the Santa Clara mother had outmarried after 1939. After Julia and Myles Martinez died (in 2000 and 2001 respectively), their children retained the family home. On September 16, 2008 the author observed the Martinez family home that was still in possession of the adult children. To understand the continuing life in Santa Clara, one must connect some prior and post decision events.

Martinez is one the most cited Indian law cases in the law databases, yet the publications are from the perspective of non-Indians and not Tewa or Santa Clara peoples. In the Pueblo and the Indian world outside there was great awareness and concern about what the Supreme Court would decide. All understood, as stated by the Pueblo's attorney in Supreme Court argument, that "Every tribe will be affected." The biggest concern was that an external authority, the laws and courts of the federal government, would take control of the critical matter of who qualifies for membership in a tribe.

Membership, commonly called citizenship in the non-Indian world, involves the requisite descent and self-identity that are culturally intertwined among indigenous peoples. The identity arises from connections with specific land and common experiences with a designated community. The common experiences extend, through the creation story and sacred culture of each tribe, with ancestors whose presence and guidance has contemporary value.

This unique form of tribal citizenship is distinct from the flexible and voluntary form of membership where non-Indians can choose to terminate citizenship in state A to start anew as a citizen of state B without loss of identity or basic rights. American Indians are further distinguished in being citizens of three sovereigns: tribe, state, and national governments. The expansive viewpoint of indigenous peoples, in which they attempt to consensually live in balance with nature in all its aspects, can appear naïve to outsiders. Non-Indians frequently embrace gender-based principles to explain how their society functions. This seems a rational approach to understanding the conduct and identity of members and is generalized to other cultural groups. Certainly tribal members can individually choose to leave a tribe and construct a new identity. However, for most American Indians that tribal identity is enduring and distinct to their tribal culture. This is why American Indians insist on retaining their unique political status and form of citizenship.

The issue of different treatment of female members who outmarry as compared to similarly situated male members has been a matter of concern for some time to members of the Pueblo. Santa Clara Pueblo members in interviews, publications, and testimony at the Federal

District Court described this ongoing issue.⁹⁹ Rina Swentzell, a Santa Clara, has a family that was immediately affected by the decision. She has special voice as a member and respected scholar and expert on Pueblo culture.

I thought long and hard about the *Martinez* case. I wanted my children to be members of Santa Clara, although I had married a non-Indian who I met in college. If the case favored the Martinez family, who I assumed had been encouraged by non-Native people to initiate the lawsuit, I felt that Santa Clara would lose any remnants of itself as a vital, self-determining community. I was relieved to hear the decision. Santa Clara was to retain the on-going conversation about who is a recognized member of the community. But, more importantly, the Western world was acknowledging a way of life which traditionally honored nurturing and feminine qualities.

In her thoughtful essay, Swentzell tells the creation story of the Santa Clara, showing how the patrilineal and matrilineal dichotomy raised in the case is not explanatory because it does not fit the core structure of Tewa pueblos such as Santa Clara.¹⁰⁰

Thus Swentzell describes the functioning and idealized identity created in this world.

At Santa Clara, the ideal person was and still is the *gia*. Earth, who gave the people birth is called *gia*, so is the biological woman who gives birth, and so are the community women who nurture and take care of extended families. They give ceremonial or political advice, physical shelter and food, if needed, and housing. Most unusual is that men in the community who behave as nurturing, embracing people in the political and ceremonial realms are also called *gias*, that is mothers. The best way to behave in the world is as a mother, because we are emulating the earth on whom we daily walk and move, but we are still obliged to acknowledge the father embodied in the sun without whom there would be no children to mother.¹⁰¹

This description of conduct and identity is distinct from the Western scholarly or general discussions that define the gender roles more narrowly.

While retaining this guidance from their approximately 700 years of continuity, the Santa Clarans met and in some ways embraced the

⁹⁹ At trial, Julia Martinez testified about the formation of a committee in 1965, Record on Appeal Vol. I, *supra* note 8, at 48–49 (Testimony of Julia Martinez). See generally Swentzell, *supra* note 5; Interview with Elder Naranjo, *supra* note 9.

¹⁰⁰ Swentzell, *supra* note 5, at 98–99.

¹⁰¹ *Id.* at 98; Ortiz, *supra* note 26, at 36: “[T]he standard phrase of encouragement to men about to undertake a demanding task is ‘Be a woman, be a man,’ while the phrase to a woman in similar circumstances is simply, ‘Be a woman.’” See Rina Swentzell & Tito Naranjo, *Nurturing the Gia at Santa Clara Pueblo*, 92 *El Palacio* 35 (Museum of New Mexico 1986). For concept of *gia/gaia*, an earth-mother or divinity, found in many cultures, see Mark P. O. Morford and Robert J. Lenardon, *Classical Mythology* 38–39 (6th ed. 1999).

changes imposed by the twentieth century. From the 1920s onward, the Pueblo members encountered more of the outside world's elements. The number of outmarriages in general increased as members pursued education and college degrees, began employment in accessible urban areas, and then, in World War II, found employment at the nearby Los Alamos Laboratories. Santa Clara elder Tito Naranjo has observed that with the creation of Los Alamos, "The U.S. Government dropped a cultural bomb on Santa Clara Pueblo."¹⁰² While these opportunities improved the educational and economic well being of members, they also introduced new issues and informal ways of coping with them within the Pueblo. Pueblo activities came to include non-member male spouses and the children from those marriages, as was true of the Martinez family. According to Julia Martinez, her children obtained medical benefits, enrollment at the Pueblo day school, free lunch at school, and Pueblo approval for a BIA education grant for university enrollment. Mrs. Martinez' family also had access to firewood, housing, hunting, fishing, and access to the Pueblo's canyon lands.¹⁰³ These benefits did not stop when the decision was announced.

Enmeshed in the issues causing the factionalism of the 1920s, described above, was the membership rule, which the Progressives wanted to change to end discriminatory treatment of women who outmarried. Elder Tito Naranjo in a recent interview filled in how the membership issue interfaced with the factionalism and how the equality that the Progressives desired extended beyond membership to women holding political office. He reported that traditional leadership of women has always been there and some formal governmental decisions could not occur without proper consultation with female elders. The female customary leadership has evolved into formalized office holding today in the Pueblo Council. On the question of amending the membership ordinance, Naranjo acknowledged that the traditional deliberation to reach a consensual decision was important. However, he was clear in the view that the issue should have been resolved by now by Santa Clara.¹⁰⁴ The September 2008 interview with Naranjo, who had served on the Pueblo Council, revealed how before, during, and after the lawsuit, some internal relationships were stressed as well as maintained. This Progressive elder knew Myles Martinez as a friend, this friendship was maintained after the lawsuit, and this situation was not unusual.

Once the Pueblo officials had helped the family get the federal government document to provide access to medical care for Audrey, continuation of the dispute disturbed the community. The lawsuit was perceived as an individual rights campaign, counter to the communal values and interests of the community. When the Martinez mother and daughter reached to external federal law and courts, this action caused

¹⁰² Interview with Elder Naranjo, *supra* note 9. Elder Tito Naranjo was Pueblo Council Secretary during the period when the *Martinez* litigation arose.

¹⁰³ Record on Appeal Vol. I, *supra* note 8, at 58–65 (Testimony of Julia Martinez).

¹⁰⁴ Interview with Elder Naranjo, *supra* note 9.

resentment among some members in the community. The Progressives who had fought for gender equality within the Pueblo felt the issue should stay within the community to resolve. These equality advocates had worked patiently in culturally appropriate ways. At the trial, Alcario Tafoya testified that he was removed from the Council because of his advocacy for allowing what he called the "other" children to be fully taken in. Paul Tafoya, who was the named defendant as the Pueblo Governor when the lawsuit was filed, had long been an equality advocate. He helped Mrs. Martinez obtain the federal documents and health services her daughter needed, accompanying them to the Albuquerque office of the BIA.¹⁰⁵ Paul's father had been Governor, a Progressive, who left a Conservative Winter Kiva because of his advocacy to change governance and rules. Paul, in keeping with his father's commitment, served on the Council for some twenty years, advocated for women's equality, and, according to elder Naranjo, was "impeached" by the Pueblo Council for his equality advocacy. The outsider's perspective of Santa Clara as a society committed to gender discrimination against women fails to account for the Pueblo's experiences on this issue.

The *Martinez* litigation further delayed the Pueblo's progress on membership. The case forced attention and resources to defending Santa Clara's ultimate interest, the Pueblo's sovereignty and immunity from outside interference in the critical internal matter of membership. At trial, one elder stated that on the membership matters, "Everything has stopped, and everything will be at a standstill until this case is done with . . . Then we'll start work again."¹⁰⁶ Swentzell discusses how the work began again in Pueblo committees and groups that have worked on the membership and gender issues, sometimes sporadically. These working groups have included individuals who are the children of Santa Clara mothers who outmarried.

In 2005 a working group presented a petition to the Pueblo Council requesting a vote to amend the law. Publicized meetings accompanied this advocacy and brought renewed external attention to the Pueblo through newspaper accounts. This historical cycle returned to Paul Tafoya, who as the defendant Governor had said his prime concern during litigation was to protect the Santa Clara government and authority from a federal mandate invalidating the part of the 1939 membership ordinance at issue in *Martinez*. He became the spokesperson for this 2005 group seeking affirmative action on the matter of membership when the group held public meetings on this renewed effort to amend the law. It appears that Tafoya, a former Governor and Council Member, differed with the Council on how to amend the law. Tafoya died in fall of

¹⁰⁵ Record on Appeal Vol. II, *supra* note 51, at 361 (Testimony of Alcario Tafoya); Record on Appeal Vol. I, *supra* note 8, at 114 (Testimony of Paul Tafoya); *id.* at 50 (Testimony of Julia Martinez); *id.* at 24–25 (Testimony of Myles Martinez).

¹⁰⁶ Record on Appeal Vol. I, *supra*, note 8, at 172–174 (Testimony of Jose Gene Naranjo).

2009. At this point the Pueblo in its formal and informal ways is conducting the internal conversation on this issue.¹⁰⁷

Impact Outside of Santa Clara Pueblo

INDIAN LAW

Within Indian law, the impact of *Martinez* is evident as tribal governments, affirmed in their sovereignty and immunity, develop their political and economic authority. The reach of *Martinez* has extended far beyond membership matters. All forms of economic development, environmental regulation, public safety services such as police and fire fighters, family and domestic relations, natural resources, and land tenure law are developed using the authority that *Martinez* protected from outside interference. Significantly, *Martinez* applied to outsiders as well as tribal members wishing to challenge tribal actions under ICRA. As Professor Frank Pommersheim has noted, however, “[W]hen direct access to federal courts was sharply curtailed [in *Martinez*], there was a concomitant growth of tribal court litigation and a renewed litigant and federal interest in prescribing the boundaries of tribal authority.”¹⁰⁸ Eventually, the Supreme Court allowed non-Indians to sue in federal court for the sole purpose of challenging tribal court jurisdiction. The result has been a series of high court decisions limiting tribal powers over outsiders.¹⁰⁹ Some scholars have suggested that if *Martinez* had been decided otherwise, tribal court jurisdiction might have fared better in the Supreme Court, or that federal legislative initiatives to restore tribal jurisdiction should offer, in exchange, to legislatively overturn *Martinez*, in whole or in part.¹¹⁰

Concern about how far the *Martinez* tribal immunity can and should be stretched is part of the dialogue in Indian law regarding tribal members as well. As tribes have obtained funds from judgments or settlements from federal lawsuits for historical wrongs and income from casinos, membership controversies have arisen. The new money has provoked interest in tribal membership among some Indian descendants, and greed among some members wishing to limit who will share in the monetary benefit. In some tribes elders and longtime members have

¹⁰⁷ Rina Swentzell, *supra* note 5, describes the committee process. See also Laura Onstot, *Pueblo Members Petition for Equal Rights*, Española Rio Grande Sun, Oct. 6, 2005, at A1; Russell Max Simon, *Santa Clara Ex-Gov Tries to Change Marriage Law*, The Albuquerque Journal, Oct. 16, 2005, at B5; Laura Onstot, *Group Challenges Pueblo Membership Rules*, Española Rio Grande Sun, Oct. 20, 2005, at A18.

¹⁰⁸ Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 Ariz. L. Rev. 329, 360–361 (1989).

¹⁰⁹ See Robert N. Clinton, *Comity and Colonialism: The Federal Courts’ Frustration of Tribal–Federal Cooperation*, 36 Ariz. St. L.J. 1 (2004).

¹¹⁰ See, e.g., Kevin Gover, “Federal Indian Policy in the Twenty–First Century,” in *American Indian Nations: Yesterday, Today, and Tomorrow* 203–205 (George Horse Capture, Duane Champagne, and Chandler C. Jackson eds., 2007); Kevin Gover and Robert Laurence, *Avoiding Santa Clara Pueblo v. Martinez: The Litigation in Federal Court of Civil Actions Under the Indian Civil Rights Act*, 8 Hamline L. Rev. 497, 522 (1985).

been disenrolled as unqualified for membership. Supporters of tribal sovereignty now articulate cautionary advice to tribal governments: sovereignty cannot mean the absolute right to be arbitrary and abusive to your own people.¹¹¹ The tolerance of the non-Indian world and the protection within federal laws can erode. Tribal governments that fail to govern with fairness can provoke the external interference that *Martinez* prevented.

Fortunately, there are also some positive models of tribes using their power and immunity to create better lives for their members and for non-members who reside on the territory governed by the sovereigns affirmed in *Martinez*. These tribes, for instance, have entered cross-jurisdictional agreements with the state and the federal governments to improve safety and security services through coordination and cross deputizing. Arguably it is *Martinez*, in affirming the tribal sovereignty and immunity, that placed the tribes in a position to more productively engage in intergovernmental relationships that benefit Indians and non-Indians alike.

RESPONSES FROM THE NON-INDIAN WORLD

Scholars and commentators outside the Indian world often do not understand the Court's decision in *Martinez* or the basis for it. The *Martinez* decision was criticized and denounced by voices spanning the political and law discourse from feminists to interest groups that had long advocated the termination of tribal sovereignty. A sampling reveals the nature of the critics' concerns as well as the gap between Pueblo culture and the external worldview.

The best-known response to *Martinez* came from Catherine MacKinnon, a leading feminist scholar in law, who found *Martinez* "a difficult case." She asked, "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 "essentialism" approach to feminism provoked its own criticism for its narrowness that ignores cultural and racial experiences that are inseparable in the lives of ethnic minority women.¹¹² Equally disturbing to American Indians are the presumptions operating when outsiders, including feminists, pass judgment on tribes and how they govern themselves. It is not uncommon to find critiques that assume all tribes have the same membership rule as Santa Clara. The 562 federally recognized tribes, with their discrete

¹¹¹ See Vollmann, *supra* note 17, at 72 ("It would be unwise to underestimate how Congress might exercise . . . power in reaction to arbitrary tribal actions disenrolling tribal members."); Ezekiel J.N. Fletcher, *Trapped in the Spring of 1978: The Continuing Impact of the Supreme Court's Decisions in Oliphant, Wheeler, and Martinez*, *The Fed. Law.* 36 (Mar./Apr. 2008); Angela R. Riley, *Good (Native) Governance*, 107 *Colum. L. Rev.* 1049, 1108 (2007).

¹¹² Catherine A. MacKinnon, *Feminism Unmodified* 66 (1987). See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *Stan. L. Rev.* 581 (1990) (response to MacKinnon).

cultures, show the fallacy of the presumption. The Onondaga Nation of New York, for instance, is structured on a clan mother system and it is the male members who outmarry (and their children) who must endure the losses.¹¹³

The voices of American Indian feminists have generally not been invoked in analyzing *Martinez*. Rayna Green, a Cherokee feminist, articulates a commonly shared viewpoint among Indian 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 IX and with Equal Opportunity and Affirmative Action. Tribes insist that treaty-based sovereignty supersedes any other federal mandate.

While American Indian feminists acknowledge that contemporary Indian life includes inequities for males and females, and between males and females, they urge a resolution process within the tribe and its own cultural practices.¹¹⁴

While the Pueblos have been described as the most tradition bound among United States tribes, they also engage in evolving their form of government, a necessity for any modern tribe. Changes in some Pueblos' rules for governance have resulted in female Pueblo Governors and for women being elected to positions previously held only by males, because of formal rules or practice.¹¹⁵ Certainly external authority and means can be helpful, but the tribal community is far better situated to identify what is valuable in culturally congruent problem solving.¹¹⁶

Other outsiders showed little hesitation about their ability to understand and interpret Santa Clara's culture and history. Some rejected the

¹¹³ See *The Winds of Change: A Matter of Promises* (PBS Video 1990) providing information on this Onondaga law, passed by the all male Council of Faith Keepers. Oren Lyons, Senior Faith Keeper, Conversation on May 20, 2009 at the United Nations with the author, where Lyons confirmed that the outmarriage rule is unchanged at Onondaga. For discussion of the Onondaga rule, see Gloria Valencia-Weber, *Racial Equality: Old and New Strains and American Indians*, 80 Notre Dame L. Rev. 333 (2004). Carla Christofferson, Note, *Tribal Courts Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act*, 101 Yale L.J. 169 (1991) mistakenly assumes that other or all tribes have a Santa Clara rule and proposes amending the ICRA.

¹¹⁴ Rayna Green, *Native American Women*, 6 Signs 248, 264 (1988). See also Rayna Green, *The Pocahontas Perplex: The Image of Indian Women in American Culture*, 16 Mass. L. Rev. 698 (1975); Rayna Green, *Women in American Indian Society* (1992); Bethany R. Berger, *Indian Policy and the Imagined Indian Woman*, 14 Kan. J.L. & Pub. Pol'y 103 (2004); Bethany R. Berger, *After Pocahontas: Indian Women and the Law, 1830 to 1934*, 21 Am. Indian L. Rev. 1 (1997).

¹¹⁵ *Female Pueblo Leaders Honored*, Albuquerque J., Mar. 23, 2004, at E3.

¹¹⁶ Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M.L. Rev. 225, 256-263 (1994) (on using custom and innovation to create culturally appropriate law); Robert Yazzie, *Law School as a Journey*, 46 Ark. L. Rev. 271 (1993) (discussing when and how Anglo-American law can be used in tribal law).

claim that the ordinance could have resulted from the enduring culture of the Santa Clara people. Rather, they contended, the corruptive ideology of patriarchy from Euro-Americans had displaced the customary law of the Pueblo. Judith Resnik raised thoughtful discussion about the federal system's capacity to tolerate differences in cultural governments of the tribes. How much similarity to the Anglo-American forms of government will defeat the claim to cultural distinction? How can federalism accommodate the indigenous need to remain independent of state and federal regimes? Resnik, however, questioned whether Santa Clara Pueblo could be culturally and politically distinct given the federal influence on tribal governments. "The 'Santa Clara Rule' is intertwined with United States' rules and culture." She concluded that the discrimination against women historically built into federal law made it easier for the Supreme Court to validate the Santa Clara government's choice.¹¹⁷

Some critics would hold the tribes to one constitutional standard of equal protection promised to all American citizens. For instance, Robert C. Jeffrey invokes a natural rights theory of constitutional rights and concludes:

In denying a remedy to Julia Martinez and her daughter, for denying it for the reason it did, on the basis of cultural and tribal distinction, the [Supreme] Court itself became guilty of that 'ancestral discrimination,' in direct contradiction to the founding principle of human equality in the Declaration of Independence.¹¹⁸

Such advocacy for United States constitutional law norms as universal for all countries and societies is espoused especially as international law begins to focus on discrimination against women.

Commentators generally supportive of tribal sovereignty, but unable to accept the result in *Martinez*, offer other approaches. One corrective offered is a proposed ICRA amendment, to provide a remedy for the Martinez family while preserving the sovereignty of tribes to govern over their members and territory. Robert Laurence, for instance, advocates that Congress overrule *Martinez* in a congressional act that would protect tribal authority. He acknowledges tribal sovereignty has been historically damaged and requires remediation so that tribes can function as successful modern governments. However, plaintiffs like Mrs. Martinez would then have a real individual right to equal protection and a remedy, as promised in ICRA. Laurence would require limits in the legislation that are sensitive to tribal concerns and would restrict the outside impact on government processes and resources.¹¹⁹

¹¹⁷ Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. Chi. L. Rev. 671 (1989).

¹¹⁸ Robert C. Jeffrey, Jr., *The Indian Civil Rights Act and the Martinez Decision: A Reconsideration*, 35 S.D. L. Rev. 355, 371 (1990); 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).

¹¹⁹ Robert Laurence, *Martinez, Oliphant and Federal Court Review of Tribal Activity Under the Indian Civil Rights Act*, 10 Campbell L. Rev. 411 (1988). Laurence would

Congress has not amended ICRA in the manner suggested by the critics of the *Martinez* decision, though it has amended the Act for other purposes. As the Supreme Court held in *Martinez* and the *Kiowa* cases, until such time as Congress expressly removes sovereign immunity or the tribe itself consents to suit, tribes have a critical building block for developing their twenty-first century governments.

Conclusion

In these three stories *Martinez* provided a view on how a matter at the most personal level, the struggle of Julia and Myles Martinez to obtain medical care for their daughter, became a lawsuit that embraced the major institutional levels of United States law. Even though the Martinez family ultimately gained access to the medical services they sought, plaintiffs Julia and Audrey Martinez did not succeed in overturning the Pueblo's membership rule. Their individual loss was sustained to protect the Pueblo and its authority. It is not unusual in United States law that individual losses are imposed to protect a greater good.

Martinez placed the Santa Clara Pueblo, its laws and practices, under the scrutiny of an exterior law and culture. Although state laws are regularly placed under the microscope of federal law, tribal exposure to ICRA was different. The theory of national government in the United States rests on the states' consent to federal authority. As the original sovereigns in the United States, tribes are outside this social contract. In sustaining the tribes' sovereignty and immunity, the Court empowered tribes for their contemporary development as functioning twenty-first century governments.

There are more *Martinez* stories to come. The development of Indian law that will apply to tribes and pueblos is dependent on institutional stories, *e.g.*, what happens in Congress and at the Supreme Court. As an evolving government, Santa Clara Pueblo will create its next story contingent on how it resolves the problems arising from its membership ordinance. Many people, inside and outside the Pueblo, await the next stories from *Martinez*.

prescribe that an ICRA plaintiff must exhaust tribal remedies; a meaningful amount in controversy should be required; sovereign immunity should protect the tribe against money damages, though an *Ex parte Young*-type remedy could apply. Moreover, federal court review should be on the tribal court record if possible, and the political question doctrine should be applied liberally.