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CONSTITUTIONAL LAW: *Santa Clara Pueblo v. Martinez:* TRIBAL MEMBERSHIP AND THE INDIAN CIVIL RIGHTS ACT

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In 1968 Congress passed the Indian Civil Rights Act (ICRA).[1] The "Indian Bill of Rights"[2] was included as part of the Act and it imposed on all Indian tribes the duty, when exercising acts of self-government, to accord all persons most of the same basic constitutional rights that are guaranteed by the Bill of Rights of the Federal Constitution. There were certain specific exceptions and changes due to the unique character of Indian tribal life. However, the section of the Act with which this article is concerned, the equal protection clause,[3] was incorporated into the Act with much of the same wording as that found in the Federal Constitution. This clause states that "[n]o Indian tribe in exercising powers of self government shall . . . (8) deny to any person within its jurisdiction the equal protection of its laws." The interpretation of this clause by the courts, especially in regard to whether it provides a basis for federal court jurisdiction over cases involving tribal membership conflicts, and its application to the case of *Santa Clara Pueblo v. Martinez,* is the subject of this paper.[4]

Santa Clara Pueblo v. Martinez

Martinez concerns the validity of a 1939 Santa Clara Pueblo membership ordinance which precludes membership for children of female members of the Pueblo who had married nonmembers, but grants membership to children of male members of the Pueblo who had married nonmembers.[5] The suit was brought by Julia Martinez and her daughter Audrey as a class action against the Pueblo and its governor, alleging that the membership ordinance contravenes the equal protection and due process provisions of the ICRA.

Julia Martinez is a member of the Pueblo who had married a Navajo. Due to the ordinance, the children of Julia and her hus-

1. 25 U.S.C. §§ 1301-1303 (1976) (originally enacted as Act of Apr. 11, 1968, Pub. L. No. 90-284, tit. II, 82 Stat. 77).
2. 25 U.S.C. § 1302.
3. 25 U.S.C. § 1302(8).
4. 98 S.Ct. 1670 (1978).
5. *Id. See also* Note, *Constitutional Law: Equal Protection: Martinez v. Santa Clara Pueblo—Sexual Equality Under the Indian Civil Rights Act,* 6 AM. INDIAN L. REV. 187 (1978).

band are not recognized as members of the Pueblo. The ordinance had been enacted by the Council, the Pueblo's single governing body, under powers given to it in a constitution adopted in 1935. The adoption of the ordinance was a response to the sudden increase in mixed marriages, which were resulting in a strain on the resources of the Pueblo. The appellants sought a declaratory judgment that the portion of the ordinance which denies Pueblo membership to the children of women, but not men, who marry nonmembers of the Pueblo is in violation of the equal protection clause of the ICRA. The district court held in favor of the Pueblo.[6] The Tenth Circuit Court of Appeals reversed the decision and remanded the cause for further proceedings.[7] The Supreme Court granted certiorari to review the case and in its recent decision held in favor of the Pueblo.[8]

The Rule Prior to Passage of the ICRA

Prior to the passage of the ICRA, the general rule with regard to internal tribal matters was that the federal courts did not have jurisdiction. The rule stems from the broad principle established in *Worcester v. Georgia* that Indian tribes are sovereign, self-governing entities subject only to the plenary power of Congress.[9] The decision in *Talton v. Mayes*[10] interpreted the doctrine of tribal sovereignty to include exemption of tribal governments from federal constitutional limitations, and this interpretation has been followed in later federal court decisions.[11]

The ability of a tribe to define its own membership has long been included as an aspect of its sovereign nature.[12] Courts have

6. 402 F. Supp. 5 (D.N.M. 1975), *rev'd* 540 F.2d 1039 (10th Cir. 1976), *rev'd*, 98 S.Ct. 1670 (1978).

7. 540 F.2d 1039 (10th Cir. 1976), *rev'd*, 98 S.Ct. 1670 (1978).

8. 98 S.Ct. 1670 (1978).

9. 31 U.S. (6 Pet.) 515 (1832).

10. 163 U.S. 376 (1896).

11. *See* Keeble v. United States, 412 U.S. 205, 210 (1973); Oliphant v. Schlie, 544 F.2d 1007, 1011 (9th Cir. 1976); Tom v. Sutton, 533 F.2d 1101, 1103 (9th Cir. 1976); James v. Wilson, 521 F.2d 724, 726 (8th Cir. 1975); Settler v. Lameer, 507 F.2d 231, 241 (9th Cir. 1974).

12. The Court of Appeals of New York in Patterson v. Council of Seneca Nation, 245 N.Y. 433, 438, 157 N.E. 734, 736 (1927), declared that the power of an Indian government to decide questions of membership derives from its status as a separate nation, and concluded that "above all, the Seneca Nation retains for itself the power of determining who are Senecas, and in that respect is above interference and dictation." The holding in *Patterson* has been influential in several recent decisions concerning tribal membership conflicts. These include the case of Martinez v. Southern Ute Tribe, 249 F.2d 915 (10th Cir.) *cert. denied*, 356 U.S. 960, *reh. denied*, 357 U.S. 924 (1957), and the post-ICRA case of Fondahn v. Native Village of Tyonek, 450 F.2d 520 (9th Cir. 1971), where the court based its holding on pre-ICRA law in adopting the reasoning of the Tenth Circuit in *Martinez. See also* Roff v. Burney, 168 U.S. 218 (1897); Waldron v. United States, 143 F. 413 (C.C D.S.D. 1905).

for many years consistently recognized that in the absence of express legislation by Congress to the contrary, a tribe has the complete authority to determine all questions of its own membership.[13] It has been regarded as necessary to the self-preservation and integrity of a tribe, and except in those areas specifically limited by Congress, the necessity for self-determination has been seen as paramount in decisions affecting tribal membership.

This brief overview outlines the judicial interpretation of federal Indian policy with respect to Indian sovereignty and tribal ability to determine membership that had developed up to the time the ICRA was passed in 1968. The following discussion of judicial interpretations of the equal protection clause of the ICRA should be read within this historical perspective.

The Equal Protection Clause as a Basis for Federal Jurisdiction

One fundamental question, which has now been decided by the Supreme Court in *Martinez*,[14] was whether the equal protection clause of the ICRA (§ 1302(8)) actually furnished a basis for federal jurisdiction. Decisions after the passage of the ICRA and before *Martinez* that dealt with tribal membership conflicts were concerned mainly with this issue in view of the fact that there is no explicit authorization for federal jurisdiction in the Act.[15] Also, as discussed above, cases decided prior to the passage of the Act had held that such questions are internal tribal matters and are therefore outside federal jurisdiction.[16] The courts generally concluded that the equal protection clause did provide them with jurisdiction, either on its own or in conjunction with Section 1343(4) of Title 28 of the United States Code.[17] This statute provides that district courts shall have "original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (4) To recover damages or to secure equitable or other

13. *See* Prairie Band of Pottawatomie Tribe v. Puckkee, 321 F.2d 767, 770 (10th Cir. 1963); Martinez v. Southern Ute Tribe, 249 F.2d 915, 920 (10th Cir. 1957). *See also* F. COHEN, FEDERAL INDIAN LAW 133 (1971 ed.), where the author lists examples of tribal authority in this area. A tribe may, for example, regulate the abandonment of membership, the adoption of nonmembers into the tribe, and the types of membership which it may choose to recognize.

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

15. *See* Laramie v. Nicholson, 487 F.2d 315 (9th Cir. 1973), *cert. denied*, 419 U.S. 871 (1974); Thompson v. Tonasket, 487 F.2d 316 (9th Cir. 1973), *cert. denied*, 419 U.S. 871 (1974); Fondahn v. Native Village of Tyonek, 450 F.2d 520 (10th Cir. 1971); Yellow Bird v. Oglala Sioux Tribe, 380 F. Supp. 438 (D.S.D. 1974).

16. See text accompanying notes 9-13, *supra*.

17. 28 U.S.C. § 1343(4) (1976) (originally enacted as Act of June 25, 1948).

relief under any act of Congress providing for the protection of civil rights, including the right to vote."[18]

The reasoning behind acceptance of jurisdiction was often couched in terms of an implied waiver of immunity by tribal governments. This assumption of an implied waiver of immunity can be seen in several Ninth Circuit decisions, starting with *Johnson v. Lower Elwha Tribal Community*,[19] decided in early 1973, regarding revocation of a lease of tribal land, and in the companion cases of *Thompson v. Tonasket*[20] and *Laramie v. Nicholson*,[21] decided later the same year, which dealt with tribal membership conflicts.

The Tenth Circuit had not decided the question of jurisdiction before *Martinez* came before the District Court of New Mexico in 1975.[22] The district court discussed the problem of jurisdiction at length, apparently agreeing with the implied waiver reasoning of the Ninth Circuit in *Laramie*,[23] *Thompson*,[24] and *Johnson*,[25] and accepted jurisdiction over the tribal conflict.[26] The appeals court, citing its recent decision in *Dry Creek Lodge, Inc. v. United States*,[27] upheld the district court's jurisdictional determination.[28] The issue of whether the Act may be interpreted impliedly to authorize actions against tribal governments was considered the threshold issue by the Supreme Court in its recent decision in *Martinez*.[29]

The Supreme Court noted that tribal governments have long been recognized as possessing a common law immunity from suit that is traditionally enjoyed by sovereign powers.[30] Citing *United States v. Testan*,[31] which stated that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed, the Court held that the Act does not authorize such actions.[32] "Nothing on the face of Title I of the ICRA," stated the Court,

18. *Id.*
19. 484 F.2d 200, 203 (9th Cir. 1973).
20. 487 F.2d 316 (9th Cir. 1973), *cert. denied*, 419 U.S. 871 (1974).
21. 487 F.2d 315, 316 (9th Cir. 1973), *cert. denied*, 419 U.S. 871 (1974).
22. 402 F. Supp. 5 (D.N.M. 1975).
23. 487 F.2d 315 (9th Cir. 1973), *cert. denied*, 419 U.S. 871 (1974).
24. 487 F.2d 316 (9th Cir. 1973), *cert. denied*, 419 U.S. 871 (1974).
25. 484 F.2d 200 (9th Cir. 1973).
26. 402 F. Supp. 5, 6-11 (D.N.M. 1975).
27. 515 F.2d 926 (10th Cir. 1975).
28. 540 F.2d 1039, 1042 (10th Cir. 1976), *rev'd*, 98 S.Ct. 1670 (1978).
29. 98 S.Ct. 1670, 1673-74 (1978).
30. *Id.* at 1677.
31. 424 U.S. 392, 399 (1976).
32. 98 S.Ct. 1670, 1674 (1978).

"purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief."[33]

With the assumption of jurisdiction by the federal courts in matters covered by Section 1302, the federal courts were dealing, in many instances, with very different customs and lifestyles. Intrusion into tribal affairs was greater than ever before and severely detrimental to the current congressional goal of tribal governmental development and self-determination. The Supreme Court's decision in *Martinez*[34] is in accord with these goals. The Supreme Court noted that providing a federal forum for Section 1302 issues would constitute an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself.[35] It also recognized that such interference might infringe on the right of Indians to govern themselves and could not help but "unsettle a tribal government's ability to maintain authority."[36] Under slightly different reasoning, the Court also noted that resolution of issues under Section 1302 will "frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts."[37]

These conclusions are in accord with the criticisms by many tribal leaders, especially leaders from the pueblos of the Southwest, of the acceptance by the federal courts of jurisdiction over cases involving internal tribal matters.[38] The pueblos have been one of the most outspoken Indian groups in their reaction against both the passage of the ICRA and its subsequent interpretations by the federal courts.[39] Leaders from the pueblos were concerned that the federal courts would require the same standards in their interpretation of the due process and equal protection clauses of the ICRA that are required of state and federal governments and would not be sensitive to nor allow for differences in Indian social and cultural life.[40] Soon after the ICRA

33. *Id.* at 1677.
34. Santa Clara Pueblo v. Martinez, 98 S.Ct. 1670 (1978).
35. *Id.*
35. *Id.*
37. *Id.* at 1684.
38. *See* Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Civil Rights Act*, 20 S.D. L. REV. 1, 42-44 (1975).
39. *See* Burnett, *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. LEGIS. 557, 601 (1972). Burnett, in summing up the reaction by the Indian tribes to the ICRA in its proposal stages, divided the reaction into four types. The fourth type was shown principally by the Pueblos. "The old, stable, and very traditional Pueblo communities," observed Burnett, "were in no way convinced that the values which their system embodied were inferior to those of white America. They resisted measures which threatened their culture or the structure of their authority. Their position, he stated, "was clear and unyielding."
40. Ziontz, *supra* note 38.

was passed, the pueblos asked to be exempted from its provisions and in response to their criticism of the Act, the Senate held hearings in Albuquerque, New Mexico.[41] Pueblo representatives again voiced their concern over the Act in 1973 at the American Indian Lawyers Association.[42]

The concern of tribal leaders over federal court interpretations of the due process and equal protection clauses of the ICRA was warranted by the similarity of the language in the ICRA to that in the Federal Bill of Rights and by the application by some federal courts of similar standards to both sections.[43] This concern proved well grounded. The cross application of standards that the tribal leaders had anticipated can be seen in the opinion of the Tenth Circuit in *Martinez*.[44] In its decision the court stated that while the fourteenth amendment standards do not apply with full force, "the Indian Bill of Rights is modeled after the Constitution of the United States and is to be interpreted in the light of constitutional law decisions."[45]

Problems with Federal Court Jurisdiction

Acceptance of jurisdiction by the federal courts over Section 1302 issues created many difficulties for the federal courts. The district court and appellate court opinions in *Martinez* exemplify many of the difficulties.[46] This case and others will be discussed to illustrate why the Supreme Court decision in *Martinez* rejecting jurisdiction is favorable for tribal governments.[47] Prior to the *Martinez*[48] decision, the federal courts were inconsistent in their interpretations of the provisions of Section 1302. Several courts stressed the need for tribes to be able to maintain their unique heritage and tribal integrity.[49] One decision went so far as to recognize that tribes should be able to maintain traditional practices that conflict with Anglo-American concepts of individual

41. *Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, Constitutional Rights of the American Indian*, 91st Cong., 1st Sess. (1969).

42. *See* Ziontz, *supra* note 38.

43. *See* Johnson v. Lower Elwha Tribal Community, 484 F.2d 200 (9th Cir. 1973).

44. 540 F.2d 1039 (10th Cir. 1976).

45. *Id.* at 1047.

46. Martinez v. Santa Clara Pueblo, 402 F. Supp. 5 (D.N.M. 1975), *rev'd*, 540 F.2d 1039 (10th Cir. 1976), *rev'd*, 98 S.Ct. 1670 (1978).

47. 98 S.Ct. 1670 (1978).

48. *Id.*

49. *E.g.*, Howlett v. Salish & Kootenai Tribes, 529 F.2d 233, 238 (9th Cir. 1976) (tribal council membership); Means v. Wilson, 522 F.2d 833, 842 (8th Cir. 1975) (tribal elections); O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140, 1144-46 (8th Cir. 1973) (exhaustion of tribal remedies required).

freedom.[50] The Fourth Circuit, in its decision in *Crowe v. Eastern Band of Cherokee Indians, Inc.*[51] concluded that the ICRA was designed to ensure only that the existing laws of tribal governments were applied with an even hand.[52] The tribal controversy was to be decided by the traditions and customs of the tribe and not by the common law, as the court felt that it could not substitute its judgment on the merits of the case for that of the tribe.[53] Another recent decision, *Howlett v. Salish & Kootenai Tribes*,[54] held that tribes could structure their governments as they chose, so long as they did not violate due process or equal protection.[55]

The standards for interpretation as applied by the courts have varied with the subject matter of the dispute. For example, the courts have usually shown a flexible view with regard to blood quantum requirements. Such requirements are analogous to membership requirements in many ways.[56] Blood quantum requirements would be unconstitutional under the Federal Bill of Rights but have been found to be a valid requirement of tribal membership because of the special needs of Indian tribes. Several cases have held that such requirements provide a legitimate means for a tribe to limit its membership.[57] It is through the use of blood quantum requirements that most tribes define themselves for membership purposes.[58] In *Daly v. United States*,[59] the Eighth Circuit, citing *Groundhog v. Keeler*,[60] recognized that "such requirement [blood quantum], if applied uniformly, is not in conflict with the Indian Civil Rights Act's guarantee of equal protection of the laws."[61] *Yellow Bird v. Oglala Sioux Tribe*,[62] a later case citing

50. Janis v. Wilson, 385 F. Supp. 1143, 1150 (D.S.D. 1974), *rev'd on other grounds*, 521 F.2d 724 (8th Cir. 1975) (termination of employment).
51. 506 F.2d 1231 (4th Cir. 1974).
52. *Id.* at 1236-37.
53. *Id.*
54. 529 F.2d 233 (9th Cir. 1976).
55. *Id.* at 240.
56. Judge Doyle, writing for the Circuit Court in *Martinez*, explicitly disagrees with this viewpoint. 540 F.2d 1039, 1046 (10th Cir. 1976).
57. Early cases include Cherokee Intermarriage Cases, 203 U.S. 76 (1906); Waldron v. United States 143 F. 413 (C.C.S.D. 1905). *See also* COHEN, *supra* note 13, at 133-39. Recent cases include Daly v. United States, 483 F.2d 700 (8th Cir. 1973); Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971); Slattery v. Arapaho Tribal Council, 453 F.2d 278 (10th Cir. 1971); Yellow Bird v. Oglala Sioux Tribe, 380 F. Supp. 438 (D.S.D. 1974).
58. Other methods include residence requirements and adoption, with the trend being one of requiring the sharing of tribal obligations. COHEN, *supra* note 13, at 136
59. 483 F.2d 700 (8th Cir. 1973).
60. 442 F.2d 674 (10th Cir. 1971) (emphasis added).
61. 483 F.2d 700, 706 (8th Cir. 1973).
62. Yellow Bird v. Oglala Sioux Tribe, 380 F. Supp. 438, 440 (D.S.D. 1974).

both *Groundhog* and *Daly*, suggested that there is a parallel between the blood quantum requirements discussed in *Daly* and the requirements for tribal membership, and held that this parallel between the two required the court to find that the membership provisions of the Oglala Sioux Tribal Constitution should not be embraced in the Indian Bill of Rights.[63] The decision of the court to refuse to apply the Indian Bill of Rights was thereby distinguished from the Ninth Circuit's earlier case of *Laramie*,[64] in which the court found a denial of equal protection of tribal laws pertaining to membership because the tribal council was applying its own law in a discriminatory manner.

The district court in *Martinez* appears to be one of the first courts to explicitly consider customs, lifestyle, and tribal history at length in formulating its decision.[65] An important consideration was the conclusion that, while the membership provision (the ordinance) was of recent origin, it was nevertheless based on criteria traditionally employed by the tribe.[66] The court decided that the equal protection clause should not be construed in a manner that would invalidate such an ordinance, and thus require the court to determine which cultural values should be preserved and which should be abrogated.[67] The opinion stressed the need for the Pueblo to be able to define for itself who can be a member of the tribe. Membership policies, said the court,

> Are 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 . . . . If its ability to do this is limited or restricted by an external authority, then . . . the culture of Santa Clara is inevitably changed.[68]

However, the opinion of the Tenth Circuit concluded instead that the ordinance was of recent origin and thus did not merit the force that would be attributed to tradition.[69] It also concluded that the ordinance originated as a result of economic considerations and for that reason was an arbitrary and expedient solution to the problem that was then confronting the tribe.[70]

63. *Id.*
64. Laramie v. Nicholson, 487 F.2d 315 (9th Cir. 1973), *cert. denied*, 419 U.S. 871 (1974).
65. 402 F. Supp. 5, 12-16 (D.N.M. 1975).
66. *Id.* at 18.
67. *Id.*
68. *Id.* at 15.
69. 540 F.2d 1039, 1046 (10th Cir. 1976).
70. *Id.*

The decision by the circuit court that Santa Clara's method of determining its membership was not fundamental to its cultural survival not only appears contrary to previous judicial decisions and much of federal Indian policy regarding the importance of membership policies to a tribe, but it is also contrary to the information presented in the Memorandum Opinion of the district court[71] and to information gained through anthropological studies of the Pueblo cultures.[72] The ordinance in question was enacted soon after the resolution of a lengthy and bitter controversy which for a time had split the Pueblo into two factions. The controversy concerned the importance of traditional customs and values and the way in which the Pueblo was to interact with the Anglo culture around it. Such controversy, or factionalism, has long been inherent in Pueblo culture and antedates Pueblo encounters with the Spanish in the 1500's.[73] Factionalism disputes have been commented on frequently in studies of Pueblo communities and there are a number of specific studies of Pueblo factionalism.[74] Factions are not a newly developed response to outside acculturative pressures, but part of a characteristic deeply rooted in Pueblo culture. They are seen as one consequence of the conservative and authoritarian nature of Pueblo culture which results in the elimination of controversial elements within their communities, and which has allowed the Pueblo culture to remain relatively stable over the centuries.[75] To allow the Anglo-American judicial system to oversee the adjudication of conflicts in Pueblo culture in an attempt to make the Pueblo conform to an Anglo-American conception of justice, could have drastic consequences for the Pueblo's cultural survival.

The appellate court also considered the legislative history of the ICRA and noted that while it failed to provide a conclusive answer for construing the Act, the proceedings did manifest a congressional intent to recognize the specific constitutional guarantee unless the tribal custom or principle outweighs the specific guarantee.[76] The ability to control and define tribal membership must therefore be weighed against the need to safeguard federal

71. 402 F. Supp. 5, 12-16 (D.N.M. 1975).

72. *See* Dozier, *Factionalism at Santa Clara Pueblo*, 5 ETHNOLOGY 172-85 (1966); Fox, *Veterans and Factions in Pueblo Society*, 61 MAN. 173-76 (1961); Hawley, *An Examination of Problems Basic to Acculturation in the Rio Grande Pueblos*, 50 AM. ANTHROPOLOGIST 612-24 (1948).

73. Dozier, *Factionalism at Santa Clara Pueblo*, 5 ETHNOLOGY 172, 175, 185 (1966). The author is an anthropologist and a native Santa Claran.

74. *Id.* at 172.

75. *Id.* at 175.

76. Martinez v. Santa Clara Pueblo, 540 F.2d 1039, 1045 (10th Cir. 1976).

constitutional guarantees. The court, using the compelling interest test, then concluded that while the necessity to control tribal membership is important in preserving the tribe's culture, it was not compelling enough to justify deviation from the fourteenth amendment standard.[77] Thus, tribal interest must be "compelling" enough to outweigh the need for upholding the constitutional guarantee against discrimination. However, Judge Doyle, in using the weighing test, did not give the traditional and customary values of the Pueblo the attention such values deserve. The need of the Pueblo to show a compelling interest puts the burden on the Pueblo to show that the particular ordinance in question is necessary to the cultural integrity of the tribe. Most rules embodying cultural distinctions would fail under this test, because no one of them would be considered as indispensable to the cultural integrity of a tribe.[78] Indeed, the whole concept of culture is founded on the premise that it is an abstraction, an intangible that cannot necessarily be summarized in any trail list or outline of rules.[79] To attempt to characterize those aspects of a culture that are "of compelling interest" from those that are not, appears from this viewpoint as an almost impossible task. A cultural distinction embodied in particular rules may serve only a small function in a culture and yet the vitality and continued existence of the entire system of rules depends on the preservation of its component parts.[80]

Conclusion

The Supreme Court in *Martinez* noted that tribal forums are available and have been recognized by lower courts as appropriate to enforce rights created by the ICRA.[81] The forum provided by Santa Clara's judicial system, while different from that of the Anglo-American system, was traditionally an effective one.[82] Now incorporated under the Indian Reorganization Act,[83] the Pueblo's

77. *Id.* at 1047.

78. Note, *Equal Protection Under the Indian Civil Rights Act: Martinez v. Santa Clara Pueblo*, 90 HARV L. REV. 627, 630 (1977).

79. Kroeber & Kluckhohn, "Culture: A Critical Review of Concepts and Definitions," Papers of the Peabody Museum of American Archaeology and Ethnology, Vol. XLVII, pp. 155-56 (Harvard University, 1952).

80. Note, *Equal Protection Under the Indian Civil Rights Act: Martinez v. Santa Clara Pueblo*, 90 HARV L. REV 627, 630 (1977).

81. Santa Clara Pueblo v. Martinez, 98 S.Ct. 1670, 1681 (1978). The Supreme Court cites Fisher v. District Court, 424 U.S. 382 (1976) and Williams v. Lee, 358 U.S. 217 (1959).

82. Aberle, *The Pueblo Indians of New Mexico: Their Land, Economy, and Civil Organization*, Memoir No. 70, 50 AM. ANTHRO ASS'N 1-93 (1948)

83. 25 U.S.C. §§ 461-79 (1976) (originally enacted as Act of June 18, 1934, 48 Stat. 983).

government consists of legislative, judicial, and executive functions that are defined in the constitution and by-laws. The Pueblo's governmental organization includes aspects of both the Anglo and traditional tribal system in the present form of government.[84] It is thus neither wholly traditional nor wholly Anglicized.[85] The persistence of the traditional method of choosing officers can be seen, for instance, in the fact that the summer moiety chief, a traditional officer, is permitted to choose the slate of officers to be elected under its present form of government. The legislative, judicial, and executive power in the Pueblo is vested in the Pueblo Council, which thus has sole power.[86]

Briefly, the judicial system of Santa Clara Pueblo can be described as follows; The Pueblo court consists of the governor of the Pueblo and the Council, and sitting together, they adjudicate all prohibited conduct. In controversies coming before the Council, the body examines all witnesses and ascertains full details of the dispute. Deliberations may take days or weeks; some cases may last for years. The defendant, plaintiff, and witnesses give their full stories without interruption and each individual is allowed to talk as long as that person wishes. After the matter has been sufficiently commented upon by the interested parties, the Council then makes a decision.[87]

In the decision of the conflict between Julia Martinez and the Pueblo Council regarding enforcement of the membership ordinance, the Council was adhering to an ordinance which had been in effect and accepted by the tribal members since 1939. The Council was also following formalized procedure established by the tribal constitution and by-laws. The Council could have amended the ordinance but chose not to do so. "The policy of the Pueblo is clear," stated the district court in its Memorandum Opinion on jurisdiction, "and the matter has been resolved by the Pueblo—against the plaintiffs."[88] The decision of the Pueblo Council should have been final. The Supreme Court decision now affirms this view and it is clear that tribal forums are to be used to resolve disputes concerning rights granted by the Indian Civil Rights Act. This is a significant development for tribal governments which will reinforce tribal authority over internal matters. This reinforcement provides a much needed step in developing

84. E. DOZIER, THE PUEBLO INDIANS OF NORTH AMERICA 191 (1970).
85. Martinez v. Santa Clara Pueblo, 402 F. Supp. 5, 13 (D.N.M. 1975).
86. DOZIER, *supra* note 84.
87. Aberle, *supra* note 82, at 28-30.
88. *See* Martinez v. Santa Clara Pueblo, 402 F. Supp. 5, 10 (D.N.M. 1975).

and maintaining responsible tribal government. Tribal judicial systems have major responsibility in enforcing the substantive guarantees contained in the Indian Civil Rights Act. Tribal governments will be relied on to actively assume responsibility for protecting the rights of individual members. It should be realized that the decisions they make, while at times not in accord with Anglo-American concepts of justice and equality, may still afford equality under the laws and traditions of the tribe. It should also be realized that such decisions may be necessary for the continued vitality and existence of the tribe. For example, the Pueblo Council's decision in the membership dispute would not be in accord with Anglo-American concepts of sexual equality, but was seen by the Pueblo Council as necessary to the maintenance of separate cultural identity.

The Supreme Court decision in *Martinez*[89] should have the effect of reinforcing recognition that tribal forums are not only capable of final determination of the issues before them, but that often they are better qualified than the federal courts to resolve such issues. Tribal forums are in a better position to understand the background of the tribal laws under discussion, and the effect of these laws on the tribe, its culture and lifestyle. Thus, they can often make a more meaningful determination of the issues because of their knowledge of the context in which these issues are placed. As the district court opinion in *Martinez* stated at the conclusion of the opinion:

> Much has been written about tribal sovereignty. If those words have any meaning at all, they must mean that a tribe can make and enforce its decisions without regard to whether an external authority considers those decisions wise. 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.[90]

Tribal governments have been arguing in favor of this proposition for many years and it has now received explicit recognition by the Supreme Court.

89. Santa Clara Pueblo v. Martinez, 98 S.Ct. 1670 (1978).
90. 402 F. Supp. 5, 18-19 (D.N.M. 1975).