AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 9: Liberalism Divided—Equality/Native Americans

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

Julia Martinez was a full-blooded member of the Santa Clara Pueblo who resided on the tribe's New Mexico reservation. In 1941, Martinez married a member of the Navajo tribe. They subsequently had several children. Although those children were raised in the Santa Clara Pueblo community, they had no rights within the tribe. Pueblo law passed by the tribal council in 1939 declared, "Children born of marriages between female member of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo." Martinez brought a class action suit on behalf of all women and children affected by this ordinance, claiming that tribal rules granting membership to the children of Pueblo fathers, but not Pueblo mothers, violated the "equal protection clause" of the Indian Civil Rights Act. The local federal district court ruled against Martinez. Judge Mechem's opinion stated,

> *the equal protection guarantee of the Indian Civil Rights Act should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and therefore should be preserved and which of them are inimical to cultural survival and should therefore be abrogated. Such a determination should be made by the people of Santa Clara; not only because they can best decide what values are important, but also because they must live with the decision every day. Obviously they can and should be the judges of whether a particular rule is beneficial or inimical to their survival as a distinct cultural group.*
>
> *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. Congress has not indicated that it intended the Indian Civil Rights Act to be interpreted in such a manner.*

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That decision was reversed by the Court of Appeals for the Tenth Circuit. After noting, "The Fourteenth Amendment standards do not . . . apply with full force," Judge Doyle continued,

> *They do, nevertheless, serve as a persuasive guide to the decision. The history and decisions teach us that 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.*

The Pueblo rule was inconsistent with this standard. Doyle asserted,

> *It appeared to the governing body of the Tribe that the offspring of mixed marriages threatened to swell the population of the Pueblo and diminished individual shares of the property. If this were the pressing problem it could have been solved without resorting to discrimination by simply excluding the offspring of both sexes where the parent, either male or female, married outside the Pueblo.*

The Pueblo tribal council then appealed to the Supreme Court of the United States. Numerous Native American tribes filed amicus briefs urging the Supreme Court to rule that federal courts had no jurisdiction to

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resolve controversies over the ICRA or that the Pueblo rules were consistent with the equal protection provision of that statute. The brief for the Confederated Tribes of the Colville Reservation asserted,

> *The tribal interest in governing its membership is at least as fundamental as the plaintiff's interest in claiming membership. Contemporary analytical approaches to equal protection under the United States Constitution are inappropriate to Indian tribes. Any rule should give great weight to tribal decision making. Gender distinctions are as valid as blood quantum distinctions so long as they are supported by some reason relevant to tribal values.*

The Carter administration and the American Civil Liberties Union filed briefs urging the justices to find that the Pueblo tribe had violated the rights of the Martinez children. The brief for the Carter administration asserted,

> *the ordinance is not substantially related to the achievement of that important objective. It excludes from membership persons like the Martinez children who are culturally Santa Clarans and live at the Pueblo, while affording membership to persons who may have no ties with the Pueblo culture and live far away from the Pueblo. Nor can the ordinance be explained as the embodiment of a long-standing Pueblo custom or tradition; rather, it was enacted to solve an economic problem facing the Pueblo in 1939. Because other solutions are available that do not involve such invidious discrimination, the ordinance cannot stand.*

Justice Marshall wrote the majority opinion for the Court, which asserted that federal courts did not have the jurisdiction over most claims under the ICRA. Did his ruling that Congress intended habeas corpus to be the only means for challenging tribal decisions, in effect, permit tribes to discriminate by gender because most equal protection claims cannot be raised on a habeas corpus appeal? Why did Marshall, who in other areas of the law was considered a crusader for minority rights, so easily dismiss Julia Martinez's concerns? Was his opinion a straightforward application of the law? Was Marshall more sensitive to the rights of tribal government than the rights of women? Suppose the justices had reached the merits. Should the case have been adjudicated under equal protection clause standards or some standard of protection you think more appropriate to Native American tribes? What is that latter standard and is Pueblo policy consistent with that standard?[1]

JUSTICE MARSHALL delivered the opinion of the Court.

Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. *Worcester* v. *Georgia* (1832). . . . Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations." . . . They have power to make their own substantive law in internal matters . . . and to enforce that law in their own forums. . . . As 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. . . .

. . .

Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess. . . . Title I of the [Indian Civil Rights Act (ICRA)] . . . represents an exercise of that authority. . . . Congress . . . impos[ed] certain restrictions upon tribal governments similar, but not identical, to those contained in the *Bill of Rights* and the *Fourteenth Amendment*. . . . . The only remedial provision expressly supplied by Congress, the "privilege of the writ of habeas corpus" is made "available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. . . . This aspect of tribal sovereignty, like all others, is subject

[1] For an interesting examination of the rights of minorities within minority communities, see Sarah Song, *Justice, Gender, and the Politics of Multiculturalism* (New York: Cambridge University Press, 2007).

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to the superior and plenary control of Congress. But "without congressional authorization," the "Indian Nations are exempt from suit." . . . .

It is settled that a waiver of sovereign immunity "'cannot be implied but must be unequivocally expressed.'" . . . Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief. . . . In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit.

As an officer of the Pueblo, petitioner Lucario Padilla is not protected by the tribe's immunity from suit. . . . We must therefore determine whether the cause of action for declaratory and injunctive relief asserted here by respondents, though not expressly authorized by the statute, is nonetheless implicit in its terms.

In addressing this inquiry, we must bear in mind that providing a federal forum for issues arising under [[the ICRA] constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself. . . . Although Congress clearly has power to authorize civil actions against tribal officers, and has done so with respect to habeas corpus relief in *§ 1303*, a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent. . . .

. . . Not only are we unpersuaded that a judicially sanctioned intrusion into tribal sovereignty is required to fulfill the purposes of the ICRA, but to the contrary, the structure of the statutory scheme and the legislative history of Title I suggest that Congress' failure to provide remedies other than habeas corpus was a deliberate one. . . . .

Two distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-a-vis the tribe, Congress also intended to promote the well-established federal "policy of furthering Indian self-government." . . . *Section 1302*, rather than providing in wholesale fashion for the extension of constitutional requirements to tribal governments, as had been initially proposed, selectively incorporated and in some instances modified the safeguards of the *Bill of Rights* to fit the unique political, cultural, and economic needs of tribal governments. . . . Thus, for example, the statute does not prohibit the establishment of religion, nor does it require jury trials in civil cases, or appointment of counsel for indigents in criminal cases,

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[C]ontrary to the reasoning of the court below, implication of a federal remedy in addition to habeas corpus is not plainly required to give effect to Congress' objective of extending constitutional norms to tribal self-government. Tribal forums are available to vindicate rights created by the ICRA, and *§ 1302* has the substantial and intended effect of changing the law which these forums are obliged to apply. . . . Nonjudicial tribal institutions have also been recognized as competent law-applying bodies. . . . Under these circumstances, we are reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck in providing only for habeas corpus relief.

[Justice Marshall then concluded that the legislative history supported his interpretation of the Indian Civil Rights Act]

By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials, Congress may have considered that resolution of statutory issues under [the ICRA], and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts. . . . [E]fforts by the federal judiciary to apply the statutory prohibitions of *§ 1302* in a civil context may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity.

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JUSTICE BLACKMUN took no part in the consideration or decision of this case.

JUSTICE WHITE, dissenting.

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The declared purpose of the Indian Civil Rights Act of 1968 (ICRA or Act), . . . is "to insure that the American Indian is afforded the broad constitutional rights secured to other Americans." . . . The Court today, by denying a federal forum to Indians who allege that their rights under the ICRA have been denied by their tribes, substantially undermines the goal of the ICRA and in particular frustrates Title I's purpose of "[protecting] individual Indians from arbitrary and unjust actions of tribal governments." . . . Because I believe that implicit within Title I's declaration of constitutional rights is the authorization for an individual Indian to bring a civil action in federal court against tribal officials for declaratory and injunctive relief to enforce those provisions, I dissent.

. . .

. . . We have previously identified the factors that are relevant in determining whether a private remedy is implicit in a statute not expressly providing one: whether the plaintiff is one of the class for whose especial benefit the statute was enacted; whether there is any indication of legislative intent either to create a remedy or to deny one; whether such a remedy is consistent with the underlying purposes of the statute; and whether the cause of action is one traditionally relegated to state law. . . . Application of these factors in the present context indicates that a private cause of action under Title I of the ICRA should be inferred.

As the majority readily concedes, "respondents, American Indians living on the Santa Clara reservation, are among the class for whose especial benefit this legislation was enacted." . . .

The ICRA itself gives no indication that the constitutional rights it extends to American Indians are to be enforced only by means of federal habeas corpus actions. On the contrary, since several of the specified rights are most frequently invoked in noncustodial situations, the natural assumption is that some remedy other than habeas corpus must be contemplated. . . . While I believe that the uniqueness of the Indian culture must be taken into consideration in applying the constitutional rights granted . . . , I do not think that it requires insulation of official tribal actions from federal-court scrutiny.

. . .

The most important consideration, of course, is whether a private cause of action would be consistent with the underlying purposes of the Act. As noted at the outset, the Senate Report states that the purpose of the ICRA "is to insure that the American Indian is afforded the broad constitutional rights secured to other Americans." . . . Not only is a private cause of action consistent with that purpose, it is necessary for its achievement. The legislative history indicates that Congress was concerned, not only about the Indian's lack of substantive rights, but also about the lack of remedies to enforce whatever rights the Indian might have. . . .

. . . Given Congress' concern about the deprivations of Indian rights by tribal authorities, I cannot believe, as does the majority, that it desired the enforcement of these rights to be left up to the very tribal authorities alleged to have violated them. In the case of the Santa Clara Pueblo, for example, both legislative and judicial powers are vested in the same body, the Pueblo Council. . . . To suggest that this tribal body is the "appropriate" forum for the adjudication of alleged violations of the ICRA is to ignore both reality and Congress' desire to provide a means of redress to Indians aggrieved by their tribal leaders.

. . . The extension of constitutional rights to individual citizens is *intended* to intrude upon the authority of government. And once it has been decided that an individual does possess certain rights vis-a-vis his government, it necessarily follows that he has some way to enforce those rights. Although creating a federal cause of action may "[constitute] an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself," in my mind it is a further step that must be taken; otherwise, the change in the law may be meaningless.

. . . As even the majority acknowledges, "we have frequently recognized the propriety of inferring a federal cause of action for the enforcement of civil rights . . . ." For the reasons set out above, I would make no exception here.

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