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NOTES AND COMMENTS

CONSTITUTIONAL LAW: EQUAL PROTECTION: *Martinez v. Santa Clara Pueblo*'—SEXUAL EQUALITY UNDER THE INDIAN CIVIL RIGHTS ACT

Andra Pearldaughter*

Introduction

An assortment of laws, including constitutional provisions, treaties, statutes, judicial decisions, and administrative regulations, governs the relationship of Native Americans to the federal and state governments.¹ This body of law reflects the vacillation between two conflicting views of the proper role of Native Americans in the dominant culture—separatism or assimilation.² One line of cases, statutes, and administrative policies maintains that Native American groups are sovereign entities and as such should be permitted, if not encouraged, to preserve their separate cultural identities and should not be forced to merge with white society.³ Although repeatedly acknowledged as sovereigns, the powers of Indian tribes have also consistently been limited under the rubric of their status as wards of the federal government.⁴

In contrast, the theory of assimilation espouses the integration of Native Americans, as other minorities, into the mainstream of life in the United States.⁵ However, such integration would inevitably lead to the destruction of the cultural identities of Native Americans. Thus, Native Americans are put to a choice between cultural extinction through integration and a special relationship

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1. See generally F. COHEN, *FEDERAL INDIAN LAW* (1942), for an overview of the statutes, treaties, federal court cases, Department of the Interior rulings, and Attorney General opinions relevant to the legal status of Native Americans in white society.

2. See Burnett, *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. LEG. 557 (1972), for a comprehensive discussion of the history of Indian tribal sovereignty which sets forth in detail the vacillation in national policy between assimilation and separatism. *Id.* at 558-74. See also 21 STAN. L. REV. 1236, 1237-40 (1969), for a brief discussion of these themes.

3. See, e.g., *United States v. United States Fidelity Co.*, 309 U.S. 506, 512 (1940); *Talton v. Mayes*, 162 U.S. 376 (1896); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

4. See *United States v. Kagama*, 118 U.S. 375 (1886); *Cherokee Nation v. Georgia*, 31 U.S. (6 Pet.) 515 (1831).

5. See Indian General Allotment Act of 1887, Act of Feb. 8, 1887, ch. 119, 24 Stat. 388; Indian Citizenship Act, 8 U.S.C. § 3(c) amended 8 U.S.C. § 1401(a)(2) (1970); Pub. L. 93-280, Act of Aug. 15, 1953, 67 Stat. 588, as amended 18 U.S.C. § 1162 (1970) and 28 U.S.C. § 1360 (1970).

with the federal government which buffers the effects of white society but which also impinges on native self-government.⁶

The most recent major federal legislation concerning Native Americans, the Indian Civil Rights Act,⁷ reflects a compromise between the assimilative and separatist approaches.⁸ Congress, exercising its plenary authority over Native Americans, imposed on tribal governments specific restraints taken almost verbatim from the Bill of Rights.⁹ Thus, Congress attempted to further the assimilation of Native Americans by the extension of many individual rights to tribal members that have long been guaranteed to all other American citizens. Omitted out of deference to cultural differences were the first amendment requirement of nonestablishment of religion and the fifteenth amendment prohibition of racial classification in voting.

The rights accorded Native Americans in their relations with federal and state governments are the same as those of any

6. See E. CAHN, *OUR BROTHER'S KEEPER: THE INDIAN IN WHITE AMERICA* 14 (1969), for a discussion of this dilemma.

7. Act of Apr. 11, 1968, Pub. L. No. 90-284, tit. II, 82 Stat. 77, *codified at* 25 U.S.C. §§ 1301-1303 (1970).

8. See generally Burnett, *supra* note 2, at 574-614, 617, for a thorough treatment of the differing philosophies of supporters and opponents of the Indian Civil Rights Act and the legislative compromises resulting from these conflicts. See also Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343 (1969) [hereinafter cited as Note, *Constitutional Status*]. The congressional attitude toward assimilation is specifically discussed. *Id.* at 1359-60.

9. 25 U.S.C. § 1302 (1970), which sets forth the individual rights guaranteed by the Act, provides: "§ 1302 Constitutional rights.

"No Indian tribe in exercising powers of self-government shall—

"(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

"(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

"(3) subject any person for the same offense to be twice put in jeopardy;

"(4) compel any person in any criminal case to be a witness against himself;

"(5) take any private property for a public use without just compensation;

"(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

"(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of \$500, or both;

"(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

"(9) pass any bill of attainder or ex post facto law; or

"(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons. (Pub. L. 90-284, title II, § 202, Apr. 11, 1968, 82 Stat. 77)"

American citizen.¹⁰ However, prior to the enactment of the Indian Civil Rights Act, the federal judicial doctrine of constitutional immunity had exempted tribal governments from constitutional restraints in their exercise of power over tribal members.¹¹ Consequently, most tribal governments had not extended certain individual rights to tribal members.¹² This was partially due to the lack of the necessary finances and education.¹³ Another significant factor, though, was the abiding concept of separate ethnic communities which had as an important goal the retention of cultures developed in a context entirely different from that of Anglo-American constitutional history.¹⁴

10. See, e.g., *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (1948); *Montoya v. Bolack*, 70 N.M. 196, 372 P.2d 387 (1962). United States citizenship was granted to Native Americans by an Act of June 2, 1924, ch. 233, 43 Stat. 253.

11. See Note, *Constitutional Status*, *supra* note 8, at 1346-53. The author discusses the history of the constitutional immunity doctrine and the impact of the Indian Civil Rights Act on it.

12. See, e.g., *Talton v. Mayes*, 163 U.S. 376 (1896) (sixth amendment right to grand jury); *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959) (first amendment freedom of religion); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958) (fifth amendment due process); *Glover v. United States*, 219 F. Supp. 19 (D. Mont. 1963) (sixth amendment right to counsel). This situation was viewed as offensive by many Anglo-Americans. However, some commentators deplore the extent to which the Indian Civil Rights Act will undermine the autonomy of the Indian tribes. They argue the effect will be to usurp yet another area from the already limited jurisdiction of the tribal courts and make the federal courts the final arbiter. See, e.g., Note, *Equitable and Declaratory Relief Under the Indian Civil Rights Act*, 48 N.D.L. Rev. 695 (1972). The authors of this note direct their attention to the availability of equitable and declaratory relief under the Indian Civil Rights Act, and suggest possible ways to minimize its undermining impact on tribal autonomy. See also Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D.L. Rev. 1 (1975); Note, *An Analysis of the Indian Bill of Rights*, 33 MONT. L. REV. 255 (1972), which also takes the position that the Indian Civil Rights Act is a blatant imposition of white values on Native American culture, destructive of tribal sovereignty and self-government.

But see, de Raismes, *The Indian Civil Rights Act of 1968 and the Pursuit of Responsible Tribal Self-Government*, 20 S.D.L. Rev. 59 (1975); Note, *Tribal Injustice: The Red Lake Court of Indian Offenses*, 48 N.D.L. Rev. 639 (1972) [hereinafter cited as Note, *Tribal Injustice*]. The author argues forcefully for application of the Indian Civil Rights Act because of the inadequacies of the tribal court system. These inadequacies include the selection of judges as part of a spoils system, the courts' lack of independence from the Bureau of Indian Affairs, and the partiality engendered by tribal politics. The author notes that, ironically, this system is now defended by many as a preserver of tradition although it was originally designed to eradicate the historic way of life of the Native American people. He attacks the tribal sovereignty argument by observing that all tribal legislation must be approved by the Bureau of Indian Affairs and that no tribe could long exist without federal aid. He concludes that the tribal court he is considering could comply with the Indian Civil Rights Act without diminishing the present state of that tribe's sovereignty.

13. See Commission on the Rights, Liberties, & Responsibilities of the American Indian, *THE INDIAN: AMERICA'S UNFINISHED BUSINESS* 37 (W. Brophy & S. Aberle eds. 1966); Burnett, *supra* note 2, at 581; Note, *The Constitutional Rights of the American Indian*, 51 VA. L. REV. 121, 138 (1965).

14. See Note, *Constitutional Status*, *supra* note 8, at 1344.

Conflicts have inevitably arisen as the preservation of native cultural integrity and the promotion of Anglo-American constitutional ideals have been considered by the courts. Illustrative of this conflict is the case of *Martinez v. Santa Clara Pueblo*.¹⁵ The *Martinez* Court considered a question of first impression: whether an ordinance differentiating between the rights of tribal members on the basis of sex was violative of the equal protection clause of the Indian Civil Rights Act.¹⁶

Facts of Martinez

Plaintiffs Julia Martinez and her daughter Audrey Martinez brought suit on behalf of themselves and others similarly situated, to challenge the membership ordinance of the Santa Clara Pueblo in New Mexico. The ordinance granted membership to all children

15. 98 S.Ct. 1670 (1978).

16. This is the first time that discrimination on the basis of sex by an Indian tribe has been considered. However, membership ordinances have previously been attacked for reasons other than sex discrimination.

In *Laramie v. Nicholson*, 487 F.2d 315 (9th Cir. 1973), the plaintiffs were children whose mothers were members of the Colville Confederated Tribe. The children were refused enrollment in the tribe solely because they had been previously enrolled as members of another tribe. The children met all other requirements for membership. The plaintiffs also alleged that others with the same supposed disqualification were allowed to enroll as members of the tribe. The trial court found no jurisdiction under the Indian Civil Rights Act, but the appellate court reversed and remanded for further proceedings. *Id.* at 316. The United States Supreme Court denied certiorari to *Laramie* in *Tonasket v. Thompson*, 419 U.S. 871 (1974). Evidently, *Laramie* was consolidated with *Tonasket*, a case which presented the same issue and was decided by the same Ninth Circuit panel.

The plaintiffs in *Slattery v. Arapahoe Tribal Council*, 453 F.2d 278 (10th Cir. 1971), alleged the discriminatory application of a membership ordinance requiring one-quarter degree Indian blood. The court found that the plaintiffs could not invoke the Indian Civil Rights Act where the pleadings showed that the tribal council had acted in accord with the ordinance, which was not itself under attack. Thus, no jurisdiction existed under which the court could consider the claim. *Id.* at 282.

The case of *Yellow Bird v. Oglala Sioux Tribe*, 380 F. Supp. 438 (D.S.D. 1974), also involved an equal protection challenge to a tribal membership provision. In that case, the court granted defendants' motion to dismiss, holding that it lacked subject matter jurisdiction over the case. The plaintiffs sought to run as candidates for tribal office in the Oglala primary election. The Oglala Sioux tribal election board refused to place their names on the ballot, evidently on the grounds that the plaintiffs were barred from tribal membership by a tribal constitutional provision which restricted membership to children born to tribal members who were residents of the reservation at the time of the child's birth.

The court found that absent allegations that membership provisions were not uniformly applied, such provisions were not subject to the equal protection requirements of the Indian Civil Rights Act. Thus, the court dismissed the suit for lack of subject matter jurisdiction under the Act. *Id.* at 440-41.

See also Note, *Equal Protection Under the Indian Civil Rights Act: Martinez v. Santa Clara Pueblo*, 90 HARV. L. REV. 627 (1977). The author of this note considers *Martinez* from the perspective of another membership ordinance case requiring the resolution of cultural autonomy with application of the Indian Civil Rights Act. However, he does not consider seriously the philosophical problems raised by the conflict between invidious discrimination and cultural autonomy.

born of marriages between male members of the Pueblo and non-members, while denying membership to all children born of marriages between female members of the Pueblo and nonmembers.¹⁷ The primary motivation for passage of the ordinance in 1939 was the fear of the economic consequences of a marked increase in the Pueblo's population caused by a sharp rise in intermarriage.¹⁸ Prior to its enactment, membership in the Pueblo for children of mixed marriages had been determined on an individual basis.¹⁹

Plaintiff Julia Martinez, whose parents were Santa Clarans, is a member of the Pueblo. Her husband is a fullblood Navajo and is not a member of the Pueblo.²⁰ Their eight living children, including plaintiff Audrey Martinez, are, as a result of the ordinance, barred from membership in the Pueblo. The Martinezes have lived at the Pueblo continuously since their marriage in 1941. All of the Martinez children were reared at the Pueblo; all speak Tewa, the traditional and official language of the Pueblo; all are allowed to practice the traditional religion. Culturally, the Martinez children are an integral part of the Pueblo.²¹ Since 1946, Mrs. Martinez has attempted to enroll her children in the Pueblo through all procedures available under the Pueblo government.²² When she exhausted the tribal remedies, she and her daughter filed suit in the federal district court in New Mexico.

Plaintiffs alleged that the ordinance deprived nonmember children of various rights, including residence at the Pueblo as a

17. *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039, 1040 -41 (10th Cir. 1976), *rev'd*, 98 S.Ct. 1670 (1978). The ordinance is as follows: "Be it ordained by the Council of the Pueblo of Santa Clara, New Mexico, in regular meeting duly assembled, that hereafter the following rules shall govern the admission to membership to the Santa Clara Pueblo;

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

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

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

4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances." Appellants are attacking sub-paragraphs 2 and 3 of the ordinance.

18. *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039, 1040 (10th Cir. 1976), *rev'd*, 98 S.Ct. 1670 (1978).

19. *Id.*

20. Martinez's marriage to a Native American, although a member of a different tribe, may seem less serious than marriage to a non-Indian. However, this is significant only from an Anglo-American view of pan-Indianism, which is not a pervasive Native American notion. See generally H. HERTZBERG, *THE SEARCH FOR AN AMERICAN INDIAN IDENTITY* 1-12 (1971), for a discussion of the attempts to organize pan-Indian movements, the need for such a cohesive political response, and the diversity of Native American cultures causing such attempts to fail.

21. *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039, 1041 (10th Cir. 1976).

22. *Id.*

matter of right; political rights such as voting, holding secular office, and bringing matters before the Pueblo Council; and sharing in the material benefits of Pueblo membership by using the land and hunting and fishing.²³ Plaintiffs also contended the ordinance prevented Mrs. Martinez from passing her possessory interest in Pueblo property to her children.²⁴

Decision of the District Court

The trial court found that under the Indian Civil Rights Act it had jurisdiction over the plaintiffs' claims.²⁵ Moreover, it held that the ordinance did not violate the Indian Civil Rights Act.²⁶ The court based this conclusion on its holding that the equal protection provision of the Indian Civil Rights Act was not coextensive with the constitutional guarantee of equal protection. "[T]he Act and its equal protection guarantee must be read against the background of tribal sovereignty and interpreted within the context of tribal laws and customs."²⁷ Accordingly, it reasoned that courts should not invalidate tribal membership ordinances which use classifications based on criteria traditionally employed by the tribe in considering membership questions, even though such classifications might be unacceptable under constitutional standards.²⁸

Judge Mechem treated the patrilineal and patrilocal traditions of the Pueblo as indications of a cultural tradition which made acceptable the male-female distinctions in classifying children of mixed marriages as members or nonmembers.²⁹ He also recognized the Pueblo's economic and cultural interests in membership policies generally and in the 1939 ordinance specifically.³⁰ If the Pueblo's ability to define Santa Clara membership "is limited or restricted by an external authority, then a new definition of what it is to be a Santa Claran is imposed, and the culture of Santa Clara is inevitably changed."³¹ Additionally, he noted the interrelation of the

23. *Id.*

24. *Id.*

25. *Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5 (D.N.M. 1975). The Tenth Circuit had not ruled on the issue of jurisdiction under the Indian Civil Rights Act at that time. The district court discussed the relevant authorities at length in concluding jurisdiction existed. *Id.* at 7-11.

26. *Id.* at 18.

27. *Id.* at 17, citing *Crowe v. Eastern Band of Cherokee Indians*, 506 F.2d 1231 (4th Cir. 1974); *Means v. Russell*, 383 F. Supp. 378 (D.S.D. 1974).

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

29. *Id.* at 16.

30. *Id.* at 15, 16.

31. *Id.* at 15.

economic and cultural interests, pointing out that economic survival is a prerequisite to maintaining cultural autonomy and identity.

Decision of the Appellate Court

Writing for the Tenth Circuit, Judge Doyle reversed the district court's decision.³² The *Martinez* panel considered three issues in its analysis: (1) sovereign immunity and jurisdiction; (2) the test for violations of equal protection under the Act; and (3) whether the ordinance survived the equal protection challenge.

The court held that federal jurisdiction existed and that to the extent the Indian Civil Rights Act applied, tribal immunity was thereby limited.³³ The Act was designed to provide protection against tribal authority³⁴ and therefore a congressional intent to allow suits against the tribe was essential to the goal of protection. To hold otherwise would reduce the Act to a mere unenforceable declaration of principles.

The *Martinez* panel held that a balancing test which weighs the

32. *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039, 1048 (10th Cir. 1976).

33. *Id.* at 1042. The *Martinez* panel upheld jurisdiction and found that sovereign immunity was waived, almost without discussion, on the basis of its decision in *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926 (10th Cir. 1975). *Dry Creek Lodge* was decided a few weeks prior to the district court's decision in *Martinez* (June 25, 1975).

In *Dry Creek Lodge*, the court notes that the general issue of jurisdiction under the Indian Civil Rights Act had been before the Tenth Circuit on three occasions. However, those courts never reached the present issue. (515 F.2d 926, 933 (10th Cir. 1975)). In *McCurdy v. Steele*, 506 F.2d 653, 656 (10th Cir. 1974), the court refrained from ruling on jurisdiction under Section 1302 because the plaintiffs had not exhausted tribal remedies. The complaint in *Slattey v. Arapahoe Tribal Council*, 453 F.2d 278, 281-82 (10th Cir. 1971), failed to disclose a denial of due process or equal protection. Thus, since the Indian Civil Rights Act was not brought into play, the court found there was no jurisdiction. In *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir. 1971), plaintiffs challenged the statutory provision for the appointment of a tribal chief by the Secretary of the Interior. The *Groundhog* court found there was no jurisdiction because the complaint was so lacking in substance and so contrary to well-established law enunciating the power of Congress to legislate concerning Native American affairs as to afford no substantial basis for a claim of federal jurisdiction. *Id.* at 678. The *Dry Creek Lodge* panel then turned to the opinions of other circuits from which it concluded jurisdiction existed under the Indian Civil Rights Act, in conjunction with 42 U.S.C. § 1343. 515 F.2d 926, 933 n.6 (10th Cir. 1975).

In considering the issue of sovereign immunity, the *Dry Creek Lodge* court summarily held the Indian Civil Rights Act functioned as a waiver by Congress of any immunity. *Id.* at 934 n.9, citing *Brown v. United States*, 486 F.2d 658 (8th Cir. 1973); *Johnson v. Lower Elwha Tribal Community*, 484 F.2d 200 (9th Cir. 1973); *Daly v. United States*, 483 F.2d 700 (8th Cir. 1973); *Loncaisson v. Leekity*, 334 F. Supp. 370 (D.N.M. 1971); *Seneca Constitutional Rights Organization v. George*, 348 F. Supp. 48 (W.D.N.Y. 1972); *McCurdy v. Steele*, 353 F. Supp. 629 (D. Utah 1973). The *Martinez* panel adopted this position, relying on *Dry Creek Lodge*. Even though the circuit court considered the issue of sovereign immunity, it was not mentioned in the district court opinion.

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

tribal interest against the individual's right to fair treatment under the law is appropriate under the equal protection provision of the Indian Civil Rights Act.³⁵ Using this test, Judge Doyle applied a compelling interest standard and found the Pueblo's interest in the ordinance not to be compelling.³⁶

In determining the appropriate test, the *Martinez* court considered the legislative history of the Indian Civil Rights Act, as well as case law.³⁷ The Act emerged from a series of congressional bills designed to safeguard Native Americans' constitutional rights. One bill, S. 961,³⁸ provided that an Indian tribe, in exercising its powers of local self-government, was subject to the same limitations and restraints as those imposed on federal and state governments by the Constitution. Senator Sam Ervin, sponsor of S. 961, stated that the bill was intended to guarantee to individual Indians the same rights that other American citizens had under the Constitution.³⁹ It was pointed out by other supporters that off-reservation Native Americans enjoyed the same rights as other American citizens, but on the reservation their rights depended upon the benevolence of tribal governments.⁴⁰ The comprehensive extension of rights was rejected, however, when further consideration indicated that this approach could undermine tribal structure. For example, giving equality in voting rights might conflict with the recognized power of the tribes to set blood quantum requirements for membership and voting.⁴¹ Also, the first amendment nonestablishment clause would have endangered the continued existence of Pueblo theocracies.⁴² While problems were seen in extending some constitutional guarantees, none were suggested with respect to equal protection. In fact, it was frequently characterized as a basic or fundamental right among the guarantees.⁴³

35. *Id.* at 1045.

36. *Id.* at 1047.

37. See generally Burnett, *supra* note 2, at 574-614, for extensive commentary on the legislative history of the Indian Civil Rights Act. See also Ziontz, *supra* note 12, at 3-20; de Raismes, *supra* note 12, at 72-76; Reiblich, *Indian Rights Under the Civil Rights Act of 1968*, 10 ARIZ. L. REV. 617, 621-23 (1968).

38. See S. REP. NO. 841, 90th Cong., 1st Sess. 5-6 (1967).

39. 113 CONG. REC. 35473 (1967).

40. See, e.g., *Hearings on Constitutional Rights of American Indians Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., pt. 1 (1962), 87th Cong., 1st Sess., pt. 2 (1963), 87th Cong., 2d Sess., pt. 3 (1963), and 88th Cong., 1st Sess., pt. 4 (1964) 3, 8, 286, 447 [hereinafter cited as *1961-63 Hearings*]; *Hearings on S. 961-68 and S.J. Res. 40, Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., 165, 221 (1965) [hereinafter cited as *1965 Hearings*].

41. *1965 Hearings*, *supra* note 40, at 65, 221.

42. *Id.*

43. E.g., *1965 Hearings*, *supra* note 40, at 18, 61.

In the subcommittee on constitutional rights of the Senate Judiciary Committee, there were conflicting statements regarding the need to refrain from undermining tribal authority. The subcommittee members stated at hearings, in Committee reports, and in floor debates their intent to extend broad constitutional protections to individual Indians.⁴⁴ Yet, once cognizant of the negative consequences of a comprehensive extension of constitutional guarantees, the original bill was amended to delete the nonestablishment clause and the fifteenth amendment, as well as to specify the guarantees granted from the first amendment, the fourth through eighth amendments, and the equal protection clause of the fourteenth amendment.⁴⁵ In this amended form, S. 961 became the Indian Civil Rights Act of 1968.

From this investigation of the legislative history, the court concluded that congress had individually considered the various protections contained in the Bill of Rights. Those considered essential and workable were retained, while those deemed out of harmony with Native American culture were eliminated.⁴⁶ The legislative history contained some evidence that Congress had anticipated that in an evaluation such as *Martinez* the cultural autonomy and integrity of the tribes would be weighed.⁴⁷ However, the court perceived nothing in the legislative history that resembled a formula for resolution of these conflicting interests.⁴⁸

The *Martinez* panel concluded that the only way to resolve a conflict between constitutional values and tribal traditions was to consider the scope, extent, and importance of the tribal interest. Against this, the individual's right to fair treatment under the law, in light of the clearness of the guarantee and the magnitude of the interest, both generally and as applied to the particular facts, was to be weighed.⁴⁹ Recognition of the specific constitutional guarantee, unless the value of the tribal custom or principle outweighed it, was thereby found to be compatible with congressional intent as manifested in the legislative proceedings.⁵⁰

The court next considered case law concerning equal protection under the Indian Civil Rights Act. Many cases had concluded that

44. *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039, 1044 (10th Cir. 1976).

45. S. 1843; passed unanimously, 113 CONG. REC. 35471-77 (1967).

46. *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039, 1044 (10th Cir. 1976.) See also *Burnett*, *supra* note 2, at 574-604 and Note, *Constitutional Status*, *supra* note 8, at 1359-60.

47. *Id.* at 1045. See also *Burnett*, *supra* note 2, at 574-604 and Note, *Constitutional Status*, *supra* note 8, at 1360.

48. *Id.*

49. *Id.*

50. *Id.*

Congress did not intend the equal protection provision of the Indian Civil Rights Act to be coextensive with the constitutional guarantee. Cases challenging blood quantum requirements for tribal membership or office-holding exemplify this.⁵¹ The court distinguished the blood quantum requirement cases as having "some semblance of basis for the classification," unlike the sex discrimination of the present case.⁵² The Tenth Circuit also noted that other courts considering the equal protection provision of the Act invariably looked to the fourteenth amendment for guidance. The line of election requirement cases which dealt with age and residency requirements for voting and holding office, apportionment of tribal legislatures, and irregularities in the conduct of elections are illustrative.⁵³ The *Martinez* panel "conceded that under the fourteenth amendment the ordinance would clearly be invalid because of its classification scheme based solely on sex."⁵⁴ In con-

51. See *Slattery v. Arapahoe Tribal Council*, 453 F.2d 278 (10th Cir. 1971); *Daly v. United States*, 483 F.2d 700 (8th Cir. 1973).

52. *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039, 1046 (10th Cir. 1976).

53. See *Howlett v. Salish & Kootenai Tribes*, 529 F.2d 233 (9th Cir. 1976) and *Two Hawk v. Rosebud Sioux Tribe*, 404 F. Supp. 1327 (D.S.D. 1975) (residency requirements); *Means v. Russell*, 522 F.2d 833 (8th Cir. 1975) (election irregularities); *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079 (9th Cir. 1975) (age requirement); *Daly v. United States*, 478 F.2d 700 (8th Cir. 1973) and *White Eagle v. One Feather*, 478 F.2d 1311 (8th Cir. 1973) (reapportionment).

54. *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039, 1046 (10th Cir. 1976). During the years of the Warren Court, a dual-level equal protection analysis evolved. Usually, the rational relationship standard was applied, which required merely that the classification be rationally related to a legitimate governmental objective. Almost any relationship alleged by the state was sufficient. See, e.g., *McGowan v. Maryland*, 366 U.S. 420 (1961) (Sunday closing laws upheld). When a suspect classification or fundamental right was involved, however, a compelling state interest was required to sustain the classification. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (one-year residency requirement for welfare applicants struck down).

With the advent of the Burger Court, there was a shift in analysis. In seven cases during the 1971 Term, the Court found substantial bases for constitutional challenges even though the traditional rational relationship criteria were recited. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Since then, the Burger Court has continued to find constitutional violations on old equal protection grounds. See, e.g., *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975). Gerald Gunther attempts to explicate this trend in *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). Justice Marshall's concurrence in *Department of Agriculture v. Murry*, 413 U.S. 508 (1973), sheds some light on these developments. He sets forth a "sliding scale" theory of equal protection which considers the impact of the rule on the individual, the nature of the right involved, the invidiousness of the classification, the governmental interest at stake, and possible safeguards or less restrictive alternatives. Marshall notes this approach utilizes traditional elements from both due process and equal protection. Perhaps this explains the Court's reliance on *Frontiero v. Richardson*, 411 U.S. 677 (1973). Although a plurality of the Court in *Frontiero* held sex to be a suspect category, it is inaccurate, based on *Frontiero*, to say, without more, that a classification predicated solely on sex violates equal protection. The Court also refers the reader to *Stanton v. Stanton*, 421 U.S. 7 (1975), *Weinberger v. Weisenfeld*, and *Reed v.*

trast, the district court had not given cognizance to the sex discrimination issue.

Despite its conclusion that equal protection standards did not apply with full force, the Tenth Circuit discussed the facts of *Martinez* in light of whether the tribal interest was compelling. The court noted that the use of the membership classification was of relatively recent origin and, when applied, it caused incongruous and unreasonable results.⁵⁵ Rejecting as conclusory the district court's characterization of the Santa Clara culture, the appeals court deemed reliance on the supposed patrilineal and patrilocal nature of the Pueblo an inappropriate justification of the ordinance.⁵⁶ Additionally, the ordinance was found not to represent Santa Clara tradition. Prior to its passage, the children of Santa Clara women in mixed marriages were sometimes admitted to Pueblo membership.⁵⁷ The ordinance was actually the product of economic concerns which could have been addressed by other, nondiscriminatory solutions.⁵⁸

Through this analysis, the court concluded that the ordinance was repugnant to the equal protection provision of the Indian Civil Rights Act. To have let the ordinance stand, as in disclaiming jurisdiction, would have rendered the Indian Civil Rights Act ineffectual except as an abstract statement of principle.⁵⁹

Decision of the Supreme Court

The Supreme Court, in an opinion by Justice Marshall, reversed the decision of the appellate court, finding that the Indian Civil Rights Act neither expressly nor implicitly authorized civil actions for declaratory or injunctive relief to enforce its substantive provisions.⁶⁰ Justice White wrote a dissenting opinion.⁶¹

The Court first addressed the issue of the sovereign immunity of the tribe. Unlike the appellate court, which found that tribal immunity was limited to the extent that the substantive portions of

Reed, 404 U.S. 71 (1971). Each of these cases struck down classifications based solely on sex. The *Martinez* panel did not clearly set forth the level of scrutiny it used to invalidate the classification. Although it alluded to the need for a compelling interest, it also discussed the factors set forth by Marshall in *Murry*. Perhaps this is an example of the "newer" equal protection theorized by Gunther.

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

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 1048.

60. *Martinez v. Santa Clara Pueblo*, 98 S.Ct. 1670 (1978).

61. *Id.* at 1684.

the Act were applicable, Justice Marshall concluded that the doctrine of tribal sovereign immunity bars suits against the tribe absent an express waiver by Congress. Because the Indian Civil Rights Act contains no such waiver, the Court held that the federal courts had no jurisdiction to hear an action against the tribe pursuant to the Act.⁶² Despite the lack of jurisdiction, the Court conceded that the Act had modified the substantive law applicable to the tribe.⁶³

The Court then examined whether the Act impliedly authorized a private right of action against tribal officers for declaratory and injunctive relief. *Cort v. Ash*⁶⁴ stated the test for determining whether a private remedy is implicit in a statute not expressly providing one. The four relevant factors enumerated in *Cort* are the following: (1) whether the plaintiff is one of the class for whose benefit the statute was enacted; (2) whether there is an indication of the legislative intent to create or deny such a remedy; (3) whether it is consistent with the underlying purposes of the legislative scheme to imply a remedy; (4) whether the cause of action is one traditionally relegated to state [or tribal] law, in an area basically the concern of the states [or tribes], so that it would be inappropriate to infer a federal cause of action.⁶⁵

The Court conceded that the plaintiff was a member of the class intended to be benefitted by the Act.⁶⁶ The Court next considered whether a private right of action would be consistent with the purposes of the Act. The majority found that Congress had pursued two goals in the Act: the strengthening of the position of individual tribal members *vis-a-vis* the tribal government, and the protecting and furthering of native self-government.⁶⁷ The Court believed the creation of a federal cause of action would undermine the latter goal by eroding the authority of the tribal courts and imposing serious financial burdens on the already financially disadvantaged tribes.⁶⁸ Thus, the omission of a private right of action was interpreted as Congress' method of balancing these two competing interests and implying a right of action would not be consistent with the goals of Congress.⁶⁹

62. *Id.* at 1677, *relying on* *United States v. Testan*, 424 U.S. 392, 399 (1976).

63. 98 S.Ct. 1670, 1677 (1978).

64. *Cort v. Ash*, 422 U.S. 66 (1975).

65. *Id.* at 78.

66. *Martinez v. Santa Clara Pueblo*, 98 S.Ct. 1670, 1678 (1978).

67. *Id.* at 1679, 1680.

68. *Id.* at 1680, 1681. However, the Court seems to ignore that most individual Native Americans seeking enforcement of Section 1302 would be as financially disadvantaged as the tribe if not more so.

69. *Id.* at 1681.

In contrast, Justice White believed there was no inconsistency. His dissent cites portions of the legislative history which he found to indicate Congress' concern, not only about Native Americans' lack of substantive rights, but also about the lack of remedies to enforce whatever rights she or he might have.⁷⁰

In looking to the third relevant factor established in the *Cort* test, the Court further reviewed the legislative history of the Indian Civil Rights Act. Congress considered and rejected three different proposals for federal review in a civil context. The first proposal was *de novo* review by federal courts of criminal convictions by tribal courts. Instead, the habeas corpus provision of Section 1303 was adopted.⁷¹ The second consisted of an administrative procedure whereby the Department of the Interior would review alleged civil violations of the Act and make referrals to the Attorney General for bringing suit.⁷² The last proposal, offered as a substitute for the second, would have authorized adjudication of civil complaints by the Department of the Interior with review by the district courts.⁷³ The Court found that the rejection of these proposals indicated an intent to deny a private remedy.⁷⁴

Justice White found the rejection of the first proposal to be of limited relevance to the civil context because it involved criminal convictions. Also, the habeas corpus remedy was adopted rather than the original because the *degree* of intrusion was less. He opined that the degree of intrusion permitted by a private cause of action in the civil context would be no greater than that of the habeas corpus remedy.⁷⁵

The rejection of administrative review with initiation of suits by the Attorney General was not a persuasive indication to Justice White of a rejection of federal judicial review.⁷⁶ Moreover, testimony indicated that the focus of this suggestion was off-reservation violations by non-Indians, *e.g.*, illegal detention of reservation Indians by state and tribal officials; arbitrary decision making by the Bureau of Indian Affairs; and denial of various state welfare services to Native Americans living off the reservation. Two witnesses did express the fear of disruption of tribal governments by the suggested procedure, but many others ex-

70. *Id.* at 1686-90.

71. *Id.* at 1687.

72. *Id.*

73. *Id.*

74. *Id.* at 1683.

75. *Id.* at 1686.

76. *Id.*

pressed the view that the Attorney General already possessed the authority to bring suits.⁷⁷

The last proposal had been made in tandem with a provision that allowed the appeal of criminal convictions in the tribal court to the Secretary of the Interior, who could affirm, modify, or reverse the tribal decision. Most of the discussion concerning this joint proposal centered on the review of criminal proceedings and consequently was of limited relevance to congressional views on civil remedies. Further, several witnesses expressed objections to appeals from judicial proceedings to the executive branch.⁷⁸ Justice White concluded these rejections were of limited significance because the proposals primarily involved criminal convictions and because . many objections to them, other than tribal autonomy, were raised.

Finally, the Court considered the appropriateness of a federal forum to vindicate the rights in question. The Court reasoned that tribal courts, which were recognized as appropriate forums for adjudicating disputes concerning both Native Americans and non-natives, were available for the enforcement of the substantive provisions of the Act.⁷⁹ Thus, contrary to the holding of the Tenth Circuit, a federal cause of action was not plainly required to give effect to the extension of constitutional norms to tribal governments.⁸⁰ Furthermore, the Court declared that Congress, in not exposing tribal officials to suit, "may have considered" that civil actions would frequently depend on questions of tribal traditions which tribal forums might be in a better position to evaluate.⁸¹

Justice White responded that it was both unrealistic and in contravention of Congress' intent to suggest that the tribal body which had allegedly violated an individual's rights was the appropriate forum for the adjudication of that alleged deprivation.⁸² In closing, he noted that the majority had acknowledged the Court's frequent recognition of the propriety of inferring a federal cause of action for the enforcement of civil rights.⁸³

Thus, after review of the legislative history, the majority found that Congress was committed to the goal of tribal self-determination and that creation of a federal cause of action would

77. *Id.* at 1687.

78. *Id.*

79. *Id.* at 1681.

80. *Id.* at 1680.

81. *Id.* at 1684.

82. *Id.* at 1689.

83. *Id.* at 1690.

not comport with this goal. Because tribal courts are available to adjudicate disputes arising under the Act, creation of a cause of action is not plainly required. The rejection of various proposed remedies indicated the belief of Congress that habeas corpus would protect the individual interests at stake while avoiding needless intrusion on tribal governments.

In contrast, the legislative history demonstrated to Justice White that Congress was as concerned with providing remedial relief as with changing the substantive law of the tribes. The relevance of the rejection of various proposals was very limited, particularly since most dealt with criminal convictions. Finally, reliance on tribal courts as forums was unrealistic due to their dual roles as legislative and judicial institutions, and such reliance was inconsistent with Congress' intent to extend constitutional protections.

Criticism of the Court's Decision

The enforcement of the Indian Civil Rights Act and the extension of federal constitutional protections to Native American citizens dictate some intervention of the dominant culture into the affairs of native cultures. As Justice White pointed out, "The extension of constitutional rights to individual citizens is *intended* to intrude upon the authority of government."⁸⁴ The majority seems unable to accept that such legislation must have as a basic presumption that the status of Native American tribes is little different from that of the states, or alternatively, Native American groups deserve no greater recognition than that given to other cultural groups such as the Amish.⁸⁵

84. *Id.* at 1689 (emphasis in original).

85. Some commentators have argued that the position of Native Americans is analogous to that of the Amish people in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Yoder*, the Supreme Court upheld the right of Amish parents to be exempt from the Wisconsin compulsory education law under a first amendment "free exercise of religion" rationale. The Amish community does not enjoy the same long-standing recognition of sovereign status accorded to Native Americans. No treaty or other obligation exists between the United States or the state of Wisconsin and the Amish people, unlike the relationship between the United States and Native Americans. Also, religion and culture are either interdependent or equivalent for Native American tribes. Thus, an even stronger argument than that made by Amish parents could be made by Native Americans that they have a right to a separate mode of life.

Even if the principle of *Yoder* were found to limit application of the Indian Civil Rights Act, Native Americans would bear a heavy burden in making out a free exercise claim. The showing necessary in *Yoder* to sustain such a claim included (1) the law in question gravely endangered or destroyed the free exercise of the religious beliefs; (2) a long history as an identifiable religious sect; (3) a long history as a successful and self-sufficient segment of American society; (4) a convincing demonstration of the sincerity of the religious beliefs; (5) a demonstration of the interrelationship between the religious belief and the mode of life; (6) a persuasive showing of the vital role the belief plays in the survival of the community; (7) a demonstration of the hazards presented by the enforcement of the statute in

Cultural autonomy is a legitimate goal. However, it is a complex and many-faceted problem which raises numerous questions. How does one define the culture that is being respected and preserved?⁸⁶ Does the culture to be protected consist only of those values traditionally held from a prior time? If so, from what time? Does cultural autonomy instead mean the right for a culture to evolve? Assuming that a culture is best defined internally, are all internal definitions inherently valid? Is cultural autonomy possible at all in today's world of increased interdependence? Is Native American culture now so adulterated by white influences that it makes no sense to speak of preserving it?⁸⁷ Are not the procedures and rules at issue, including those in *Martinez*, frequently those that have been adopted as concessions or adaptations to white society, rather than expressions of a separate culture?

The issue of cultural autonomy is further complicated by the ramifications of sovereignty. *Martinez* is merely another example of the ambivalent sentiments of the white courts, the white legislatures, and ultimately, the white people. Sovereignty may well be a bogus issue, for while the sovereignty of Native American peoples has been repeatedly upheld,⁸⁸ that same sovereignty has been curtailed under the euphemism of guardianship when expedient for white objectives.⁸⁹ Similarly, it has been manipulated to serve the goals of whites.⁹⁰

Even assuming that native tribes possess more than the trappings of sovereignty, should any group, by virtue of sovereignty,

question; (8) a demonstration of the adequacy of the alternative mode of life; (9) a convincing showing that few other groups could qualify for the exemption. See Zientz, *supra* note 12, at 53-56, for criticism of this possible application of *Yoder* as narrow and insensitive to tribal integrity. But see de Raismes, *supra* note 12, at 82-90, for a discussion supporting a *Yoder* analysis as an appropriate limit on the Indian Civil Rights Act.

86. Not only are there different cultural philosophies represented among tribes, but also there exist differences in perspective within a given tribe. See Burnett, *supra* note 2, at 574-602 for a narration of the variety of reactions by Indians to proposals for the Indian Civil Rights Act. There are specific allusions to Pueblo communities and their reactions. *Id.* at 601, 614-15.

87. See Bysiewicz & Van de Mark, *The Legal Status of the Dakota Indian Woman*, 3 AM. INDIAN L. REV. 255 (1975) for an example of such adulteration. The authors discuss in detail the negative impact of white culture upon the traditional status of Dakota women. See also the discussion in Burnett, *supra* note 2, at 657-59, concerning the white origins of the present tribal court system.

88. See note 3, *supra*, and accompanying text.

89. See note 4, *supra*, and accompanying text. See also *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 290-91 (1955).

90. See Burnett, *supra* note 2, at 559-60, for a discussion of white creation and retention of native police forces and courts to set examples of acculturation and to undermine recalcitrant chieftains and councils.

be able to utilize cultural structures that destroy or limit the growth and potential of whole classes of human beings?

Examination of this question in the abstract presents an insoluble dilemma. The entities identified as destructive will vary depending upon who is doing the identifying. Realistically, all one can do in addressing these complex issues is to remain constantly aware of the tension between cultural values and the inherent biases each person possesses. In *Martinez*, such awareness is particularly difficult. No separate, recognized "women's culture" exists. Yet, the conflict must be viewed as involving differences in sexual values *as well as* differences in racial/ethnic values. Sexual values are not merely a function of racial/ethnic culture.

Conclusion

The federal court system has been less than totally successful in exercising a self-awareness of bias and a sensitivity to differences in sexual values.⁹¹ The district court in its decision on the merits in *Martinez* seemed oblivious to this aspect of concern. One wonders whether the Supreme Court would have reached a different result in resolving the tension between racial/ethnic cultures had some interest more central to white *male* institutions been in conflict with the sovereignty and cultural autonomy of Native Americans.

On the other hand, the Tenth Circuit's decision illustrates a sensitive consideration of all the relevant values. The *Martinez* panel made a detailed analysis, identifying each party's interest.⁹² The

91. See, e.g., *Geduldig v. Aiello*, 417 U.S. 484 (1973) and *Gilbert v. General Electric*, 429 U.S. 125 (1976) (the Court found that discrimination in employment benefits based on pregnancy was not sex discrimination); *Kahn v. Shevin*, 416 U.S. 351 (1974) (Florida tax law giving exemption to widows but not widowers was not impermissible sex discrimination).

The Canadian government and Canadian Indians have faced the same problem of resolving the idea of cultural autonomy with individual rights. In *In re Lavell*, 38 D.L.R. 3d 481 (Sup. Ct. 1973), § 12(1)(b) of the Indian Act, CAN. REV. STAT. c. I-6 (1970) was challenged. This section provides that an Indian woman loses her status as an Indian if she marries a non-Indian. Plaintiffs contended this section violated the equal protection provision of the Canadian Bill of Rights. However, the Supreme Court rejected this argument, reasoning that equal protection referred only to nondiscriminatory application of the laws. This case is even more disturbing in its implications than many United States cases because the rule being upheld is not one promulgated by a tribal authority, but rather one legislated by the dominant culture. This indicates that sexism is recognized as the destructive force it is even to a lesser degree outside the United States. See Sanders, *Status of Indian Women on Marriage to Person Without Indian Status*, 38 SASKATCHEWAN L. REV. 243 (1974), and Note, *Civil Rights: Loss of Indian Status by Indian Woman Marrying Non-Indian under Indian Act (Can.)*, § 12(1)(b), 6 OTT. L. REV. 635 (1974), for differing views on the *Lavell* case.

92. *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039, 1041-48 (10th Cir. 1976).

court then balanced these interests acknowledging the differences in sexual values as well as racial/ethnic values.⁹³

Beyond intervention, the tribe itself must again critically examine the issues raised in *Martinez*. The district court found that, "To abrogate tribal decisions, particularly in the delicate area of membership, for whatever 'good' reasons, is to destroy cultural identity under the guise of saving it."⁹⁴ Likewise, the effect of the tribe's use of a sex-based criterion to exclude from membership those who would be culturally and racially identified as Santa Clarans, but for the sex of the Santa Claran parent, is to diminish its human resources under the guise of preserving them.

93. *Id.* at 1047. The *Martinez* panel did not clearly set forth the standard it used to balance these interests. It merely stated that under the fourteenth amendment the ordinance would clearly be invalid because of its classification scheme based solely on sex." *Id.* at 1046. Some insight into the *Martinez* panel's conclusion may be gained from a review of the development of the law by the Supreme Court concerning equal protection. See note 54, *supra*.

94. *Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5, 18-19 (D.N.M. 1975).