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Tribal Sovereignty: Santa Clara Pueblo v. Martinez: Tribal Sovereignty 146 Years Later

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TRIBAL SOVEREIGNTY: *SANTA CLARA PUEBLO V. MARTINEZ*: TRIBAL SOVEREIGNTY 146 YEARS LATER

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On May 15, 1978, the Supreme Court of the United States handed down a decision that will have enormous impact on the sovereignty of tribal worlds.[1] Reversing the appellate court decision,[2] the Supreme Court, in *Santa Clara Pueblo v. Martinez*,[3] held that 25 U.S.C. §§ 1301-1303 (the Indian Civil Rights Act of 1968) did not expressly nor implicitly grant federal court jurisdiction over civil actions against the tribes, arising out of the guarantees within the Act.

The Act reads in part: "No Indian tribe in exercising powers of self-government shall . . . 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 . . . ." Prior to the unexpected Supreme Court decision, most federal courts and legal commentators who had cause to consider the impact of the Indian Civil Rights Act on tribal sovereignty comfortably assumed that the Act clearly intended to provide for federal forums for the adjudication of grievances against the tribal governments.[4] The decision in *Martinez*, however, means that individual Indians with complaints against their tribal leaders or regulations have no recourse to a federal court for adjudication of their rights and must instead remain within the jurisdiction of the tribal courts.

The case began when Julia Martinez and her daughter, individually and as representatives of a class, brought an action against the Santa Clara Tribe for declaratory and injunctive relief against the enforcement of a 1939 tribal ordinance that denied tribal membership to all children of Santa Clara women who married nonmembers of Santa Clara Pueblo. Yet the same or-

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1. Case law establishing tribal sovereignty began in 1832 with Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

2. United States v. Martinez, 540 F.2d 1039 (10th Cir. 1976). The court held that the Indian Civil Rights Act provides for federal jurisdiction in intratribal civil disputes and that the tribes are compelled by the fourteenth amendment to observe equal protection and due process requirements, despite tribal claims of sovereign immunity.

3. 436 U.S. 49 (1978).

4. *See, e.g.*, Spotted Eagle v. Blackfeet Tribe, 301 F. Supp. 85 (D.N.M. 1975); Dodge v. Nakai, 298 F. Supp. 17 (D. Ariz. 1968); Jones, *Should Indians Have A Cause of Action Under 42 U.S.C. § 1983?*, 3 AM. L. REV. 183 (1975).

dinance allowed tribal membership to all children of Santa Clara *men* who married outside of the pueblo. Martinez contended that the 1968 Indian Civil Rights Act prohibited such discrimination as a denial of equal protection and due process.

The plaintiffs claimed specifically the denial of three categories of rights: political (nonmembers are not allowed to vote or participate in secular duties), material (nonmembers are denied land and irrigation water use rights as well as tribal pecuniary benefits), and residential (nonmembers are technically not allowed to continue living on the reservation once the Santa Clara mother dies). The plaintiffs further contended that the economic considerations that prompted the original criteria for membership were no longer viable.

Although the district court[5] and the court of appeals[6] differed in their decisions on the merits, neither had difficulty in finding that there was in fact jurisdiction. The defendants' motion to dismiss for lack of jurisdiction at the district court level was denied on two occasions; the court first found that cited precedent in favor of such dismissal was based on situations arising prior to the enactment of the Indian Civil Rights Act, and then found that the Act allowed for federal jurisdiction over intratribal controversies previously not within federal purview. The court of appeals affirmed jurisdiction under 28 U.S.C. § 1343(4) for actions under the Act, noting that said Act was intended to protect tribal members from misuse of tribal authority and, as such, must have the power to implement such protection in order to avoid making the Act "a mere unenforceable declaration of principles."[7]

On reaching the merits, the district court expressed its reluctance to rule on cultural survival values, and held that the ordinance of 1939 employed traditional criteria in regulating membership and as such did not violate the provisions of the Act. Looking to the legislative intent, the court found that Congress did not intend to grant constitutional guarantees of due process and that, therefore, the Act should not be used to invalidate tribal membership ordinances based on traditional values.

The court of appeals also looked into legislative history to determine whether the rights enumerated in the Indian Civil Rights Act were coextensive with constitutional rights of equal protection and due process. The court found that the purpose of

5. United States v. Martinez, 402 F. Supp. 5 (D.N.M. 1975).
6. 540 F.2d 1039 (10th Cir. 1976).
7. *Id.* at 1042.

the original bill (and thus the Act) was to confer upon tribal members the fundamental rights enjoyed by all other Americans. Noting conspicuous omissions (*e.g.*, there was no provision prohibiting the establishment of a religion), the court concluded that Congress was obviously aware of traditional Indian cultures and concerns, and reserved only such basic rights to tribal members as were considered necessary without undermining tribal law. The court than held that fourteenth amendment standards, though not applicable with full force, were persuasive to the degree that Santa Clara's interests in discriminating on the basis of sex were not compelling.

Discussion of its rationale led the court into examination of the motivation and history of the Ordinance of 1939. Prior to its adoption, intratribal marriages were handled on an individual basis; the ordinance was developed in response to economic considerations of a growing community, fearful that an increasing population would put too much demand on the land and would decrease individual shares. This is no longer an applicable consideration for the tribe. Several alternative methods of determining membership were pointed out by the court, which did not feel compelled, therefore, to regard the ordinance as an embodiment of traditional values and heritage.

The Supreme Court did not even reach these issues, however. Justice Marshall, writing for the majority,[8] held that Indian tribes are sovereign nations and, as such, are barred from suit by immunity that cannot be waived except by express legislative enactment. The Indian Civil Rights Act was held not to constitute such a waiver.

In discussing precedent, the Court noted that constitutional provisions did not operate against the tribal governments prior to the Act. The Court, in its reading of the Act's legislative history, concluded that omissions as to remedies available to tribal members (against their respective tribes) were deliberate, and the congressional policies regarding self-determination supported this reading. Furthermore, the Court indicated that tribal courts and even nonjudicial tribal institutions have traditionally been available for redress of injuries, thus making federal judicial intervention unnecessary.

Justice White's dissent indicated his belief that federal jurisdic-

8. Justice Marshall wrote the majority opinion; Justice Rehnquist joined in parts I, II, IV, and V of the Court's opinion. Justice White dissented. Justice Blackmun took no part in the consideration or decision.

tion was conferred by the Act and that Congress did not intend to deny a cause of action to enforce the very rights which it simultaneously granted. He further felt that the very nature of the Santa Clara government—that is, the tribal council's embodiment of both legislative and judicial powers—prevented the forum from being a realistic and practicable means of redress for its members.

A detailed analysis of *Santa Clara Pueblo v. Martinez* is useful in understanding the current status of tribal sovereignty and in attempting to discover an appropriate perspective for evaluation and discussion of the implications for future tribal and federal activity. Although the Supreme Court did not rule on the merits of the case, its discussion of precedent and legislative intent brought it to a consideration of traditional tribal concerns and potential congressional involvement. The Supreme Court decision, for the time being, controls the future of tribal sovereignty and sets the federal policy in relationship to the tribes.

Analysis

> We are of the same opinion with the people of the United States; you consider yourselves as independent people; we, as the original inhabitants of this country, and sovereigns of the soil, look upon ourselves as equally independent, and free as any other nation or nations. This country was given to us by the Great Spirit above; we wish to enjoy it, and have our passage along the lake, within the line we have pointed out.
>
> Joseph Brant, 1794

In its efforts to address the issue of whether the Indian Civil Rights Act authorizes federal intervention in civil actions against the individual tribes, the Supreme Court traced briefly the history of federal-tribal relationships, beginning with *Worcester v. Georgia*,[9] which established that "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government."[10] In *Worcester*, the state of Georgia claimed jurisdiction within Cherokee boundaries, arresting and imprisoning a non-Indian who had tribal permission to reside on the land. Chief Justice Marshall's opinion, denying Georgia jurisdiction, characterized tribal powers as

9. 31 U.S. (6 Pet.) 515 (1832).
10. *Id.* at 559.

reserved, not created, and went on to assert the nature of tribal sovereignty as independent of state control and power. Felix Cohen elaborates:

> Perhaps the most basic principle of all Indian law, supported by a host of decisions . . . is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, *delegated* powers granted by express acts of Congress, but rather *inherent* powers of a limited sovereignty which has never been extinguished.[11]

The Supreme Court in *Martinez* further recognized that "[a]s separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."[12] In *Talton v. Mayes*,[13] the Court held that the fifth amendment did not operate as a restriction upon the powers of tribal governments; this decision was subsequently extended to exempt tribal governments from compliance with certain other amendments.[14]

One of the characteristics of sovereign powers is their immunity from suit, long recognized as extending to Indian tribes.[15] *Talton* noted the congressional authority to modify or even eliminate this immunity and right to self-government,[16] but the Supreme Court acknowledged that "'without congressional authorization,' the 'Indian Nations are exempt from suit.' *United States v. United States Fidelity & Guaranty Co.*, *supra*, 309 U.S., at 512, 60 S.C. at 656."[17]

The Indian Civil Rights Act was, according to the Supreme Court, just such a congressional authorization, intending to impose certain guidelines upon the tribes; however, the Court held that "[n]othing on the face of Title I of the ICRA purports to

11. F. COHEN, FEDERAL INDIAN LAW 122 (1942) (emphasis added).

12. 436 U.S. 49, 56 (1978).

13. 163 U.S. 376 (1896).

14. *See, e.g.*, Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967) (due process clause of the fourteenth amendment).

15. Puyallup Tribe, Inc. v. Washington Dep't of Game, 433 U.S. 165 (1977); Turner v. United States, 248 U.S. 354 (1919).

16. 163 U.S. 376, 380 (1896). Congress has the constitutional authority to deal with the tribes, expanding or modifying their powers as Congress sees fit, *e.g.*, the Major Crimes Act and the Indian Reorganization Act. The Supreme Court in *Martinez* notes that, while Congress did not confer federal jurisdiction through the vehicle of the ICRA, it certainly could have done so.

17. 436 U.S. 49, 58 (1978).

subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief."[18]

In next addressing the issue of whether an officer of the pueblo would be protected by this tribal immunity, the Court weighed policy considerations characterized in part by the decision in *Cort v. Ash*.[19] Here, a test was proposed that would help determine if a cause of action, not specifically provided for by statute, could be inferred. Obviously, for the federal courts to agree to exercise jurisdiction over tribal officers acting in behalf of and in accordance with the rules of a tribe would be to undermine tribal authority. Out of deference both to tribal and to congressional powers, the Court expressed its intentions to "tread lightly in the absence of clear indications of legislative intent."[20] An analysis of the Indian Civil Rights Act failed to persuade the Court that federal jurisdiction was required in order to implement the Act. In fact, the Court noted that "the structure of the statutory scheme and the legislative history of Title I suggest that Congress' failure to provide remedies other than habeas corpus was a deliberate one."[21]

The purpose of the Act was twofold: to protect individual Indian citizens from infringement of their rights by the tribal governments, but also to promote Indian self-determination. The latter policy has a solid foundation in both judicial decisions and legislative enactments. Congressional commitment to Indian self-government is demonstrated within the Indian Civil Rights Act itself, which provides only for *selected* rights and safeguards in recognition of "the unique political, cultural, and economic needs of tribal governments."[22] In a footnote to its decision, the Court pointed out the results of congressional selectivity:

> The provisions of § 1302, . . . differ in language and in substance in many other respects from those contained in the constitutional provisions on which they were modeled. The provisions in the Second and Third Amendments, in addition to those of the Seventh Amendment, were omitted entirely. The provision here at issue, § 1302(8), differs from the constitutional Equal Protection Clause in that it guarantees "the

18. *Id.* at 59.
19. 422 U.S. 66 (1975).
20. 436 U.S. 49, 60 (1978).
21. *Id.* at 61.
22. *Id.* at 61-62.

equal protection of *its* [the tribe's] laws," rather than of "*the* laws."[23]

The dual purposes of the Act are often at odds with each other, and the Supreme Court was very cautious about choosing one at the expense of the other. To create a federal cause of action against the tribes not only would undermine the tribal authority but also "would impose serious financial burdens on already 'financially disadvantaged' tribes."[24] Neither of these alternatives is in the congressionally expressed interest of promoting Indian self-determination. The Court decided that such a federal cause of action was unnecessary since both tribal courts and non-judicial tribal institutions have been recognized as effective and competent forums for litigating internal tribal affairs in the past.

Although Julia Martinez was unsuccessful in her invocation of tribal remedies, there is no doubt that they were available to her and that she did in fact have a number of opportunities to appeal, not only to the tribal council but also to the entire community of Santa Clara. The judicial system of the tribe consists of an annually elected governor and the tribal council. This body listens to both sides of the problems brought before it; interested parties, similar to our amicus curiae, are allowed to present their opinions as well. The final decision is then made.[25]

Julia Martinez first approached her representative to the council, asking him to take up the issue of membership criteria; her representative refused. Martinez and her supporters then petitioned the tribal council and were successful in convening the entire community. The Santa Claras, as a body, voted against changing the Ordinance of 1939. Martinez then attempted to have her Navajo husband enrolled within the Santa Clara Tribe. Although her efforts were unsuccessful, Martinez had several auditions with her representatives, the governor, and the tribal council.[26] The Supreme Court did not discuss Martinez's exhaustion of tribal remedies (previously held by lower courts to be a prerequisite to invocation of federal jurisdiction[27]), since it deter-

23. *Id.* at 63 n.14.

24. *Id.* at 64.

25. Note, *Constitutional Law: Santa Clara Pueblo v. Martinez: Tribal Membership and the Indian Civil Rights Act*, 6 AM. IND. L. REV. 205, 215 (1978) [hereinafter cited as Note].

26. 402 F. Supp. 5, 11 (D.N.M. 1975).

27. *See, e.g.*, Morigeau v. Confederated Salish & Kootenai Tribes, No. CV-77-25-M (D. Mont. 1977) (ICRA requires exhaustion of tribal remedies unless they are inadequate or resort to them would be futile).

mined that tribal forums presented appropriate and ample opportunities to seek resolution of intratribal disputes.

The Court's unwillingness to find a federal cause of action under the Indian Civil Rights Act was further reinforced by its perusal of the legislative history, which indicated congressional intent to allow for habeas corpus relief as the exclusive review mechanism authorized under the Act. The Court noted that "Congress considered and rejected proposals for federal review of alleged violations of the Act arising in a civil context."[28] Many tribes were strongly antagonistic, not merely to the review power, but to the Act as a whole,[29] and a responsive Congress eliminated the provision for suit by the Attorney General as well as declining to authorize the Secretary of the Interior to review intratribal civil actions.[30]

Tribal sentiment about the Bill of Rights has frequently been adverse. The Pine Ridge Sioux, for example, rejected a proposition that would have extended the guarantee of basic rights to their tribal members. As the vice chairman of the Lower Brule Sioux Tribe testified: "The barrier seems to be getting across to these people an understanding of what the devil the Bill of Rights is. If they don't know what it is, they are not going to adopt it."[31]

In a later Senate subcommittee hearing, a spokesman for United Pueblos offered an explanation of the unwillingness of many tribal people to adopt the rights which, for Anglo-Americans, are cherished and vigorously protected. It might appear that the barrier arises not so much from a lack of understanding as from a lack of desire for the rights.

28. 436 U.S. 49, 67 (1978).

29. At Senate subcommittee hearings in 1969, members of the southwestern tribes expressed their reasons for disliking the bill of rights forced upon them. Such law is alien to traditional ways of thinking and living, and many Indians were offended at attempts to infringe upon tribal sovereignty. The tribes also were afraid not only of impending destruction of traditional modes of governing but of the influx of non-Indian lawyers and legal standards. Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of ICRA*, 20 S.D. L. REV. 1, 42 (1975).

The other side is summarized by the Chairman of the Mescalero Apache Tribe: "every Indian is opposed to the Indian Civil Rights Act . . . until he has been screwed by his tribal council." De Raismes, *The Indian Civil Rights Act of 1968 and the Pursuit of Responsible Tribal Self-Government*, 20 S.D. L. REV. 59, n.1 (1975).

30. 436 U.S. 49, 67-68 (1978).

31. *Hearings before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, Pursuant to S. Res. 260*, 87th Cong., 2d Sess. (June 1963), p. 649.

> We have learned, through many centuries, what is best for us, and we hope that we may be allowed to follow the system which we have found best suited to our needs. . . . We believe we understand, better than non-Indians, the background and traditions which shape Indian conduct and thinking, and we do not want so important a matter to be tried by those who are not familiar with them. . . . Pueblo officials are mindful of their people and careful consideration is given to the rights of the accused. Moreover, because we are not hedged about by the trappings of the white man's courts and the possibilities of the miscarriage of justice by lawyers who often succeed in defeating justice by forensic skill and adroitness, substantial justice is done and without resort to the delays characteristic of non-Indian courts.[32]

Congress seemed, in many ways, aware of these differences in social values[33] and may have considered that adjudication under the Indian Civil Rights Act "will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts."[34]

Although the Court accepted the customary recognition of tribal courts as appropriate and competent forums for settling intratribal disputes, it did, in the final paragraph of the majority opinion, reaffirm the congressional authority to enact law that would bring tribal cases within the purview of federal courts.

> But unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.[35]

Justice White, in his solitary dissent, did not find such a restriction upon the courts, arguing that a private cause of action against the tribe was not only consistent with legislative purpose but in fact "necessary for its achievement."[36] Although White

32. *Hearings before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, on S. 961, S. 962, S. 966, S. 967, S. 968, and S.J. Res. 40 to Protect the Constitutional Rights of American Indians*, 89th Cong., 1st Sess. (June 1965), pp. 352-53.

33. 436 U.S. 49, 62-63 nn.12, 13, 14 (1978).

34. *Id.* at 71.

35. *Id.* at 72.

36. *Id.* at 80.

agreed that Congress was concerned with the encouragement of tribal self-determination, he did not feel it necessarily followed that federal courts were prohibited from enforcing the provisions of the Indian Civil Rights Act.[37]

> The fact that a statute is merely declarative and does not expressly provide for a cause of action to enforce its terms "does not, of course, prevent a federal court from fashioning an effective equitable remedy," *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 414 n.13, 88 S.Ct. 2186, 2190 20 L.Ed.2d 1189 (1968) . . . .[38]

Justice White's further dismay was with what he believed to be the unrealistic and ineffective reliance upon tribal forums as appropriate authorities for adjudicating tribal grievances. To suggest that the tribal council (judicial) is the realistic place to seek redress against the tribal council (legislative) for wrongs committed under the Indian Civil Rights Act is, for White, to ignore congressional intent. His analysis of the Act and its history led him to conclude "that Congress did not intend to deny a private cause of action to enforce the rights granted . . . ,"[39] and therefore he was willing to proceed to the merits.

An evaluation of the majority opinion in *Martinez* necessarily requires a look at its immediate impact as well as its long-range implications. These are best viewed within a framework that acknowledges the various circumstances that affect the coexisting legal systems of the federal and tribal governments. As legal anthropologist Pospisil explains, "any penetrating analysis of law of a primitive or civilized society can be attained only by relating it to the pertinent societal structure and legal levels, and by a full recognition of the plurality of legal systems within a society."[40]

Evaluation

> I will not tell you a lie—I am going to tell the truth. You love your country—you love your people—you love the manner in which they live, and you think your people are brave. I am like you, my Great Father, I love my country—I love my people—I

37. *Id.* at 81-82.
38. *Id.* at 73-74.
39. *Id.* at 74.
40. POSPISIL, ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY 126 (1971) [hereinafter cited as POSPISIL].

> love the manner in which they live, and think myself and warriors brave. Spare me then, Father; let me enjoy my country . . . .
>
> Petalesharo, 1822

In order to evaluate the impact of the Indian Civil Rights Act on the Santa Claras and other Indian tribes, it is necessary to look into the structure of their community makeup, their subgroup legal system. When alien systems are superimposed upon a native system, a basic understanding of the two is required in order to speculate as to the results.

Legal systems, whatever their form, develop in response to a necessity for order within a society and subgroups of the society. Existing legal options are not always satisfactory, and need for justice and stability creates pressure for the development of new channels for dispute settlement.[41] Whether the development of legal systems is seen as a response to chaos or whether the development of societal activity is seen as a response to inadequate legal strictures, the resultant systems function to resolve disputes, punish offenses, and generally stave off the disorder that challenges their very existence.[42] Ehrlich, a legal sociologist, points out the interrelation between the rules of conduct and a society's vitality.

> Every human relation within the association, whether transient or permanent, is sustained exclusively by the rules of conduct. If the rules cease to be operative, the community disintegrates; the weaker they become, the less firmly knit the organization becomes. The religious communion dissolves if the precepts of religion lose their validity. The family breaks up if the members of the family no longer consider themselves bound by the order of the family.[43]

In discussing membership criteria and, specifically, the gender-based discrimination claimed by Martinez, we must consider traditional Santa Clara attitudes towards exogamy. As a patrilocal society, dependent upon a strong sense of community for its survival, Santa Clara has always been antagonistic to the idea of marriage outside of the tribe.

41. *See* Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998 (1979).

42. POSPISIL, *supra* note 40, at 118.

43. EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 40 (W. Moll, tr. 1936) [hereinafter cited as EHRLICH].

> Even when no ceremonial ties are involved, there is opposition to people moving away. A single family, one person even, is a loss and, besides, may start a migratory trickle. Town endogamy is one expression of this feeling. Girls in particular are made to feel that they should not marry out. A Sia girl wanted to marry a Jemez man and live at Jemez. "If she marries him, some day she may not be found," said the girl's father, "just as it happened once when a Santa Clara girl left to marry a San Juan man. That Santa Clara girl went into the hills and never came back."[44]

Marriages with non-Pueblos or non-Indians are even more undesirable, a common belief being that, if you marry a Mexican, an Anglo, or a Navajo, after your death you will turn into, respectively, a mule, horse, or other animal.[45] This intertown antagonism extends to the point of blaming other tribal groups for one's own misfortunes. Belief in witchcraft is prevalent, even today, and suspicion of witchcraft running amok in neighboring towns is not uncommon.[46] It is not surprising then that many Indian communities so vehemently oppose matrimonial ties with nonmembers.

This sort of consideration may seem at first to be of ethnology, not of law; however, though a discussion of witchcraft is not obviously related to the Bill of Rights, it does have its place. Legal systems are not always, as many legal anthropologists and sociologists point out, formulated in the mode to which we have become accustomed.

> Just as the technical expert in iron construction, when speaking of iron, is not thinking of the chemically pure substance which the chemist or the minerologist refers to as iron, but rather of the chemically very impure compound that is used in iron construction, so the jurist does not mean by law that which lives and is operative in society as law, but, apart from a few branches of public law, exclusively that which is of importance as law in the judicial administration of justice.[47]

A large part of our present concern is with this "living law," but it is important to recognize that there are different manifesta-

44. 1 PARSONS, PUEBLO INDIAN RELIGION pt. 1 (1939), p. 7 [hereinafter cited as PARSONS].

45. *Id.* at 44.

46. *Id.* at 12.

47. EHRLICH, *supra* note 43, at 10.

tions of law, arising in response to different needs, growing into different forms. In his investigation of several subgroups, Pospisil found that, despite such differences:

> The decisions of the leaders of the various subgroups bore all the necessary criteria of law (in the same way that modern state law does): the decisions were made by leaders who were regarded as jural authorities by their followers . . . ; these decisions were meant to be applied in all "identical" (similar) cases decided in the future . . . ; they were provided with physical or psychological sanctions . . . , and they settled disputes between parties . . . .[48]

Such decisions are not always readily recognizable as bona fide legal controls though they function just as do sophisticated modes of jurisprudence. Everyone is a member in a number of groups and subgroups and is subject to the varying laws and procedures of each. This multiplicity of legal systems, each with its own loyalties, purposes, and regulations, is the source of many of the problems arising between federal and tribal societies.

Certainly, it is the basis of the problem in *Martinez*. Although sex distinctions in kinship determinations are said to be less important among the Santa Clara than among certain other tribes,[49] women's roles in ceremonial life are comparatively minor, "and the most precious things, fetishes, songs, prayers, and myths are usually possessed by men."[50] In *The Tewa World*, written by a Santa Clara anthropologist, the finishing rites (initiation) for young boys is described, and then:

> The meaning of the finishing rite for girls, on the other hand, is more limited. They are finished, as one informant summarized it, "only so that they will know, someday when they get married, what their husbands mean when they say they have to attend to kiva duties." This is the only time in their lives that they will even get into the antechamber, for they may never impersonate the gods.[51]

Traditionally, because of patrilocal structures, a Santa Clara woman is expected to move to the home of her husband. This, as we have seen, frustrates the tribe's desire to stay together. If,

48. POSPISIL, *supra* note 40, at 106.
49. DOZIER, THE PUEBLO INDIANS OF NORTH AMERICA 165 (1970).
50. PARSONS, *supra* note 44, at 40.
51. ORTIZ, THE TEWA WORLD 43 (1969).

however, the woman remains in Santa Clara with her outsider husband (as was the case when Julia Martinez married a Navajo, member of a matrilocal society which expects a man to move to the house of his wife), the most important religious figure in the household—the man—will be a "profane" person, a nonparticipant in the sacred (thus the only "real") world. He will be unavailable to his children for religious instruction and discipline in the Santa Clara ways.

Although there is reference in the court of appeals opinion to the effect that in the past children of Santa Clara women (who had married outsiders) were occasionally admitted to the pueblo,[52] these cases were decided on an individual basis. Such a concession was uncommon and occurred only when the governing factor of the pueblo weighed the various considerations and decided that admission of the particular children was not harmful to social and religious life. The court of appeals seemed to feel that this was adequate reason to allow admission to all children of Santa Clara women, that discrimination was not "traditional" because it was not unbending. A more realistic appraisal would be to recognize the compelling tribal interests in maintaining its integrity and then marvel at the flexibility and fairness exhibited by the individualized approach of the tribal council. Each case was decided on its unique merits. The fact that some children were admitted while Martinez's were not is less an indication of sexual discrimination than an indication that circumstances surrounding her particular case were such as to deny the wisdom of extending membership to Julia Martinez's family. The distinction is not an arbitrary exercise of bias, based as it is on numerous important social principles evolved in response to the ordering characteristic of the particular people.

In the sense that the tribe has developed and accepted such principles as controlling, it is law. Anglo-American reluctance to appreciate the Santa Clara concept of order and control may stem from a distrust of alien norms and from a belief that United States law is the only applicable law for dealing with its citizens. But, "[i]t is not an essential element of the concept of law that it be created by the state, nor that it constitute the basis for the decisions of the courts or other tribunals, nor that it be the basis of a legal compulsion consequent upon such a decision."[53]

52. 540 F.2d 1039, 1047 (10th Cir. 1976).

53. EHRLICH, *supra* note 43, at 24.

The fact is that, for certain subgroups, within certain situations, state law (or federal law, in this context) is not always the controlling and most successful of the various legal systems at work. Though it might be the most all-encompassing, it is not always the law that is followed. This becomes increasingly obvious—and increasingly troublesome—when dealing with social and religious norms which are integrated into the conflicting legal systems.

Ehrlich, in discussing social and state sanction of subgroup norms, claims that it is incorrect to say that competing subgroup legal systems are actually in conflict. "To a certain extent," he says, "the interests of the dominant groups must coincide with the interests of the whole association, or at least with those of the majority of the members of the association; for if this were not so, the other members would not obey the norms established by the dominant group."[54] The problem with this statement, however, in relation to the particular circumstances before us, is that the co-extant systems of the federal and tribal governments resulted from a forced application.

New legal levels are created often by evolution or formal agreement; a third method involves "conquest of one group by another and a simultaneous retention of the former groupings as segments of the new overall political structure,"[55] as Pospisil explains. The imposition of the dominant system, forced upon a significantly divergent system, necessarily will entail conflicts. Llewellyn's and Hoebel's studies among the Cheyenne show that the differences in customs and perspectives may lead to "utterly and radically different bodies of 'law' . . . ."[56] Many of these are not easily recognizable as such within a framework of traditional American jurisprudence, but that they exist, function, and conflict can hardly be denied.

There are similar conflicts between federal law and state law, even between an individual family's law and state law; although one group might say a rule is constitutional and the other disagree, though one group might condone an activity which the other decries, their rules and decisions each qualify as parts of integral legal systems. To ignore this is to be hampered by unrealistic expectations and ethnocentric moralities.[57] Of course,

54. *Id.* at 61.
55. POSPISIL, *supra* note 40, at 121.
56. LLEWLLYN & HOEBEL, THE CHEYENNE WAY 28 (1941).
57. POSPISIL, *supra* note 40, at 112.

this is not to say that all subsystems can be integrated into or honored by the federal systems; the point is merely that they coexist, whether in harmony or in conflict. Joseph Goldstein, in an essay on human dignity and criminal procedure, discusses a similar problem in coping with the standards of individuals' or minority subgroups' concepts of justice as opposed to the societal standards of the system in control.

> I have not meant to imply that the law is unambivalently committed to deferring to the dignity of all its citizens as human beings. Rather it is its ambivalence which prompts or requires clarification of what it authorizes and does in the name of, but often not in the service of, human autonomy.[58]

The Supreme Court of the United States, faced with the problems inherent in the multiplicity of legal systems, resolved the issue by recognizing the areas of conflict and avoiding them. Although the Court did not discuss at length the characteristics of tribal customs, it recognized the superior ability of tribal courts to deal with such customs and traditions.[59]

Sensitive to the differences and subtleties of the Santa Clara system, the Court relied upon the effectiveness of intratribal jurisdiction for the satisfaction of claims. To have decided otherwise and to have found federal jurisdiction in intratribal matters would be to ignore a basic, though unwritten, factor in determining such jurisdiction. Although the Indian Civil Rights Act may or may not have given jurisdiction in the legal sense, the idea of jurisdiction from an anthropological or sociological point of view "means that three, the two litigants as well as the authority, have to belong to the same social group in which the latter wields judicial power (has jurisdiction)."[60] Imposition of federal power in intratribal disputes may not have been readily accepted by tribes, which, in many cases, do not feel themselves to be a part of the same social, religious, historical, legal system as that of the Supreme Court. The presence within the tribes of adequate and more appropriate forums gave the Court the opportunity to avoid the conflict.

The existence of tribal sanctions, as effective if not more so than those imposed by the federal government, works to ensure

58. Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 YALE L.J. 683, 702 (1975).

59. 436 U.S. 49, 68 (1978).

60. POSPISIL, *supra* note 40, at 125.

the protection of individual rights without interfering in the exercise of tribal sovereignty.

> The norms of ethical custom, morality, religion, tact, decorum, etiquette, and fashion would be quite meaningless if they did not exercise a certain amount of coercion. They too constitute the order of the human associations, and it is their specific function to coerce the individual members of the association to submit to the order. All compulsion exercised by the norms is based upon the fact that the individual is never actually an isolated individual; he is enrolled, placed, embedded, wedged, into so many associations that existence outside of these would be unendurable, often even impossible, to him. . . . It is within his circle that each man seeks aid in distress, comfort in misfortune, moral support, social life, recognition, respect, honor. In the last analysis it is his group that supplies him with everything that he sets store by in life.[61]

It would appear obvious that, to a Santa Clara, compulsion would be most effective coming from within the community, as the center of her/his world. And would it not seem more realistic and desirable for Julia Martinez to conform to the norms of Santa Clara, the source of her existence, than for Santa Clara to be forced to conform to the norms of an alien society to which it owes no debts and which, from a Santa Clara perspective, has been the subject of much antagonism, derision, and heartache over the years?

Some argue that now "customary law is dead," and that traditional values have been lost in the reorganization of the tribal governments in recent years.[62] A test has been proposed that would attempt to weigh tribal autonomy against fundamental human rights, the burden being on the tribe to prove the existence and rationale behind traditional cultural values.[63] The danger in requiring such a balancing test is that the nexus is often difficult to trace, and the factors being weighed are subjective and often culturally idiosyncratic.

> To attempt to characterize those aspects of a culture that are "of compelling interest" from those that are not, appears from this viewpoint an almost impossible task. A cultural distinction

61. EHRLICH, *supra* note 43, at 62-63.
62. De Raismes, *supra* note 29, at 104.
63. *Id.*

> 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.[64]

The Supreme Court's recognition of the difficulty and undesirability of federal adjudication of intratribal problems came as quite a surprise to many federal courts that had previously faced the problems head-on, believing that the Indian Civil Rights Act gave federal jurisdiction over the tribes in civil suits.[65] In the months following the Supreme Court's decision, several reversals and some new decisions have been handed down in an effort to comply with the Court's holding. Many of these cases had originally been brought by individuals against their tribes in an effort to prevent (or seek redress for) alleged tribal election irregularities; the *Martinez* decision was applied retroactively.[66]

The long-range implications are less predictable and more important, no matter which side one takes. Those in disagreement with the Court's decision are quite justified in their unhappiness about the denial of many rights by the tribal governments. Sanctioning of sexual discrimination raises questions of whether any legal system should be allowed to run roughshod over the basic rights of its citizens in the name of cultural preservation. Joseph de Raismes portrays the governing bodies as "disposed to crushing individuals in their collective lumbering toward collec-

64. Note, *supra* note 25, at 214.

65. *See, e.g.*, Laramie v. Nicholson, 487 F.2d 315 (9th Cir. 1973), *aff'd*, Thompson v. Tonasket, 487 F.2d 316 (9th Cir. 1973). See also note 4, *supra*.

66. Sekaquaptewa v. MacDonald, 430 U.S. 931 (1977) (individual can't join into suit between two sovereign tribes); Mousseaux v. Rosebud Sioux Tribe, No. 78-1414 (8th Cir. 1978) (*Martinez* decision applied retroactively in claim for injunction against tribal officials in election proceedings); Stands Over Bull v. Crow Tribe, 578 F.2d 799 (9th Cir. 1978) (repeals earlier decision and dismisses appeal); Crowe v. Eastern Band of Cherokee Indians, Inc., 584 F.2d 45 (4th Cir. 1978) (no jurisdiction over claim that tribal council permitted election irregularities); Cogo v. Central Council of Tlingit, 465 F. Supp. 1286 (D. Alas. 1979) (Tlingit is a tribe and cannot be sued; thorough discussion of rationale); Boe v. Fort Belknap Indian Community, 455 F. Supp. 462 (D. Mont. 1978) (no jurisdiction for suit against tribal court); Wilson v. Turtle Mountain Band of Chippewa Indians, 457 F. Supp. 384 (D. Alas. 1978) (Indian village/council immune from suit); Wisconsin v. Baker, 464 F. Supp. 1377 (W.D. Wis. 1978) (state challenged tribe's ordinance governing fishing rights); Sturdevant v. Wilber, 456 F. Supp. 428 (E.D. Wis. 1978) (distinguished *Martinez* on the grounds that Menominee Restoration Committee (party sued) is merely an interim governing body established by federal act; therefore there are no compelling reasons to prohibit suit); Johnson v. Frederick, Civ. No. A78-2071, slip op. (Mar. 1979) (prisoner cannot sue tribal judge).

tive goals,"[67] while Andra Pearldaughter "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."[68]

Others agree with White's dissent because they feel that the tribal courts are inadequate for adjudication of disputes against the tribe. This is especially true for those Indian people who feel that the hated BIA controls the tribal system in the first place and is certainly not the proper forum in which to bring complaints. To these people, "the veil of tribal sovereignty" provides Anglo America with the means for invisible manipulation of Indian affairs.[69]

The most unfortunate result of the *Martinez* decision is that it does, in fact, allow for the continuance of sexual discrimination within the various tribes. This is particularly offensive to the majority of Americans, instilled as we are with such reverence for our Bill of Rights. The unpleasant spectre of sanctioned discrimination becomes more acceptable, however, when viewed in context. For example, while state and federal governments are prohibited from racial discrimination and the establishment of a religion, Indian tribes have traditionally required both for their continued existence. It is easier to make these exceptions if one understands their applicability to a particular system. Equality and justice according to tribal traditions may not correspond to the Anglo versions of equality and justice, but qualitatively they are comparable.[70]

Despite the difficulties posed by the *Martinez* decision, there are several advantages, not the least of which is to ensure a consistency in federal court rulings which, prior to May 15, 1978, applied different standards of interpretation to the Indian Civil Rights Act.[71] The Court also noted that denial of federal jurisdiction in intratribal disputes would discourage "frivolous and vexatious lawsuits,"[72] thereby easing the pressure on financially weak

67. De Raismes, *supra* note 29, at 100.

68. Note, *Constitutional Law: Equal Protection: Martinez v. Santa Clara Pueblo—Sexual Equality Under the Indian Civil Rights Act*, 6 AM. IND. L. REV. 187, 203 (1978).

69. De Raismes, *supra* note 29, at 101.

70. Note, *supra* note 25, at 216.

71. *Id.* at 210-11.

72. 436 U.S. 49, 67 (1978).

tribes. *Martinez* serves to prevent the waste of money, both tribal and federal, spent in litigation and damages.

The positive effects of the Supreme Court's stand also stem from the reaffirmation of the concept of tribal sovereignty. Not only does this increase the authority of the tribal governments (which has been seriously eroded over the past few centuries), but it also renews tribal confidence in the workability of self-determination policies and gives incentive to the younger members of the tribes to work within their own systems. Though sovereignty may very well mask certain manipulative activities, it is vitally important as the sole source of tribal power remaining to the tribes; to discard the idea of sovereignty as "an unworthy concept"[73] would be foolish—rather like throwing away the trump card just because you don't like the player who dealt it.

The *Martinez* decision ensures at least token respect for differing modes of equality and justice. Faced with their new freedom, and thus the responsibility, to exercise sovereign powers, the tribes may very well take advantage of the opportunity to strengthen tribal forums and to make them even more efficient and competent. There is always the danger of a congressional enactment to remove such power from the tribal courts in the event that the power is poorly exercised, and such a spectre is likely to spur the various tribes into conscientious adjudication and application of their laws.

The *Martinez* decision has also given the Indian tribes a big chance, perhaps their last one, to salvage the remnants of their native legal systems and to develop their governmental powers. It is, in many ways, a landmark decision in the history of tribal law, for it is an acknowledgment and acceptance by the dominant system of the existence of conflicting systems. It is a sign, therefore, to the tribal people that there is a chance for a continued existence of traditional societies, not otherwise possible under policies of assimilation or eradication. If legal systems are the orderings that prevent chaos and destruction, continuance of such systems is requisite to a group's survival. The district court recognized this in concluding its 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

73. De Raismes, *supra* note 29, at 101.

tribal decisions, particularly in the delicate area of membership, for whatever "good" reasons, is to destroy cultural identity under the guise of saving it.[74]

The *Martinez* decision prevented the enforcement of a smothering paternalism that could ruin traditional Indian modes of social, political, and religious life. "A self-governing society must have the power to balance for itself the individual rights of its members vis-a-vis the right of members to live together in a cohesive, autonomous enduring unit."[75] The Supreme Court decision in *Santa Clara Pueblo v. Martinez* has given tribes this control, this chance to endure.

The story of a People is the history of what they are doing. It is the story of their struggle to continue. It is the story of their resistance against that which will take their humanity away. It is their will to win victory for all the People. It is not a brief story and it is not pushed into a dark corner of a book or a newspaper and forgotten. It lives and endures and continues.

Simon Ortiz, 1973

74. 402 F. Supp. 5, 11 (D.N.M. 1975).

75. Werhan, *The Indian Civil Rights Act after Santa Clara Pueblo v. Martinez*, 5 IND. L. REP. M-33 (1978).