




10-1977

Santa Clara Pueblo v. Martinez

Lewis F. Powell Jr.

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JAN 24 1977

Court .CA. 7. 10.....

Voted on....., 19...

Argued, 19...

Assigned, 19...

No. 76-682

Submitted, 19...

Announced, 19...

SANTA CLARA PUEBLO, ET AL, Petitioners

vs.

JULIA MARTINEZ, ET AL.

11/15/76 - Cert.

See back
CCA

SG recommends
Grant on 3 issues
(see back)
5/10

Ask
views
of
S.G.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
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Stevens, J.		✓											
Rehnquist, J.			✓										
Powell, J.			✓										
Blackmun, J.		✓											
Marshall, J.			✓										
White, J.			✓										
Stewart, J.			✓										
Brennan, J.			✓										
Burger, Ch. J.			✓										

Ask S.G.
or Ask S.G.
Call for views of S.G.

Included to ~~Army~~
→ Grant
5/10

Interesting quest. as to
extent to which "Indian Civil
Rts Act" is to be construed
like 14th Amend rather than
in light of tribal customs.

There was plain sex
discrimination here that CA 10
found unjustified by tribal
custom.

Preliminary Memo

May 12
January 21, 1977 Conference
List 1, Sheet 2,
3

No. 76-682

SANTA CLARA
PUEBLO

v.

MARTINEZ

Timely

Cert to CA 10
(Barrett, Doyle
& DJ Stanley)
Federal/Civil

The question is whether a tribal membership
ordinance, which provides that children of a "mixed"
marriage between a tribal member and a nonmember shall
be members if the father is a member but not if the
mother is a member, ^{1/} violates the equal protection

Sex -
discrimination

^{1/}
See Appendix.

DISCUSS
An interesting
question of
an Indian tribe's
power to define
its own
membership
in ways that
discriminate
by sex of
parents.
CA 10's

Decision may
well be
right, but
it strikes me
as a close
call. CA

and due process provisions of the Indian Civil Rights Act, 25 U.S.C. § 1302(8).

1. FACTS & DECISIONS BELOW: Petr is an Indian tribe with recognized powers of self-government. Its membership ordinance was adopted by the Tribal Council in 1939 in response to a marked increase in marriages between Pueblo members and nonmembers. Prior to the enactment of the ordinance, membership in the Pueblo for children of mixed marriages had been determined on an individual basis.

Resps are a female member of the Pueblo, married to a nonmember, and her child barred from membership because of the ordinance. Resps sued the Pueblo and its governor on behalf of themselves and others similarly situated, alleging that the ordinance deprives children of female line mixed marriages of certain political, land use, and residential rights^{2/} enjoyed by tribal members, in violation of the provision in the Indian Civil Rights Act that "No Indian tribe in exercising its powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of the laws or deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(8).

2/

These rights include the right to vote in tribal elections, to hold tribal office, to inherit possessory interest in tribal land, and to continue living in the Pueblo after the death of the parent who is a member. Lack of membership does not affect federal benefits accorded Indians generally.

The DC (D. N. Mex.) (Mechem) found jurisdiction under 18 U.S.C. § 1343(4), on the ground that the action here was one brought under an Act of Congress [25 U.S.C. § 1302] "providing for the protection of civil rights." That Act also waived sovereign immunity. The court went on to uphold the membership ordinance under § 1302(8), the equal protection provision of the Act. It reasoned that Congress did not intend for the equal protection standard of the Indian Civil Rights Act to be as stringent as that under the Fourteenth Amendment, and that the standard under the Act does not invalidate traditional membership criteria. The court did not find that this particular discrimination against female line mixed marriages embodied a traditional membership rule, but did find it rooted in the traditional patrilinear and patrilocal organization of Pueblo society.

CA 10 reversed, agreeing with the DC that § 1302(8) is not coterminous with the 14th Amendment's Equal Protection Clause and that Congress intended for the courts to weigh the importance of tribal custom and cultural identity in applying the statute. However, CA 10 pointed out that Congress chose to include some constitutional provisions in the Act (free speech, the Fourth through Eighth Amendments, and equal protection) while excluding others (the Fifteenth Amendment and the establishment clause) out of a concern for tribal cultural identity; thus Congress had already performed some of the balancing of individual liberties against tribal traditions

when it included the equal protection guarantee in the Act. The court found that the Pueblo had not shown how the discrimination here fosters the tribe's cultural survival, noting that the plaintiff child here was reared at the Pueblo, spoke the tribal language, practiced the tribal religion -- and hence in a cultural sense was a tribal member. The court thought that the Pueblo could have adopted means other than the instant sex discrimination to preserve the patrilinear tradition in the tribe and to deal with the economic problems posed by the increase in membership attributable to mixed marriages. The court distinguished several CA decisions upholding a quantum of Indian blood as a ^{on} ~~criterion~~ for tribal membership or office-holding, because of ^{the} ~~the~~ importance of those qualifications in maintaining the "integrity" of tribal membership.

2. CONTENTIONS: Petrs argue that the Act did not intend to waive the tribe's sovereign immunity, that the equal protection clause of the Act requires only that tribal membership rules be administered evenly, and that the instant discrimination is necessary for the cultural survival of the tribe.

3. DISCUSSION: I think the decision below is correct and consistent with the law in other circuits.

There ^a are ~~a~~ response~~s~~ and amici briefs in support of cert from several Indian tribes.

1/12/77

Spiegel

CA, DC opinions in
petn.

ME

APPENDIX

THE 1939 ORDINANCE

December 15, 1939

Be it ordained by the Council of the Pueblo of Santa Clara, New Mexico, in regular meeting duly assembled, that hereafter the following rules shall govern the admission to membership to the Santa Clara Pueblo:

1. All children born of marriages between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo.
2. All children born of marriages between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo.
3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo.
4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances.

5/6/77

The SG recommends that the Court grant cert, to resolve "important questions regarding the interpretation and effect of the Indian Civil Rights Act. He specifically requests review of (1) whether 28 U.S.C. 1343(4) provides a proper jurisdictional base for federal review of claims under the Act; (2) whether the Act implicitly abrogated the sovereign immunity of the Indian tribes; and (3) the proper standard of review of equal protection claims under the Act. The SG notes that the circuits do not agree on the applicable standard.

I think the Court should grant.

CCA

Court
 Argued, 19...
 Submitted, 19...

Voted on....., 19...
 Assigned, 19...
 Announced, 19...

No. 76-682

SANTA CLARA PUEBLO

vs.

MARTINEZ

(Brief filed by the SG at invitation of the Court.)

*SG recommends
 Grant on 3 issues*

Granted

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
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Powell, J.		✓											
Blackmun, J.		✓											
Marshall, J.		✓											
White, J.			✓										
Stewart, J.													
Brennan, J.		✓											
Burger, Ch. J.													

Join 3

Join 3

file

September 20, 1977

No. 76-682 Santa Clara Pueblo, et al v. Martinez, et al

This memorandum will merely identify the issues, as an aid to memory, and will venture no analysis. As I dictate this, I have not looked at the cert memo - which is probably a far better summary than I will undertake at this time.

Santa Clara Pueblo (Tribe) is an Indian tribe of some 1,200 members. It claims a lineage of "at least 700 years as a distinct cultural group". It has been at its present location on the Rio Grande River for some 300 years. The Tribe is based on an official Indian Reservation "with sovereign powers of self government", with a written constitution, a council and a president.

In 1939, and as a response to a marked increase in marriages between tribal members and nonmembers, the Pueblo Tribe Council adopted an ordinance that distinguished between marriages by male members of the tribe and marriages by female members. The ordinance grants tribal membership to "all children born of marriages between male members . . . and non-members . . ." But it precludes membership for "children born of marriages between female members . . . and non-members".

In 1968, Congress enacted the Indian Civil Rights Act, 28 U.S.C. § 1308(3). Subsection (8) of § 1302 provides:

No Indian tribe in exercising its powers of self government shall

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

The named respondent, Julia Martinez, a member of the tribe, married a Navaho who is not a member. Their eight children have been reared within the reservation, speak the Tewa language of the tribe, practice the traditional religion, and - according to CA10 - "the Martinez children are, culturally, members of the Pueblo".

But by virtue of the 1939 tribal ordinance, the children are barred from membership. This results ⁱⁿ ~~from~~ their being deprived of various substantial rights, including those of voting, holding secular office, and "sharing the material benefits of Pueblo membership".

Children of a mixed marriage, where the father is a tribal member and the mother is not, are entitled to full membership and enjoyment of all tribal rights. This discrimination based on the sex of the parent would be invalid under the equal protection clause of the Fourteenth Amendment. The substantive question is whether it also is violative of subsection (8) of the 1968 Act.

Jurisdictional and Immunity Issues

1. The first question is whether federal courts have jurisdiction under 28 U.S.C. 1343(4) over suits alleging violation of the Act of 1968? Both the DC and CA10 held that federal jurisdiction exists where - as here - action is brought under an Act of Congress. Both courts below also agreed that to the extent that the Act of 1968 is applicable, tribal immunity is thereby waived or limited. These holdings are strongly challenged by petitioner, in the briefs of several of the amici, and the SG's memorandum of April 26 indicates that the questions of jurisdiction and immunity are serious ones. The Act of 1968 contains no specific grant of jurisdiction or any express waiver of tribal sovereign immunity.

Although I am not at rest, I am inclined to agree with the courts below. This case invokes an Act of Congress which should be sufficient to establish jurisdiction. And if sovereign immunity could be pled against the Act of 1968, a substantial part of its purpose could thereby be frustrated.

The briefs indicate that the four circuit courts of appeals that have considered the jurisdictional and immunity questions agree with CA10.

Merits

Respondent's brief makes a rather convincing showing, based on the legislative history and particularly the report

of the Senate Judiciary Committee (brief 13), that the Act of 1968 was intended to guarantee substantially the same rights as those of the U.S. Bill of Rights. Respondents agree, however, that although the legal standards of § 1302(8) should be the same as those of the Fourteenth Amendment, application of these standards must be made in the context of "an Indian tribe with distinct cultural traditions and social organization" that differ from the states to which the Fourteenth Amendment applies. This difference concerns identification of the purpose served by the ordinance and a judgment as to whether it is legitimate. Respondent⁵ agrees that the purpose of preserving racial and cultural and racial identity is legitimate, but they deny that the purposes are rationally served by the ordinance. They point out that "male-line children of half or less Indian ancestry, raised away from the Pueblo, knowing nothing of its language, culture, religion or traditions," automatically become tribal members whereas persons such as the children of Audrey Martinez who are culturally members of the tribe in every respect are denied legal membership.

CA10 appears to have applied the compelling state interest standard (Pet. 43a), one that a majority of the Court has never applied to a sex discrimination case. Petitioners contend that the rational basis test is the appropriate standard, and as I read respondents' brief they ^{also} are willing₁

to stand or fall on the "middle-tier" test of Craig v. Boren (br. 28): whether the classification on the basis of gender serves "important governmental objectives and [is] substantially related to achievement of those objectives".

Petr's' brief is particularly strong in supporting the legitimacy of the tribal interest. It also argues that the 1939 ordinance "is simply a written embodiment of preexisting unwritten rule of membership that has been in existence from time immemorial". Brief 9. It is also argued with a good deal of reason - and I believe[✓] authority that I have not checked - that both Congress and the federal courts should leave determination of tribal membership to tribal[✓] law.*

I terminate my dictation at this point - inconclusively. The SG has not yet filed his brief. Based on the April memo, I would expect the SG to urge reversal on one or even all of the three principal issues. There is a fourth issue latent in the case, namely, whether this suit could be maintained against the President of the tribe individually without regard to tribal immunity. I rather doubt, however, whether we reach this issue.

I view the case on the merits as quite close. The preservation of tribal[✓] and cultural identity could best be

*This argument has a good deal of surface appeal. But if membership in the tribe determines whether one enjoys, or does not enjoy, the basic rights apparently sought to be protected by the Act of 1968, the argument loses much of its force.

preserved on a case-by-case basis without regard to the sex of the parent. This, however, could well result in manipulation and discrimination. Another alternative would be to provide that the children of a "non-tribal" marriage would always be denied membership without regard to the sex of the tribal parent. This would have the objection, however, of diluting the strength of an already weakened tribe. These thoughts suggest that the 1939 ordinance is not as wholly irrational as it seems to be on its face.

I will await further briefing, discussing with my clerk, the oral argument - and in all probability - will go to the Conference and await the views of my colleagues who profess to be Indian law experts, notably White and Rehnquist.

L.F.P., Jr.

L.F.P.

ss

Reviewed. 11/28.

1. Juris. Close quest., as Indian Civil Rts Act provides expressly for only H/C relief in Fed Cts. But four CAs have implied a cause of action under § 1302 of Act. Otherwise, there would be no relief other than H/C.

2. Sovereign Immunity. Not expressly waived by Act. But on ~~an~~ analogy of Ex parte Young injunctive relief vs the Tribe is appropriate. We need not reach the Q whether lawsuit may be brought. (p 14, 15)

3. Moritz. The Tribal Ordinance is sex discrimination. Whether the Tribal interest is substantial enough to justify it, in case of - given reluctance of Cts to interfere with Tribal

BENCH MEMO

To: Mr. Justice Powell

From: Jim Alt

self-government. SG would affirm CA 10. Act applies, but more weight is accorded Tribal action than in

November 25, 1977

No. 76-682, Santa Clara Pueblo v. Martinez. normally accorded action by a state.

This case presents the question whether a tribal ordinance (p 3) that bars from membership in the tribe children of marriages between a woman who is a member of the tribe and a man who is not, but that mandates membership for children of marriages between a man who is a member of the tribe and a woman who is not, violates the "equal protection" provision of the Indian Civil Rights Act of 1968, 25 U.S.C. §1302(8). It also presents the preliminary questions whether the DC had jurisdiction to

entertain a suit for the vindication of individual rights under the Indian Civil Rights Act; and whether the suit was barred by the sovereign immunity of the tribe.

I. FACTS AND DECISIONS BELOW.

The named plaintiffs are Julia Martinez and her daughter Audrey Martinez. Julia is a member of the Santa Clara Pueblo tribe ("Pueblo") and is married to a Navajo Indian who is not a member of the Pueblo. Julia and her husband have lived on the Pueblo reservation since their marriage in 1941, and Audrey and their other children speak the Pueblo language, participate in the Pueblo religion, and live on the Pueblo reservation. Since 1946, Julia has tried repeatedly to enroll her children as members of the Pueblo, without success. Denial of membership prevents the children from voting for or holding tribal office, and it prevents their mother from passing her house on the reservation and lands in which she has a possessory interest on to the children.

The Pueblo tribe, which has occupied lands near Sante Fe, New Mexico for some 300 years, organized and adopted a constitution under the Indian Reorganization Act of 1934, 25 U.S.C. §476, in 1935. Art.II, §1 of the 1935 Constitution provides that children of parents both of whom are members of the Pueblo shall be members of the Pueblo; and that, "All children of mixed marriages between members of the Santa Clara pueblo and nonmembers [shall be members], provided such children have been recognized and adopted by the [tribal] council." App.2. Prior to 1939, children of marriages between women who were members of the Pueblo and men who

were not were admitted to membership in the Pueblo on a case-by-case basis.

In 1939 the tribal council of the Pueblo, which exercises both legislative and judicial power and is elected by all members of the tribe over age 18, enacted the ordinance that is at issue here. It provides:

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

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

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

4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances.

Since this ordinance was enacted, no children of marriages between women who are members of the Pueblo and men who are not have been made members of the Pueblo.

The named plaintiffs brought this suit in the DC alleging that enforcement of sections 2 and 3 of the ordinance deprived them and members of their class of rights under 25 U.S.C. §1302(8), which provides:

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

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

The suit named as defendants the Santa Clara Pueblo tribe and its elected governor in his individual and official capacity.

Jurisdiction was asserted under 28 U.S.C. §1343(4), which provides:

The 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 relief under any Act of Congress providing for the protection of Civil Rights, including the right to vote.

The suit sought declaratory and injunctive relief, but not damages.

The DC denied a motion to dismiss for lack of subject matter jurisdiction, relying on cases from three other circuits to establish that jurisdiction was proper under §1343(4) and that sovereign immunity did not bar the suit. E.g., Crowe v. Eastern Band of Cherokee Indians, 506 F.2d 1231 (CA4 1974); Laramie v. Nicholson, 487 F.2d 315 (CA9 1973); Daly v. United States, 483 F.2d 700 (CA8 1973). It held that if exhaustion of tribal remedies was a prerequisite of suit under the Indian Civil Rights Act, plaintiffs had satisfied that requirement.

After trial on the merits, the DC filed an opinion that constituted its findings of fact and conclusions of law. The court stated that defendants had "sought to prove that the [1939] Ordinance was merely the written embodiment of ancient custom, or alternatively, that the Ordinance regulated membership for religious as well as secular purposes." Pet.App. at 21a. The court found that the ordinance did not regulate membership for religious purposes, noting that Audrey Martinez (the daughter) was allowed to participate in the Pueblo religion as fully as if she were a member of the Pueblo. The court thought it was "less clear" whether the ordinance was "an embodiment of

pre-existing ancient Pueblo culture." On one hand, no fixed rule had been enforced before 1939 with regard to children of mixed marriages, and "In that sense, the establishment of any rule must be seen as a break with tradition." But:

On the other hand, the criteria employed in classifying children of mixed marriage as members or non-members are rooted in certain traditional values. It appears that Santa Clara was traditionally patrilineal and patrilocal - in other words, that kinship, name and location of residence were expected to follow the male rather than the female line. These cultural expectations have lost much of their force, but they are not entirely vitiated. The absentee voter lists of the Pueblo show that in 1971, 148 members of the Pueblo lived elsewhere. Of these, 59 were men and 89 were women. In 1973, 143 members lived elsewhere, of whom 59 were men and 84 were women.

Turning to the legal issue, the DC said that other courts "have consistently held that the equal protection guarantee of the Indian Civil Rights Act is not identical to the constitutional guarantee of equal protection. [cites] Instead, the Act and its equal protection guarantee must be read against the background of tribal sovereignty and interpreted within the context of tribal law and custom." At a minimum, §1302(8) "requires that existing tribal law be applied with an even hand." And where tribes have departed from traditional methods of choosing leaders, the courts have imposed one man-one vote requirements under §1302(8). But, the court thought, "§1302(8) should not be construed in a manner that would invalidate a tribal membership ordinance when the classification attacked is one based on criteria that have been traditionally employed by the tribe in considering membership questions." Plaintiffs and defendants agree that the Indian Civil Rights Act should not be construed so as to destroy the

tribe's cultural identity, but plaintiffs argue the ordinance does not rationally further preservation of cultural identity because it bars children like Audrey, who culturally is a Pueblo, from membership while admitting other children who culturally are not Pueblos. But, "Even assuming plaintiffs are correct, 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." That is a decision only the Pueblo can make.

On appeal, CA 10 agreed that the DC had jurisdiction and that sovereign immunity did not bar the suit. It disagreed, however, with the conclusion /that the ordinance did not violate §1302(8). CA 10 first reviewed the legislative history of the Indian Civil Rights Act. It originated as a bill that provided Indian tribes were subject to all the requirements of the Bill of Rights and other pertinent constitutional provisions. In response to protests that the bill would cut too deeply into traditional Indian culture, the Senate subcommittee rewrote the bill to delete its version of the non-establishment clause and the Fifteenth Amendment. At the same time, it retained the guarantee of free exercise of religion over tribal protests. Thus, Congress was aware of the need to balance individuals' rights against tribal autonomy and tradition, and it meant to make some inroads on the latter in favor of the former. But, apart from some general statements, nothing in the

legislative history tells how Congress expected the balance to be struck in particular cases under the equal protection provision of the Act.

Turning to the case law under the Act, the court noted that the equal protection provision has been held not to impose precisely the same requirements as its Constitutional counterpart. In particular, courts have upheld requirements that persons have particular amounts of Indian blood to qualify for tribal membership and office. Thus, although the ordinance here would fall under the Fourteenth Amendment, it does not necessarily fall under §1302(8); for, "The interest of the Tribe in maintaining its integrity and in retaining its tribal cultures is entitled to due consideration. [cite] And where the tribal tradition is deep-seated and the individual injury is relatively insignificant, courts should be and have been reluctant to order the tribal authority to give way." Nonetheless, cases under the Fourteenth Amendment provide at least a starting point for decision.

The difficulty in this case, CA 10 thought, is that the policy reflected in the ordinance here "is of relatively recent origin and so . . . does not merit the force that would be attributable to a venerable tradition." Moreover, there was evidence that the ordinance was designed as an economic measure, to limit the number of persons entitled to shares in tribal property and income. Granting the tribe's strong interest in preserving its cultural identity, the ordinance does not further that goal because it bars cultural Pueblos like Audrey from membership while admitting

persons who are not cultural Pueblos. All things considered, CA 10 thought, "the facts do not support a decision that the Tribe's interest [in the ordinance] is compelling."

II. JURISDICTION.

Petrs' and amici' first argument is that the courts below erred in holding that jurisdiction existed under §1343(4). That statute grants jurisdiction over "any civil action authorized by law [for relief] under any Act of Congress providing for the protection of civil rights . . ." The Indian Civil Rights Act authorizes only one kind of lawsuit. 25 U.S.C. §1303 provides:

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

Thus, if a person were detained in violation of the provisions of the Indian Civil Rights Act that protect against unreasonable searches and seizures, 25 U.S.C. §1302(2), or double jeopardy, §1302(3), or compulsory self-incrimination, §1302(4), or speedy trial, §1302(6), or excessive bail, §1302(7), or jury trial, §1302(10), he could bring an action^{under §1303} to vindicate those rights. But no other section in the Act authorizes suit, so that the other rights declared by §1302 cannot be vindicated by suit under §1343(4).

In addition, a right of action to vindicate those rights should not be implied. First, Congress has provided a remedy for vindication of some §1302 rights in §1303, and that remedy by implication is exclusive. Second, Congress rejected proposals

that would have authorized appeals from convictions in tribal courts to federal court, and that would have empowered the Attorney General to bring criminal and civil actions to vindicate denials of constitutional rights by tribes. Obviously, Congress meant to limit judicial intrusion into the affairs of Indian tribes. Finally, in hearings held after the Act became law, Senator Ervin, the prime mover behind the Act, stated:

] This bill does not provide for the Federal courts to review all the decisions of the Indian courts. In fact, provision for Federal review was in there originally, and at the request of a number of tribes we eliminated that entirely. The only provision in this bill that provides for Federal court interference is writ of habeas corpus, and that probably exists as law now . . .

Senator Ervin

N

This statement confirms the argument that §1303 was intended to be the exclusive remedy for the rights guaranteed in §1302.

Resps and amicus United States reply that a right of action should be implied from the provisions of §1302. First, Congress' evident intent was to protect the rights that it declared in §1302. The habeas corpus remedy of §1303 provides relief only in a limited number of circumstances, and would be ineffective in protecting such rights as freedom of religion, freedom of the press, and due process, where physical detention was not imposed. Moreover, the Senate Report on the Act discussed a series of cases in which federal courts had denied/remedies for violations of constitutional rights by Indian tribes, including one dispute over tribal membership. S.Rep.No.841, 90th Cong., 1st Sess. 9-10 (1967), discussing Martinez v. Southern Ute Tribe, 249 F.2d 915 (CA 10 1957), cert. denied, 356 U.S. 960. The

Resps' answer to Juris

intent of Congress must have been to supply a remedy in such cases.

The United States refines this argument, contending that the guidelines of Cort v. Ash, 422 U.S. 66 (1975) for deciding whether to imply a right of action are satisfied. First, resps are members "of the class for whose especial benefit the statute was enacted," 422 U.S., at 78, for they are full-blooded Indians who have lived on the Pueblo reservation all their lives. Second, although the legislative history is quite sketchy as to Congress' intent in this regard, "the intention to provide [a remedy] seems implicit in the statute's language and its purpose." Third, a private remedy would be "consistent with the underlying purposes of the legislative scheme," 422 U.S., at 78, for no other remedy is available. Finally, this is not a cause of action "traditionally relegated to state law," for absent congressional authorization, the States have no jurisdiction over Indian tribes.

Petr's reliance on Senator Ervin's remarks is misplaced. First, those remarks appear aimed only at the provision in the original bill that would have authorized an appeal from tribal courts to federal courts in criminal cases, which was, as he said, deleted from the final version. Second, because the remarks came after the bill was enacted, they cannot carry much weight.

Finally, all four circuits that have considered whether private suits to vindicate §1302 rights may be brought under §1343(4) jurisdiction have concluded that they can, although at

Four CAs have 11.
implied a right
of action under § 1302

least one district court thinks otherwise. See cases cited to Brief for United States at 21-22 n.19.

Petr's reply to all this by arguing that resps are not without a remedy because the Act remains enforceable in tribal courts and because the Secretary of the Interior has the power to disapprove tribal ordinances that are inconsistent with the Act. Petrs do not claim, however, that either of these remedies is open to resps at the present time.

DISCUSSION: I believe I would follow the four courts of appeals that have implied a right of action from §1302. I find it hard to believe that Congress would have declared all those fine sounding rights without meaning to make them enforceable at the instance of one who is denied them. The Court has followed this course under a number of other civil rights statutes that do not explicitly authorize private actions. E.g., Johnson v. Railway Express Agency, 421 U.S. 454 (1975)(right of action under 42 U.S.C. §1981); Jones v. Alfred Mayer Co., 392 U.S. 409 (1968) (right of action under 42 U.S.C. §1982); Allen v. State Board of Elections, 393 U.S. 544 (1969)(right of action under §5 of Voting Rights Act of 1965). I would not place dispositive weight on Congress' enactment of the §1303 habeas remedy, because that section seems to me simply a counterpart to the various other criminal-process rights enumerated in §1302. I do not think either side can draw much comfort from the legislative history.

The strongest argument against implying a cause of action is that federal courts traditionally have not had jurisdiction over

tribal affairs and that Congress' intent to change that should be expressed more clearly than it is here. Because this argument is more relevant to the question whether the tribe's sovereign immunity has been waived by the Act, I consider it in the next section.

II. SOVEREIGN IMMUNITY.

Petr's and their amici contend that this Court long has held Indian tribes are immune from suit except to the extent that Congress has expressly waived immunity. E.g., Puyallup Tribe, Inc. v. Dept. of Game of Washington, 45 U.S.L.W. 4837, 4839 (1977); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512 (1940). No such explicit waiver can be found here, as resp's own argument in favor of implying a cause of action demonstrates.

Resp replies first, that the committee report and hearings accompanying the Act show Congress clearly was aware that Indian tribes cannot be sued without a congressional waiver of sovereign immunity. What is more important, resp's argue, is that petr's do not distinguish between suits for injunctions and suits for damages. While it may be true that an express waiver of sovereign immunity is required before a suit for damages can be brought, suits for injunctive relief traditionally have been allowed against the sovereign by letting plaintiffs use the fiction of suing the sovereign's agent, Ex parte Young, 209 U.S. 123 (1908), even though sovereign immunity has not been waived. In this case, the governor

of the Pueblo - the chief executive officer of the tribe - is a named defendant, as well as the tribe itself. And the only relief sought is equitable. Therefore, this Court should apply the doctrine of Ex parte Young here. In fact, it should go a step further, and allow the tribe itself to be named as a defendant in a suit for injunctive relief, because Ex parte Young is, after all, just a convenient fiction anyway.

The United States takes about the same line as resps, except that it does not insist that the tribe can be made a named party. All the cases relied on by petrs for the proposition that ^{a tribe's} sovereign immunity must be waived explicitly involve suits for damages, and so are distinguishable. In a footnote, the United States notes that the tribal constitution vests the power to determine the membership status of children of mixed marriages in the tribal council, which was not named as a party. Thus, the Court might deem it necessary to add the council as a party defendant pursuant to Fed. R. Civ. Pro. 21. But, in the United States' opinion this is not necessary, because the relief sought was only an injunction against enforcement of the ordinance, and not admission to the tribe. This relief can be granted against the governor himself, as chief enforcement officer of the tribe.

Petrs answer these arguments by contending that there is no logical justification for holding, in effect, that immunity is waived to suits for injunctive relief but not for damages. Moreover, the doctrine of sovereign immunity of Indian tribes serves

both to recognize the special status of Indian tribes as conquered nations, and to protect the tribes' financial existence. But the tribes' financial existence will be threatened if resps' or the United States' position is accepted, because the cost of defending against suits for injunctive relief will be crippling. In addition, the doctrine of sovereign immunity should be given special deference where, as here, the suit challenges the tribe's right to determine its own membership, because that right is the very essence of sovereignty.

DISCUSSION. Resps appear to have retreated from their position in the CA, which the CA accepted, that the Indian Civil Rights Act works as a waiver of tribal immunity as well as a grant of rights to individuals. I think that what is on everyone's mind is the possibility that future plaintiffs will bring damage suits against Indian tribes under the Act, and no one - petrs, resps, or United States - is willing to argue that those should be allowed. Because there apparently is no authority against resps' and the United States' position, it seems to me that the analogy to Ex parte Young has some merit. Again, it is hard to believe Congress did not mean for some kind of remedy to be available, and a finding of complete immunity would have the effect of foreclosing all remedies.

Sov.
Immunity

7. The one thing that puzzles me is why resps argue that the tribe itself should be able to be named as a defendant. It may be that resps cannot obtain all the relief they seek without that, but as the United States points out, the only relief sought

an injunction against enforcement of the ordinance, and not admission to membership in the tribe. If, as the United States hints, resps should have named the members of the tribal council as defendants in order to get all the relief they seek, resps have no one but themselves to blame. It was they, after all, who convinced the CA that the Act waived immunity altogether; and it is they who now have backed away from that position. If, under their current theory, they should have named members of the council instead of the tribe as an entity, they are the ones who should ask leave to amend their complaint.

I note that the theory now being urged apparently has not been raised in the various courts of appeals that have found jurisdiction to hear/suits under §1302 and §1343(4). Those courts, without much discussion, have concluded that the Act works as a waiver of sovereign immunity and have allowed tribes to be made named parties. I doubt whether the spector of money damages, or the theory of Ex parte Young, was raised in any of those cases.

My own inclination would be to hold that a suit for injunctive relief can be brought to vindicate rights under the Act, without reaching the question of money damages. To hold otherwise would leave resps holding a set of rights without remedies just as effectively as to hold that jurisdiction under §1343(4) did not lie. Neither would I find/petr's ^{convincing} argument that sovereign immunity should be accorded special respect where the tribe's membership policies are challenged. That argument suggests no way to distinguish between suits under the Act challenging membership policies, and

suits under the Act challenging other kinds of tribal policies. The result of accepting the argument, I suspect, would be to immunize a whole range of tribal policies from attack. The argument simply does not limit itself as petrs seem to think.

III. MERITS.

On the merits, there are disputes both as to the appropriate "equal protection" standard to apply under §1302(8), and as to the result of applying whatever standard is appropriate to this set of facts. The latter problem is complicated because the parties cannot agree on what the facts are, and the CA apparently took a different view of them from the DC. This dispute serves to demonstrate the difficulty of gearing results under §1302(8) to particular tribes' traditions; although as will be seen, the most sensible way of reading §1302(8) may require just such inquiry.

A. The most narrow view of the equal protection provision of the Act is advanced by three amici and by petrs' reply brief. The argument is that §1302(8) states that an Indian tribe shall not deny "to any person within its jurisdiction the equal protection of its laws" The substitution of "its" for the Fourteenth Amendment's "the" is said to imply that §1302(8) requires only that tribal laws be applied to everyone in an evenhanded manner, and not that the laws themselves be evenhanded. E.g., Brief for Nat'l Tribal Chairmen's Ass'n at 19-20. This argument is buttressed by reference to a statement in a committee print of the Senate subcommittee, commenting on a version of the bill proposed by

the Interior Department:

The Department of Interior's bill would, in effect, impose upon the Indian governments the same restrictions applicable presently to the Federal and State governments with several notable exceptions, viz, the 15th Amendment, certain procedural requirements of the 5th, 6th, and 7th amendments, and, in some respects, the equal protection requirement of the 14th amendment.

Staff of Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess., Report on the Constitutional Rights of the American Indian, at 25 (Comm. Print 1966)(emph. added). Thus, the equal protection provision of §1302(8) was not intended to be coextensive with that of the 14th Amendment. Finally, amici argue, a number of courts have suggested this is the correct construction of §1302(8).

Resps and the United States reply that no such significance can be attached to the use of "its laws" instead of "the laws" in §1302(8). Amicus' use of legislative history is misleading, because the Interior Dept bill to which the committee print referred only prohibited denial of equal protection to "members of the tribe," which was changed to "persons" in the Act. Thus, although the Interior Dept bill was, as the committee print says, narrower than the Fourteenth Amendment, the Act is not. Moreover, nowhere in the legislative history is there a suggestion that use of "its" instead of "the" was thought to have any significance. And ~~by~~ the only case that lends colorable support to amicus' position actually went off on other grounds. Crowe v. Eastern Band of Cherokee Indians, 506 F.2d 1231, 1237 (CA 4 1974), quoted in Brief for Nat'l Tribal Chairmen's Ass'n at 20. Finally, the

argument cannot be squared with Congress' apparent intent to apply traditional equal protection notions to Indian tribes. If Congress meant to require only equal application of tribal laws, it surely would not have used the language of the Fourteenth Amendment, which imports notions of equality of the laws themselves.

My own view is that this construction is attractive only because it would enable courts to avoid evaluating claims that Indian laws violate equal protection in light of traditional Indian culture, which evaluation will be required under any other standard/adopted. This is no small virtue, but the legislative history lends little support for it. The problem with the legislative history is that it concentrates on the criminal-process guarantees of the Act, and says little about the equal protection provision. However, as was pointed out above, Congress did delete from the Act those provisions, like the establishment-of-religion clause, that it felt intruded too deeply into tribal affairs; yet it retained the equal protection provision. That fact, together with the fact that Congress chose to mirror the language of the Equal Protection Clause in §1302(8), would incline me against holding that §1302(8) requires only equal application of Indian laws that themselves would be unreviewable.

B. The next position, pressed by petrs themselves, is the that/tribal law should be subjected to no more stringent test than a determination of "whether there is any rational relation between the 1939 Santa Clara Ordinance and the cultural and

traditional values of the tribe." Brief for Petrs at 27. There apparently are two branches to this argument. First, Congress and all the courts that have considered §1302(8) agree that it must be applied in light of Indian traditions and culture. In order to insure that proper deference is paid to those considerations, courts should not apply conventional equal protection analysis where "fundamental rights" or "suspect classes" are involved. Second, the discrimination claimed here is sex discrimination, which the Court never has held is subject to strict scrutiny. Scoring an easy point, petrs complain that CA 10 erred in finding the tribe's interests in the ordinance are not "compelling."

Under this test - or, indeed, any stricter test - CA 10 erred in reversing the DC. It ignored the testimony of the governor of the Pueblo, who stated what the effects would be if the ordinance were overturned:

It would tend to destroy the Pueblo as a whole. . . . Without it we would have an influx of people that we don't know who they are. They would come in from all directions; Indians and non-Indians alike. So it would be a destruction on the Santa Clara Indian culture.

Brief for Petrs at 28. In a similar vein, a retired professor of anthropology and expert on Pueblo culture testified:

Well, because of the importance of men in connection with the carrying on of the culture, the training of the children in the socio-religious situation, the culture eventually would break down and be lost.

Id. at 28-29. Resps introduced no expert evidence to contradict

this testimony, which the DC evidently accepted. The CA should not have reversed because it thought the Pueblo culture could survive without the ordinance.

C. Resps and the United States reply that conventional equal protection analysis should be applied under §1302(8), albeit with "special weight . . . given to Indian values in determining whether a particular tribal action meets the established equal protection standard that is applicable" Brief for United States at 35. In this case, the ordinance discriminates on the basis of sex because it bars women, but not men, from passing homes and land to their children, and it discourages women, but not men, from marrying outside the tribe. Under Craig v. Boren, 429 U.S. 190, 197 (1976), "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." And in this case, CA 10 correctly held that this test is not met. (The United States also suggests that, "Since the ordinance deprives the children of Julia Martinez of the political rights that come with membership in the Pueblo, it may demand closer scrutiny as a discrimination that impinges on fundamental rights"; but it does not pursue this argument because it is confident of victory under Craig v. Boren.)

Resps make an elaborate argument to show that CA 10 correctly disregarded the DC's finding that "Santa Clara was traditionally patrilineal and patrilocal - in other words, that kinship, name and location of residence were expected to

follow the male rather than the female line." See Brief for
Resps at 45-49. Resps agree that Pueblo/^{children}take their father's
name, but not that ties of kinship or location are based
primarily on the male line. Petrs' own anthropologist
testified that kinship ties are bilateral to the father's and
mother's family, and the expert upon whom she relied has written
that, "The [Pueblo] household is partially extended to include
relatives on either the mother's or the father's side." Id. at 47.
As for the anthropologist's testimony that the Pueblo is
"patrilocal," that testimony directly contradicted the sources
upon which she relied. Id. at 48. Finally, the DC could not
safely rely on figures indicating that more women than men
moved from the Pueblo after entering mixed marriages, because
those figures must reflect the very discrimination of which
resps complain.

What all this means is that the DC's finding that the
ordinance, although "a break in tradition" in the sense that
no fixed rules had been imposed before, nonetheless was "rooted
in tradition," was clearly erroneous. CA 10 correctly discerned
that the Pueblo's interest in maintaining its traditions and
culture was not served by the ordinance. That ordinance bars
from membership persons who are in the mainstream of the tradition
and culture, and admits persons who are not. The fact that
the Pueblo admitted children of marriages between women who
are members and men who are not from 193⁵~~8~~ to 1939 demonstrates
that the ordinance is no part of traditional Pueblo culture.

The United States takes a similar view of the evidence. It concedes that if the testimony of the governor and the anthropologist, quoted above, is "correct," then "the ordinance would be substantially related to the achievement of an important tribal objective and therefore might well be consistent with the equal protection clause of the Act, its discriminatory impact on respondents notwithstanding." Brief for United States at 39. But the CA was right in holding that the ordinance does not serve the purposes claimed. The ordinance cannot be defended as necessary to preserve the tribe's economic resources, for that objective could be served without discriminating. And the anthropologist's testimony about the importance of the father in passing on Pueblo traditions is belied by the fact that the children in this case are fully assimilated into Pueblo tradition and culture. But, the United States adds, a different conclusion might well be reached on different facts; that is, if a tribe could show that its traditions really were handed down from father to children.

In my view, this is where the case becomes hard. I tend to agree with resps and the United States that it would be simpler, in one sense, to import/^{the}traditional equal protection framework into the Indian Civil Rights Act and then to adjust for the particular interests of tribes in maintaining their culture and tradition. That approach would have the advantage of drawing on a body of law that already has been (more or less) worked out. In addition, whatever adjustments that would have to be made

under resps' and the United States' approach for tribal tradition and culture also would have to be made under petr's proposed "rational relation" test, because courts still would have to identify the particular cultural or traditional interests to which tribal laws would have to be rationally related.

On the other hand, use of the rational relation test might not require a court to delve as deeply into such matters. In particular, I worry about cases where the tribal law could be upheld only if the tribal interest were found to be "compelling." That kind of determination, it seems to me, puts a court in the position of judging the weight of tribal interests in a way that a rational relation test would not; and, as the evidentiary dispute in the instant case demonstrates, courts are not very well equipped to make such judgments.

As I view the instant case, however, it presents a slightly different problem. Here everyone agrees that the asserted tribal interests are important, and the argument is over whether the means-end fit is good. Although it is true that CA 10 rode a little roughshod over the testimony of the governor and the anthropologist on this point, I do not think the DC relied on that testimony. Its view simply was that the membership provisions were not subject to the equal protection provision of §1302(8), and that, I think, is wrong. The children in this case are living proof that the means-end fit of the ordinance is not good, whatever the governor and the anthropologist had to say. For that reason, I tend to doubt

whether the ordinance should pass muster under Craig v. Boren. The question whether the ordinance would pass a rational relation test is closer, because more women leave the Pueblo after marrying non-members and because there is some evidence that Pueblo traditions tend to be handed down through fathers, although they were not in this case.

My tentative conclusion would be to accept the United States' position and to apply traditional equal protection analysis with adjustment for uniquely tribal interests. As I read the cases in the courts of appeals, that is roughly the solution toward which they have been groping. Although I am uncomfortable with the notion of the courts riding herd over tribal laws, it seems inescapable that that is what Congress mandated when it passed the Act. If Congress had meant for a lower standard of review to apply, it would have done well to choose some formulation different from the language of the Fourteenth Amendment. It is a little difficult for me to see how the Court could reach a result that would apply Petrs' rational relation standard in all cases, given the language of §1302(8).

D. Petrs' last-gasp argument is that a tribe's determination of who shall be members, like the nation's determination of who should be citizens, should be immune from judicial review. They point out that the Court upheld an immigration law in Fiallo v. Bell, 430 U.S. 787 (1977) that granted preference to illegitimate children of women who are citizens or resident

aliens, but not to illegitimate children of fathers in the same position, on the theory that Congress retains plenary power over immigration. Similarly, petrs contend, a tribe should retain plenary power over membership.

Resps and the United States reply that Indian tribes, unlike the United States, do not possess complete sovereignty. Here, Congress has decided that Indian sovereignty should be limited by the provisions of §1302 (at least to the extent that individuals can sue for injunctions). Moreover, petrs' analogy is imperfect because these resps are more like persons born in the United States, who automatically become citizens, than like immigrants.

Petrs do not seem to pursue this argument very vigorously, and I would not be inclined to take it very seriously.

CA 10
held Ordinance
violated
Ind. Civil Rts
Act.

Q - Extent to which "Indian Civil Rights Act" is to be construed in accord with E/P analysis rather than in accord Tribal custom & law.

A Tribal Ordinance regulating membership in Tribe grants membership to all children born of marriages between male members & non-members, but denies tribal membership to children born of marriage by female members to male non-members.

CA 10 invalidated Ordinance as sex discrimination ~~is~~ impermissible under the Indian Civil Rts Act. CA 10 ~~and~~ emphasized that there was no showing that the ordinance was rationally related to the purpose of preserving tribal identity. In this case, the woman lived on Res., had married an Indian from another tribe, their children were been raised at Pueblos.

Pelo (Petr

Small Tribe - 1200 members.

Ordinance is written embodiment
of ~~the~~ unwritten Tribal law

Jurisdiction. Statute provides
only for H/C actions.

Sov / immunity. Only Congress
can waive it for a Tribe, &
waiver must be express - can't
be implied. See Puyallup III.

Merits: 14th Amend. was never
intended to be applied to Indians
- nor did Congress intend to
apply its Civil Rts Act of '68 to
same extent as to non-Indians.

Father is parent who instills
culture & beliefs of Tribe in children.

Collier (Rosh)

The children involved are culturally Santa Clara. They speak the language, etc.

If "tradition & culture" of Tribe controls, the Civil Rts Act could never be applicable.

Mrs Martinez could inherit but she cannot - under Ordinance - pass membership to her children.

Leg. history indicates ~~Senate~~ Senate Hought Act could be vindicated in Fed Cts.

If merits are reached, the E/P clause must be applied in light of Tribe's standards & traditions. But here the Ordinance is counter-productive to Tribal tradition.

Relies on Cort v Ash (but 4th requirement as to state custom & law ~~is~~ would support reversal of CA 10 here)

John
Stevens
noted

There is no counter-part in Act to 1983

12/1
76-862 Santa Clara Pueblo

CA 10 did largely ignore testimony
that wording of Ordinance would
destroy the Tribe

x x x

1. Juris - no implied cause of action
(4th ground in Court - not type
of action traditionally allowed)
2. Immunely - now rely on Ex parte
Young.

Then two Qs ^{are} related - results
the same.

3. Merits - Traditions (religion) inculcated
in children by father. ~~to~~

Then was clear action - certified

Reversed 5 Affirms 1
Passed 1
Absent from Conference 1 (C.F.)
Absent from town 1 (Hamm)

76-862 SANTA CLARA PUEBLO v. MARTINEZ

Conf. 12/2/77

The Chief Justice

Absent - will vote later

Mr. Justice Brennan

Reverse

Can ^{not} infer a private cause of action
But cannot infer waiver of immunity.

The Act authorizes only H/C. This makes it difficult to infer any waiver of immunity. Congress may well have thought it improper to get civil its into issues of tribal customs (including religion).

Act is not a nullity. It changes prior rule that Tribal law was not subj. to Const. of U.S.

Mr. Justice Stewart

Not wholly at rest. Extremely difficult case. Tentative views are:

1. Not quest. of juris ^{or fed ct} - as that exists under "§ 1331 or 1343." Q is whether there is an implied cause of action under Act. Think there is an implied cause.
2. As Governor is co-D, don't need to reach Sovereign immunity issue.
3. As to merits, parties agree that Act does not parallel the Bill of Rights. Act should not be ~~con~~ construed to reach issue of determining membership in Tribe. We leave to Congress decisions as to who becomes citizens. This is ~~the~~ analogous

Indian Tribes usually are impoverished - can't afford these suits
No cause of action

Mr. Justice White Affirm

Agree with CA 10 on merits.

There is juris. ~~Consistent~~ Cause of action
can be inferred from Act.

No need to take issue to Sec. of Interior

Mr. Justice Marshall Reverse

Agree with W. J. B.

Indian Tribes should have
right to determine membership

Mr. Justice Blackmun

Absent - Did not sit.

Mr. Justice Powell

Reverend

I'd not imply private cause
of act.

I agree with W. & B. ~~reassure~~
~~in~~ that Act reflects no
intent to afford ~~to~~ any fed relief
other than H/C

I agree with P.S. on merits

Mr. Justice Rehnquist

Reverend

Agrees with W & B

Mr. Justice Stevens

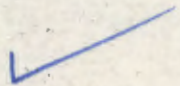
Reverend

Agrees with W & B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 10, 1977



Re: 76-682 - Santa Clara Pueblo v. Martinez

MEMORANDUM TO THE CONFERENCE:

My vote is to reverse.

Regards,

WRB

*Informing came in
as time - Bureau - 11*

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: 28 MAR 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-682

Santa Clara Pueblo et al.,
Petitioners,
v.
Julia Martinez et al. } On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit.

[March —, 1978]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case requires us to decide whether a federal court may pass on the validity of an Indian tribe's ordinance denying membership to the children of certain female tribal members.

Petitioner Santa Clara Pueblo is an Indian tribe that has been in existence for over 600 years. Respondents, a female member of the tribe and her daughter, brought suit in federal court against the tribe and its Governor, petitioner Lucario Padilla, seeking declaratory and injunctive relief against enforcement of a tribal ordinance denying membership in the tribe to children of female members who marry outside the tribe, while extending membership to children of male members who marry outside the tribe. Respondents claimed that this rule discriminates on the basis of both sex and ancestry in violation of Title I of the Indian Civil Rights Act of 1968 (ICRA), 25 U. S. C. §§ 1301-1303 (1970), which provides in relevant part that "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws." *Id.*, § 1302 (8).¹

¹ The Indian Civil Rights Act was initially passed by the Senate in 1967, 113 Cong. Rec. 35473, as a separate bill containing six titles. S. 1843, 90th Cong., 1st Sess. (1967). It was re-enacted by the Senate in 1968 without change, 114 Cong. Rec. 5838, as an amendment to a House-originated bill, H. R. 2516, 90th Cong., 2d Sess. (1968), and was

*Reviewed
LJP
3/28/78*

*Included
to join.*

Title I of the ICRA does not expressly authorize the bringing of civil actions for declaratory or injunctive relief to enforce its substantive provisions. The threshold issue in this case is thus whether the Act may be interpreted to impliedly authorize such actions, against a tribe or its officers, in the federal courts. For the reasons set forth below, we hold that the Act cannot be so read.

I

Respondent Julia Martinez is a fullblooded member of the Santa Clara Pueblo, and resides on the Santa Clara reservation in Northern New Mexico. In 1941 she married a Navajo Indian with whom she has since had several children, including respondent Audrey Martinez. Two years before this marriage, the Pueblo passed the membership ordinance here at issue, which bars admission of the Martinez children to the tribe because their father is not a Santa Claran.² Although

then approved by the House and signed into law by the President as Titles II through VII of the Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 77. Thus, the first title of the ICRA was enacted as Title II of the Civil Rights Act of 1968. The six titles of the ICRA will be referred to herein by their title numbers as they appeared in the version of S. 1843 passed by the Senate in 1967.

² The ordinance, enacted by the Santa Clara Pueblo Council pursuant to its legislative authority under the Constitution of the Pueblo, establishes the following membership rules:

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

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

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

"4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances."

Respondents challenged only subparts (2) and (3). By virtue of subparagraph (4), Julia Martinez' husband is precluded from joining the

the children were raised on the reservation and continue to reside there now that they are adults, as a result of their exclusion from membership they may not vote in tribal elections or hold secular office in the tribe; moreover, they have no right to remain on the reservation in the event of their mother's death, or to inherit their mother's home or her possessory interests in the communal lands.

After unsuccessful efforts to persuade the tribe to change the membership rule, respondents filed this lawsuit in the United States District Court for the District of New Mexico, on behalf of themselves and others similarly situated.³ Petitioners moved to dismiss the complaint on the ground that the court lacked jurisdiction to decide intratribal controversies affecting matters of tribal self-government and sovereignty. The District Court rejected petitioners' contention, finding that jurisdiction was conferred by 28 U. S. C. § 1343 (4) and 25 U. S. C. § 1302 (8). The court apparently concluded, first, that the substantive provisions of Title I impliedly authorized civil actions for declaratory and injunctive relief, and second, that the tribe was not immune from such suit.⁴ Accordingly, the motion to dismiss was denied. 402 F. Supp. 5 (NM 1975).

Pueblo and thereby assuring the children's membership pursuant to subparagraph (1).

³ Respondent Julia Martinez was certified to represent a class consisting of all women who are members of the Santa Clara Pueblo and have married men who are not members of the Pueblo, while Audrey Martinez was certified as the class representative of all children born to marriages between Santa Claran women and men who are not members of the Pueblo.

⁴ Section 1343 (4) gives the district courts "jurisdiction of any civil action *authorized by law* to be commenced by any person . . . to secure equitable or other relief under any Act of Congress providing for the protection of civil rights" (emphasis added). The District Court evidently believed that jurisdiction could not exist under § 1343 (4) unless the ICRA did in fact authorize actions for declaratory or injunctive relief in appropriate cases. For purposes of this case, we need not decide whether § 1343 (4) jurisdiction can be established merely by presenting a *substantial question*

Following a full trial, the District Court found for petitioners on the merits. While acknowledging the relatively recent origin of the disputed rule, the District Court nevertheless found it to reflect traditional values of patriarchy still significant in tribal life. The court recognized the vital importance of respondents' interests,⁵ but also determined that membership rules were "no more or less than a mechanism of social . . . self-definition," and as such were basic to the tribe's survival as a cultural and economic entity. *Id.*, at 15.⁶ In sustaining the ordinance's validity under the "equal protection clause" of the ICRA, 25 U. S. C. § 1302 (8), the District Court concluded that the balance to be struck between these competing interests was better left to the judgment of the Pueblo:

"[T]he 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 should therefore be preserved 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. . . .

". . . To abrogate tribal decisions, particularly in the delicate area of membership, for whatever 'good' reasons,

concerning the availability of a particular form of relief. Cf. *Bell v. Hood*, 327 U. S. 678 (1948) (jurisdiction under 28 U. S. C. § 1331). See also *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62, 67-68 (1933) (Cardozo, J.).

⁵ The court found that "Audrey Martinez and many other children similarly situated have been brought up on the Pueblo, speak the Tewa language, participate in its life, and are, culturally, for all practical purposes, Santa Claran Indians." 402 F. Supp., at 18.

⁶ The Santa Clara Pueblo is a relatively small tribe. Approximately 1200 members reside on the reservation; 150 members of the Pueblo live elsewhere. In addition to tribal members, 150-200 nonmembers live on the reservation.

is to destroy cultural identity under the guise of saving it." *Id.*, at 18-19.

On respondents' appeal, the Court of Appeals for the Tenth Circuit upheld the District Court's determination that 28 U. S. C. § 1343 (4) provides a jurisdictional basis for actions under Title I of the ICRA. 540 F. 2d 1039, 1042 (CA10 1976). It found that "since [the ICRA] was designed to provide protection against tribal authority, the intention of Congress to allow suits against the tribe was an essential aspect [of the ICRA]. Otherwise, it would constitute a mere unenforceable declaration of principles." *Ibid.* The Court of Appeals disagreed, however, with the District Court's ruling on the merits. While recognizing that standards of analysis developed under the Fourteenth Amendment's Equal Protection Clause were not necessarily controlling in the interpretation of this statute, the Court of Appeals apparently concluded that because the classification was one based upon sex it was presumptively invidious and could be sustained only if justified by a compelling tribal interest. See 540 F. 2d, at 1047-1048. Because of the ordinance's recent vintage, and because in the court's view the rule did not rationally identify those persons who were emotionally and culturally Santa Clarans, the court held that the tribe's interest in the ordinance was not substantial enough to justify its discriminatory effect. *Ibid.*

We granted certiorari, 431 U. S. 913 (1977), and we now reverse.

II

Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. *Worcester v. Georgia*, 31 U. S. (6 Pet.) 515, 559 (1832); see *United States v. Mazurie*, 419 U. S. 544, 557 (1975); F. Cohen, *Handbook on Federal Indian Law* 122-123 (1941). 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." *United States v. Kagama*, 118 U. S. 375, 381-382 (1886). See *United States v. Wheeler*, — U. S. — (1978). They have power to make their own substantive law in internal matters, see *Roff v. Burney*, 168 U. S. 218 (1897) (membership); *Jones v. Meehan*, 175 U. S. 1, 29 (1899) (inheritance rules); *United States v. Quiver*, 241 U. S. 602 (1916) (domestic relations), and to enforce that law in their own forums, see, e. g., *Williams v. Lee*, 358 U. S. 217 (1958).

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. Thus, in *Talton v. Mayes*, 163 U. S. 376 (1896), this Court held that the Fifth Amendment did not "operat[e] upon" "the powers of local self-government enjoyed" by the tribes. *Id.*, at 384. In ensuing years the lower federal courts have extended the holding of *Talton* to other provisions of the Bill of Rights, as well as to the Fourteenth Amendment.⁷

⁷ See, e. g., *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F. 2d 529, 533 (CA8 1967) (Due Process Clause of the Fourteenth Amendment); *Native American Church v. Navajo Tribal Council*, 272 F. 2d 131 (CA10 1959) (freedom of religion under First and Fourteenth Amendments); *Barta v. Oglala Sioux Tribe*, 259 F. 2d 553 (CA8 1958), cert. denied, 358 U. S. 932 (1959) (Fourteenth Amendment). See also *Martinez v. Southern Ute Tribe*, 249 F. 2d 915, 919 (CA10 1957), cert. denied, 356 U. S. 960 (1958) (applying *Talton* to Fifth Amendment due process claim); *Groundhog v. Keeler*, 442 F. 2d 674, 678 (CA10 1971). But see *Colliflower v. Garland*, 342 F. 2d 369 (CA9 1965) and *Settler v. Yakima Tribal Court*, 419 F. 2d 486 (CA9 1969), cert. denied, 398 U. S. 903 (1970), both holding that where a tribal court was so pervasively regulated by a federal agency that it was in effect a federal instrumentality, a writ of habeas corpus would lie to a person detained by that court in violation of the Constitution.

The line of authority growing out of *Talton*, while exempting Indian tribes from constitutional provisions addressed specifically to State or Federal Governments, of course does not relieve State and Federal Governments of their obligations to individual Indians under these provisions.

As the Court in *Talton* recognized, however, Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess. 163 U. S., at 384. See, e. g., *United States v. Kagama*, *supra*, 118 U. S., at 379-381, 383-384; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 305-307 (1902). Title I of the ICRA, 25 U. S. C. §§ 1301-1303, represents an exercise of that authority. In 25 U. S. C. § 1302, Congress acted to modify the effect of *Talton* and its progeny by imposing certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment.⁸

⁸ Section 1302 in its entirety provides that:

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

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

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

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

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

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

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

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

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

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

In 25 U. S. C. § 1303, 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."

Petitioners concede that § 1302 modifies the substantive law applicable to the tribe; they urge, however, that Congress did not intend to authorize federal courts to review violations of its provisions except as they might arise on habeas corpus. They argue, further, that Congress did not waive the tribe's sovereign immunity from suit. Respondents, on the other hand, contend that § 1302 not only modifies the substantive law applicable to the exercise of sovereign tribal powers, but also authorizes civil suits for equitable relief against the tribe and its officers in federal courts. We consider these contentions first with respect to the tribe.

III

Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Turner v. United States*, 248 U. S. 354, 358 (1919); *United States v. United States Fidelity & Guaranty Co.*, 309 U. S. 506, 512-513 (1940); *Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U. S. 165, 172-173 (1977). This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But "without congressional authorization," the "Indian Nations are exempt

"(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons."

Section 1301 is a definitional section, which provides, *inter alia*, that the "powers of self-government" shall include "all governmental powers possessed by an Indian tribe, legislative, executive and judicial, and all offices, bodies, and tribunals by and through which they are executed" 25 U. S. C. § 1301 (2) (1970).

from suit." *United States v. United States Fidelity & Guaranty Co.*, *supra*, at 512.

It is settled that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. Testan*, 424 U. S. 392, 399 (1976), quoting, *United States v. King*, 395 U. S. 1, 4 (1969). 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. Moreover, since the respondent in a habeas corpus action is the individual custodian of the prisoner, see, *e. g.*, 28 U. S. C. § 2243, the provisions of § 1303 can hardly be read as a general waiver of the tribe's sovereign immunity. 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.

IV

As an officer of the Pueblo, petitioner Lucario Padilla is not protected by the tribe's immunity from suit. See *Puyallup Tribe, Inc. v. Washington Dept. of Game*, *supra*, 433 U. S., at 171-172; cf. *Ex parte Young*, 209 U. S. 123 (1908). 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 § 1302 constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself. Even in matters involving commercial and domestic relations, we have recognized that "subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves," *Fisher v. District Court*, 424 U. S. 382, 387-388 (1976), may "undermine the authority of the tribal court[] . . .

Barred
by
sovereign
immunity

and hence . . . infringe on the right of the Indians to govern themselves." *Williams v. Lee, supra*, 358 U. S., at 223.⁹ A *fortiori*, resolution in a foreign forum of intratribal disputes of a more "public" character, such as the one in this case, cannot help but unsettle a tribal government's ability to maintain authority. 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. Cf. *Antoine v. Washington*, 420 U. S. 194, 199-200 (1975); *Choate v. Trapp*, 224 U. S. 665, 675 (1912).

With these considerations of "Indian sovereignty . . . [as] a backdrop against which the applicable . . . federal statute[] must be read," *McClanahan v. Arizona State Tax Commission*, 411 U. S. 164, 172 (1973), we turn now to those factors of more general relevance in determining whether a cause of action is implicit in a statute not expressly providing one. See

⁹ In *Fisher*, we held that a state court did not have jurisdiction over an adoption proceeding in which all parties were members of an Indian tribe and residents of the reservation. Rejecting the mother's argument that denying her access to the state courts constituted an impermissible racial discrimination, we reasoned that:

"The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law . . . [E]ven if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government." *Id.*, at 390-391.

In *Williams v. Lee, supra*, we held that a non-Indian merchant could not invoke the jurisdiction of a state court to collect a debt owed by a reservation Indian and arising out of the merchant's activities on the reservation, but instead must seek relief exclusively through tribal remedies.

Cort v. Ash, 422 U. S. 66 (1975).¹⁰ We note at the outset that a central purpose of the ICRA and in particular of Title I was to "secur[e] for the American Indian the broad constitutional rights afforded to other Americans," and thereby to "protect individual Indians from arbitrary and unjust actions of tribal governments." S. Rep. No. 841, 90th Cong., 1st Sess., 5-6 (1967). There is thus no doubt that respondents, American Indians living on the Santa Clara reservation, are among the class for whose especial benefit this legislation was enacted. *Texas & Pacific R. Co. v. Rigsby*, 241 U. S. 33, 39 (1916); see *Cort v. Ash*, *supra*, at 78. Moreover, we have frequently recognized the propriety of inferring a federal cause of action for the enforcement of civil rights, even when Congress has spoken in purely declarative terms. See, e. g., *Jones v. Alfred H. Mayer Co.*, 392 U. S. 409, 414 n. 13 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U. S. 229, 238-240 (1969). See also *Bivens v. Six Unknown Named Agents*, 403 U. S. 388 (1971). These precedents, however, are simply not dispositive here. Not only are we unpersuaded that a judi-

¹⁰ "First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted,' *Texas & Pacific R. Co. v. Rigsby*, 241 U. S. 33, 39 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, e. g., *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U. S. 453, 458, 460 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, e. g., *Amtrak*, *supra*; *Securities Investor Protection Corp. v. Barbour*, 421 U. S. 412, 423 (1975); *Calhoon v. Harvey*, 379 U. S. 134 (1964). And finally, is the cause of action one traditionally relegated to state [or tribal] law, in an area basically the concern of the States [or tribes], so that it would be inappropriate to infer a cause of action based solely on federal law?" *Cort v. Ash*, *supra*, 422 U. S., at 78.

See generally Note, Implication of Civil Remedies Under the Indian Civil Rights Act, 75 Mich. L. Rev. 210 (1976).

cially 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. See *National R. R. Passenger Corp. v. National Assn. of R. R. Passengers*, 414 U. S. 453 (1974); *Cort v. Ash*, *supra*.

A

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-à-vis the tribe, Congress also intended to promote the well-established federal "policy of furthering Indian self-government." *Morton v. Mancari*, 417 U. S. 535, 551 (1974); see *Fisher v. District Court*, *supra*, 424 U. S., at 391.¹¹ This commitment to the goal of tribal self-determination is demonstrated by the provisions of Title I itself. Section 1302, rather than providing in wholesale fashion for the extension of constitutional requirements to tribal governments, as had been initially proposed,¹² selectively incorporated and in some

¹¹ One month before passage of the ICRA, President Johnson had urged its enactment as part of a legislative and administrative program with the overall goal of furthering "self-determination," "self-help," and "self-development" of Indian tribes. See 114 Cong. Rec. 5518, 5520 (1968).

¹² Exploratory hearings which led to the ICRA commenced in 1961, before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee. In 1964, Senator Ervin, Chairman of the Subcommittee, introduced S. 3041-3048, 88th Cong., 2d Sess., on which no hearings were had. The bills were reintroduced in the 89th Congress as S. 961-968 and were the subject of extensive hearings by the subcommittee. Hearings on S. 961-968 and S. J. Res. 40 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 89th Cong., 1st Sess. (1965) [hereinafter cited as 1965 Hearings].

S. 961 would have extended to tribal governments all constitutional provisions applicable to the Federal Government. After criticism of this proposal at the hearings, Congress instead adopted the approach found

instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments.¹³ See n. 8, *supra*. 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, cf. *Argersinger v. Hamlin*, 407 U. S. 25 (1972).¹⁴

The other titles of the ICRA also manifest a congressional purpose to protect tribal sovereignty from undue interference. For instance, Title III, 25 U. S. C. §§ 1321-1326, hailed by some of the ICRA's supporters as the most important part of the Act,¹⁵ provides that States may not assume

in a substitute bill submitted by the Interior Department, reprinted in 1965 Hearings, *supra*, at 318, which, with some changes in wording, was enacted into law as 25 U. S. C. §§ 1302-1303. See also n. 1, *supra*.

¹³ See, e. g., Subcommittee on Constitutional Rights, Senate Judiciary Committee, Constitutional Rights of the American Indian: Summary Report of Hearings and Investigations Pursuant to S. Res. 194, 89th Cong., 2d Sess., 8-11, 25 (Comm. Print 1966) [hereinafter cited as Summary Report]; 1965 Hearings, *supra*, at 17, 21, 50 (statements of Solicitor of the Dept. of Interior); *id.*, at 65 (statement of Arthur Lazarus, Counsel for the Association of American Indian Affairs).

¹⁴ The provisions of § 1302, set forth fully in n. 8, *supra*, differ in language and in substance in many other respects from those contained in the constitutional provisions on which they were modeled. The provisions of 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 equal protection of *its* [the tribe's] laws," rather than of "*the* laws." Moreover, § 1302 (7), which prohibits cruel or unusual punishments and excessive bails, sets an absolute limit of six months imprisonment and a \$500 fine on penalties which a tribe may impose. Finally, while most of the guarantees of the Fifth Amendment were extended to tribal actions, it is interesting to note that § 1302 does not require tribal criminal prosecutions to be initiated by grand jury indictment, which was the requirement of the Fifth Amendment specifically at issue and found inapplicable to tribes in *Talton v. Mayes*, discussed, *supra*, pp. 6-7.

¹⁵ See, e. g., 114 Cong. Rec. 9596 (1968) (remarks of Rep. Meeds);

civil or criminal jurisdiction over "Indian country" without the prior consent of the tribe, thereby abrogating prior law to the contrary.¹⁶ Other titles of the ICRA provide for strengthening certain tribal courts through training of Indian judges,¹⁷ and for minimizing interference by the Federal Bureau of Indian Affairs in tribal litigation.¹⁸

Where Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other. Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance

Hearings on the Rights of Members of the Indian Tribes before the Subcommittee on Indian Affairs of the House Committee on Interior & Insular Affairs, 90th Cong., 2d Sess., 108 (1968) (hereinafter cited as House Hearings). See also 1965 Hearings, *supra*, at 198 (remarks of Executive Director, National Congress of American Indians).

¹⁶ In 25 U. S. C. § 1323 (b), Congress expressly repealed § 7 of Pub. L. 83-280, 67 Stat. 590 (1953), which had authorized States to assume criminal and civil jurisdiction over reservations without tribal consent.

¹⁷ Title II of the ICRA provides, *inter alia*, "for the establishing of educational classes for the training of judges of courts of Indian offenses." 25 U. S. C. § 1311 (4) (1970). Courts of Indian offenses were created by the Federal Bureau of Indian Affairs to administer criminal justice for those tribes lacking their own criminal courts. See generally W. Hagan, *Indian Police and Judges* 104-125 (1966).

¹⁸ Under 25 U. S. C. § 81, the Secretary of the Interior and the Commissioner of Indian Affairs are generally required to approve any contract made between a tribe and an attorney. At the exploratory hearings, see n. 12, *supra*, it became apparent that the Interior Department had engaged in inordinate delays in approving such contracts and had thereby hindered the tribes in defending and asserting their legal rights. See, *e. g.*, Hearings on Constitutional Rights of the American Indian before the Subcommittee on Constitutional Rights, Senate Committee on the Judiciary, 87th Cong., 1st Sess. (Pt. I), 211 (1961) [hereinafter cited as 1961 Hearings]; *id.* (Pt. II), 290, 341, 410. Title V of the ICRA, 25 U. S. C. § 1331, provides that the Department must act on applications for approval of attorney contracts within 90 days of their submission or the application will be deemed to have been granted.

with § 1302, plainly would be at odds with the congressional goal of protecting tribal self-government. Not only would it undermine the authority of tribal forums, see pp. 9-10, *supra*, but it would also impose serious financial burdens on already "financially disadvantaged" tribes. Subcommittee on Constitutional Rights, Senate Judiciary Committee, Constitutional Rights of the American Indian: Summary Report of Hearings and Investigations Pursuant to S. Res. 194, 89th Cong., 2d Sess., 12 (Comm. Print 1966) (hereinafter cited as Summary Report).¹⁹

Moreover, contrary 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.²⁰

¹⁹ The cost of civil litigation in federal district courts, in many instances located far from the reservations, doubtless exceeds that in most tribal forums. See generally I American Indian Policy Review Commission, Final Report 160-166 (1977); M. Price, Law and the American Indian 154-160 (1973). And as became apparent in congressional hearings on the ICRA, many of the poorer tribes with limited resources and income could ill afford to shoulder the burdens of defending federal lawsuits. See, e. g., 1965 Hearings, *supra*, at 131, 157; Summary Report, *supra*, at 12; House Hearings, *supra*, at 69 (remarks of the Governor of the San Felipe Pueblo).

²⁰ Prior to passage of the ICRA, Congress made detailed inquiries into the extent to which tribal constitutions incorporated "Bill of Rights" guarantees, and the degree to which the tribal provisions differed from those found in the Constitution. See, e. g., 1961 Hearings (Pt. I), *supra*, at 121, 166; *id.* (Pt. II), 359; Hearings on the Constitutional Rights of the American Indian before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 88th Cong., 1st Sess. (Pt. IV), 823 (1963). Both Senator Ervin, the ICRA's chief sponsor, and President Johnson, in urging passage of the Act, explained the need for Title I on the ground that few tribal constitutions included provisions of the Bill of Rights. See

Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.²¹ See, e. g., *Fisher v. District Court*, 424 U. S. 382 (1976); *Williams v. Lee*, 358 U. S. 217 (1959). See also *Ex parte Crow Dog*, 109 U. S. 556 (1883). Nonjudicial tribal institutions have also been recognized as competent law-applying bodies. See *United States v. Mazurie*, 419 U. S. 544 (1975).²² 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.

B

Our reluctance is strongly reinforced by the specific legislative history underlying 25 U. S. C. § 1303. This history,

House Hearings, *supra*, at 131 (remarks of Sen. Ervin); 114 Cong. Rec. 5520 (1968) (Message from the President).

²¹ There are 287 tribal governments in operation in the United States, of which 117 had operating tribal courts in 1973. I American Indian Policy Review Commission, Final Report, 5, 1963 (1977). In 1973 these courts handled approximately 70,000 cases. *Id.*, at 163-164. Judgments of tribal courts, as to matters properly within their jurisdiction, have been regarded in some circumstances as entitled to full faith and credit in other courts. See, e. g., *Mackey v. Coxe*, 59 U. S. 100 (1855); *Standley v. Roberts*, 59 F. 836, 845 (CAB 1894), appeal dismissed, 17 S. Ct. 1999 (1896).

²² By the terms of its Constitution, adopted in 1935 and approved by the Secretary of the Interior in accordance with the Indian Reorganization Act of 1934, 25 U. S. C. § 476, judicial authority in the Santa Clara Pueblo is vested in its tribal council.

Many tribal constitutions adopted pursuant to 28 U. S. C. § 476, though not that of the Santa Clara Pueblo, include provisions requiring that tribal ordinances not be given effect until the Department of Interior gives its approval. See I American Indian Policy Review Commission, *supra*, at 187-188; 1961 Hearings (Pt. I), *supra*, at 95. In these instances, persons aggrieved by tribal laws may, in addition to pursuing tribal remedies, be able to seek relief from the Department of Interior.

extending over more than three years,²³ indicates that Congress' provision for habeas corpus relief, and nothing more, reflected a considered accommodation of the competing goals of "preventing injustices perpetrated by tribal governments, on the one hand, and, on the other, avoiding undue or precipitous interference in the affairs of the Indian people." Summary Report, *supra*, at 11.

In settling on habeas corpus as the exclusive means for federal court review of tribal criminal proceedings, Congress opted for a less intrusive review mechanism than had been initially proposed. Originally, the legislation would have authorized *de novo* review in federal court of all convictions obtained in tribal courts.²⁴ At hearings held on the proposed legislation in 1965, however, it became clear that even those in agreement with the general thrust of the review provision—to provide some form of judicial review of criminal proceedings in tribal courts—believed that *de novo* review would impose unmanageable financial burdens on tribal governments and needlessly displace tribal courts.²⁵ See Summary Report, *supra*, at 12; Hearings on S. 961-968 and S. J. Res. 40 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 89th Cong., 1st Sess., 22-23, 157, 162, 341-342 (1965) (hereinafter cited as 1965 Hearings). Moreover,

²³ See n. 12, *supra*. Although extensive hearings on the ICRA were held in the Senate, see *id.*, House consideration was extremely abbreviated. See House Hearings, *supra*; 114 Cong. Rec. 9614-9615 (1968) (remarks of Rep. Aspinall).

²⁴ S. 962, 89th Cong., 1st Sess. (1965), reprinted in 1965 Hearings, *supra*, at 6-7. See n. 12, *supra*.

²⁵ There was also concern that *de novo* review would unduly burden the federal district courts, and might prove too expensive for individual defendants. Summary Report, *supra*, at 12. The former concern would militate against inferring additional remedies under the Act; moreover, since the latter was at least matched by concern about financial burdens on the tribes, it does not provide support for the remedy sought by the respondents here.

tribal representatives argued that *de novo* review would "deprive the tribal court of all jurisdiction in the event of an appeal, thus having a harmful effect upon law enforcement within the reservation," and urged instead that "decisions of tribal courts . . . be reviewed in the U. S. district courts upon petition for a writ of habeas corpus." 1965 Hearings, *supra*, at 79. After considering numerous alternatives for review of tribal convictions, Congress apparently decided that review by way of habeas corpus would adequately protect the individual interests at stake while avoiding unnecessary intrusions on tribal governments.

Similarly, and of more direct import to the issue in this case, Congress considered and rejected proposals for federal review of alleged violations of the Act arising in a civil context. As initially introduced, the Act would have required the Attorney General to "receive and investigate" complaints relating to deprivations of an Indian's statutory or constitutional rights, and to bring "such criminal or other action as he deems appropriate to vindicate and secure such right to such Indian."²⁶ Notwithstanding the screening effect this proposal would have had on frivolous or vexatious lawsuits, it was bitterly opposed by several tribes. The Crow Tribe representative stated that,

"This [bill] would in effect subject the tribal sovereignty of self-government to the Federal government. . . . [B]y its broad terms [it] would allow the Attorney General to bring any kind of action as he deems appropriate. By this bill, any time a member of the tribe would not be satisfied with an action by the [tribal] council, it would allow them [*sic*] to file a complaint with the Attorney General and subject the tribe to a multitude of investigations and threat of court action." 1965 Hearings, *supra*, at 235 (statement of Mr. Real Bird).

²⁶ S. 963, 89th Cong., 1st Sess. (1965). See n. 12, *supra*.

In a similar vein, the Mescalero Apache Tribal Council argued that "[i]f the perpetually dissatisfied individual Indian were to be armed with legislation such as proposed in [this bill] he could disrupt the whole of a tribal government." *Id.*, at 343. In response, this provision for suit by the Attorney General was completely eliminated from the ICRA. At the same time, Congress rejected a substitute proposed by the Interior Department that would have authorized the Department to adjudicate civil complaints concerning tribal actions, with review in the district courts available from final decisions of the agency.²⁷

Given this history, it is highly unlikely that Congress would have intended a private cause of action for injunctive and declaratory relief to be available in the federal courts to secure enforcement of § 1302. Although the only committee report on the ICRA in its final form, S. Rep. No. 841, 90th Cong., 1st Sess. (1967), sheds little additional light on this question,

²⁷ The Interior Department substitute, reprinted in 1965 Hearings, *supra*, at 318, provided in relevant part:

"Any action, other than a criminal action, taken by an Indian tribal government which deprives any American Indian of a right or freedom established and protected by this Act may be reviewed by the Secretary of the Interior upon his own motion or upon the request of said Indian. If the Secretary determines that said Indian has been deprived of any such right or freedom, he shall require the Indian tribal government to take such corrective action as he deems necessary. Any final decision of the Secretary may be reviewed by the United States district court in the district in which the action arose and such court shall have jurisdiction thereof."

In urging Congress to adopt this proposal, the Solicitor of Interior specifically suggested that "Congress has the power to give to the courts jurisdiction that they would require to review the actions of an Indian tribal court," and that the substitute bill which the Department proposed "would actually confer on the district courts the jurisdiction they require to consider these problems." 1965 Hearings, *supra*, at 23-24. Congress' failure to adopt this provision is noteworthy particularly because it did adopt the other portion of the Interior substitute bill, which led to the current version of §§ 1302 and 1303. See n. 12, *supra*.

it would hardly support a contrary conclusion.²⁸ Indeed, its description of the purpose of Title I,²⁹ as well as the floor debates on the bill,³⁰ indicate that the ICRA was generally understood to authorize federal judicial review of tribal actions only through the habeas corpus provisions of § 1303.³¹

²⁸ Respondents rely most heavily on a rambling passage in the Report discussing *Talton v. Mayes* and its progeny, see n. 8, *supra*, some of which arose in a civil context. S. Rep. No. 841, *supra*, at 8-11. Although there is some language suggesting that Congress was concerned about the unavailability of relief in federal court, the Report nowhere states that Title I would be enforceable in a cause of action for declaratory or injunctive relief, and the cited passage is fully consistent with the conclusion that Congress intended only to modify the substance of the law applicable to Indian tribes, and to allow enforcement in federal court through habeas corpus. The Report itself characterized the import of its discussion as follows:

"These cases illustrate the continued denial of specific constitutional guarantees to litigants in tribal court proceedings, on the ground that the tribal courts are quasi-sovereign entities to which general provisions in the Constitution do not apply." *Id.*, at 10.

²⁹ The Report states: "The purpose of Title I is to protect individual Indians from arbitrary and unjust actions by tribal governments. This is accomplished by placing certain limitations on an Indian tribe in the exercise of its powers of self-government." It explains further that "[i]t is hoped that Title II [25 U. S. C. § 1311], requiring the Secretary of Interior to recommend a model code [to govern the administration of justice] for all Indian tribes, will implement the effect of Title I." *Id.*, at 6. (Although § 1311 by its terms refers only to courts of Indian offenses, see n. 17, *supra*, the Senate Report makes clear that the code is intended to serve as a model for use in all tribal courts. S. Rep. No. 90-841, at 6, 11.) Thus, it appears that the committee viewed § 1302 as enforceable only on habeas corpus and in tribal forums.

³⁰ Senator Ervin described the model code provisions of Title II, see n. 29, *supra*, as "the proper vehicle by which the objectives" of Title I should be achieved. 113 Cong. Rec. 13475 (1967). And Congressman Reifel, one of the ICRA's chief supporters in the House, explained that "by providing for a writ of habeas corpus from the Federal court, the bill would assure effective enforcement of these fundamental rights." 114 Cong. Rec. 9553 (1968).

³¹ Only a few tribes had an opportunity to comment on the ICRA in

This understanding is reflected in remarks made by the ICRA's chief sponsor, Senator Ervin of North Carolina, one year after its enactment.³² Almost immediately after the Act's passage, legislation had been introduced to exempt the Pueblos of the Southwest, including the Santa Clara Pueblo, from the requirements of Title I. In responding to tribal leaders supporting the proposed exemption, Senator Ervin explained that Title I's provisions should not prove unduly burdensome to tribal governments:

"[The ICRA] does not provide for the Federal courts to review all the decisions of the Indian courts. In fact, provision for federal review was in there originally, and at the request of a number of tribes we eliminated that entirely. The only provision in [Title I] that provides for Federal court interference is [the one authorizing issuance of a] writ of habeas corpus If the man was convicted in violation of a law, the Federal court

its final form, since the House held only one day of hearings on the legislation. See n. 23, *supra*. The Pueblos of New Mexico, testifying in opposition to the provisions of Title I, argued that the habeas corpus provision of § 1303 "opens an avenue through which federal courts, lacking knowledge of our traditional values, customs, and laws, could review and offset the decisions of our tribal councils." House Hearings, *supra*, at 37. It is inconceivable that, had they understood the bill impliedly to authorize other actions, they would have remained silent, as they did, concerning this possibility. It would hardly be consistent with "[t]he overriding duty of our Federal Government to deal fairly with Indians," *Morton v. Ruiz*, 415 U. S. 199, 236 (1974), lightly to imply a cause of action on which the tribes had no prior opportunity to present their views.

³² Senator Ervin was not only the nominal sponsor of the ICRA, but the prime mover behind its enactment. See n. 12, *supra*. At his prompting the Senate commenced exploratory hearings into the area in 1961, and in three successive Congresses he introduced legislation to address the problems that emerged in those hearings. He is credited by some as having single-handedly secured passage of the bill by the force of his support for it. See generally Burnett, An Historical Analysis of the 1968 "Indian Civil Rights" Act, 9 Harv. J. Legis. 557, 574-602, 603 (1972).

light of this finding, and given Congress' desire not to intrude needlessly on tribal self-government, it is not surprising that Congress chose at this stage to provide for federal review only in habeas corpus proceedings.

By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials, Congress may also have considered that resolution of statutory issues under § 1302, 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. Our relations with the Indian tribes have "always been anomalous . . . and of a complex character." *United States v. Kagama*, 118 U. S. 375, 381 (1886). Although we early rejected the notion that Indian tribes are "foreign states" for jurisdictional purposes under Art. III, *Cherokee Nation v. Georgia*, 30 U. S. 1 (1831), we have also recognized that the tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the federal and state governments. See *Elk v. Wilkins*, 112 U. S. 94 (1884). As is suggested by the District Court's opinion in this case, see pp. 4-5, *supra*, efforts 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.³³

³³ A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. See *Roff v. Burney*, 168 U. S. 218 (1897); *Cherokee Inter-marriage Cases*, 203 U. S. 76 (1906). The legislative history of the ICRA, however, affords no basis for distinguishing between membership questions and other issues in deciding whether a cause of action for declaratory and injunctive relief is implicit in § 1302. See, e. g., S. Rep. No. 841, *supra*, at 9-10; 114 Cong. Rec., at 394 (1968) (remarks of Sen. Ervin). And given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters.

March 30, 1978

76-682 Santa Clara Pueblo v. Martinez

Dear Thurgood:

I am glad to join your opinion, which is extremely well done.

I would prefer to omit Part III (pp. 8-9), in which you hold that Congress did not waive tribal immunity from suit by enacting the Indian Civil Rights Act. I would not have thought this necessary to include in view of your holding in Part IV. But my "join" is not conditioned on your eliminating Part III.

Sincerely,

Mr. Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

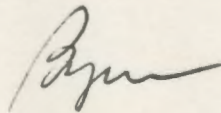
March 30, 1978

Re: 76-682 - Santa Clara Pueblo
v. Martinez

Dear Thurgood,

I am considering a lonesome dissent
in this case.

Sincerely,



Mr. Justice Marshall
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

✓

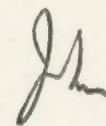
March 30, 1978

Re: 76-682 - Santa Clara Pueblo v. Martinez

Dear Thurgood:

Although I do not qualify my join in your opinion, I also had the feeling expressed by Lewis that it would be better to omit Part III.

Respectfully,



Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 31, 1978

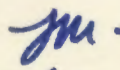
Re: No. 76-682 - Santa Clara Pueblo v. Martinez

Dear Lewis and John:

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

However, if Part III continues to trouble you, or if it is a problem for others in the majority who have not yet spoken, I would be prepared to abandon it.

Sincerely,



T.M.

Mr. Justice Powell
Mr. Justice Stevens

cc: The Conference

April 3, 1978

No. 76-682 Santa Clara Pueblo v. Martinez

Dear Thurgood:

Thank you for your note of March 31.

Although my preference is to omit Part III, I certainly will "join four" to leave it in - if this is your preference.

Sincerely,

Mr. Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST



April 5, 1978

Re: No. 76-682 - Santa Clara Pueblo v. Martinez

Dear Thurgood:

Please join me in Parts I, II, ^{IV and} V, and in the judgment in this case. I am familiar with the exchange of correspondence between you, Lewis, and John, and appreciate your preference for leaving in Part III. Nonetheless, I tend to agree with Harry's observation made in one of these cases during the last Term or so that eventually, in a proper case, we are going to have to take another look at the somewhat casually considered decision in United States v. United States Fidelity and Guaranty Co., 309 U.S. 506 (1940); I also feel there is some slight cross-pulling between your Part III and my recent opinion for the Court in Oliphant v. Suquamish, which is perhaps not surprising since you dissented in that case. I agree with the analysis contained in the rest of your opinion, and could probably join Part III with a few changes. But I am sure you would prefer to get a Court for the whole opinion as now written, and that is why I am sending you this "join" letter.

Sincerely,

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE



April 7, 1978

Re: 76-682 - Santa Clara Pueblo v. Martinez

Dear Thurgood:

I join.

Regards,

WEB A large, stylized handwritten signature in black ink, which appears to be "WEB" followed by a large flourish.

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 10, 1978

Re: No. 76-682, Santa Clara Pueblo v. Martinez

Dear Thurgood,

At the Conference discussion I expressed a different reason why I thought the judgment in this case should be reversed. I have decided, however, that no souls would be saved by a concurring opinion on my part. Your opinion for the Court is very persuasive, and I am glad to join it.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

As we have repeatedly emphasized, Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained. See *Lone Wolf v. Hitchcock*, 187 U. S. 553, 565 (1903). Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of § 1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. 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.

The judgment of the Court of Appeals is, accordingly,

Reversed.

[illegible]