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ESSAYS

(RE)LOCATING OTHER/THIRD WORLD WOMEN: AN ALTERNATIVE APPROACH TO SANTA CLARA PUEBLO V. MARTINEZ'S CONSTRUCTION OF GENDER, CULTURE AND IDENTITY

Shefali Milczarek-Desai¹

"The stereotypical image conjured by invocation of the contrast between universalism and [relativism] is that of the dichotomy between Western liberal individualism and non-Western forms of communalism. . . . On the one hand, we have the liberal individual who is committed to constitutional democracy; on the other, the tightly knit non-Western community, with its sometimes peculiar if not (from a Western perspective) downright repulsive rituals . . ."

— Michel Rosenfeld²

"[B]ecome just like us or stay just the way you are (or, more accurately, the way we imagine you to be)."

— Margaret D. Jacobs³

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2. Michel Rosenfeld, *Can Human Rights Bridge the Gap Between Universalism and Cultural Relativism? A Pluralist Assessment Based on the Rights of Minorities*, 30 COLUM. HUM. RTS. L. REV. 249, 251 (1999).

3. MARGARET D. JACOBS, *ENGENDERED ENCOUNTERS: FEMINISM AND PUEBLO CULTURES, 1879-1934* 184 (1999).

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

Facts: Santa Clara Pueblo, a Pueblo in New Mexico, adopted an ordinance in 1939 stating that the children who result from marriages between female Pueblo members and non-Santa Clara Pueblo members cannot become members of the Pueblo. This restriction, however, did not apply to the children of male Pueblo members who married non-Pueblo women.

Issue: Julia Martinez, a Santa Clara Pueblo member, married a non-member. She lived in the Pueblo and had several children. Due to the 1939 Ordinance, however, Martinez's children could not become Pueblo members. Martinez and her daughter, Audrey, brought an equal protection claim against the Pueblo because the 1939 Ordinance treated male members of the Pueblo differently from female members of the Pueblo. The Pueblo defended its rule stating that membership is a prerogative of tribal sovereignty and, thus, outside the purview of the federal court system.

INTRODUCTION

The above statement of facts and issues begins to erect the framework within which *Santa Clara Pueblo v. Martinez*,⁴ has been introduced, discussed, and analyzed both in case law as well as in academic literature. I became interested in *Santa Clara Pueblo*⁵ because framing the case as a binary struggle between equal protection and tribal sovereignty reminded me of the international discourse that surrounds non-Western cultural practices such as female circumcision, suttee, or women's status in certain Muslim countries. The way in which *Santa Clara Pueblo* has been presented parallels the universal-human-rights-versus-cultural-relativism debate over women's human rights and that debate's formulation of Other/Third World women.⁶

I am not the first to recognize that the binary discourse of universalism-versus-relativism has been employed in domestic as well as international realms. In fact, several legal scholars point to *Santa Clara Pueblo* as the domestic equivalent to the international discourse on women's human rights.⁷ Although similari-

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

5. When the case name appears in italics without a case citation as it does here, it refers to the case generally and not to a specific decision.

6. The use of this term is discussed *infra* Part I.

7. Robyn C. Smith writes that "one of the main issues in *Santa Clara Pueblo* [parallels the] international debate surrounding female circumcision," and L. Amede Obiora agrees that an example of how the binary discourse is utilized in the domestic context occurs in *Santa Clara Pueblo*. Robyn C. Smith, *Female Circumcision:*

ties between the use of the binary discourse in the international arena and in *Santa Clara Pueblo* have not gone unnoticed, the few scholars who have established this connection, have not made this issue — the issue of the appropriateness of the binary discourse in framing *Santa Clara Pueblo* — the focus of their work.

One purpose of this Essay, then, is to demonstrate to legal scholars and feminist theorists who have analyzed the case through the universalism/relativism binary that there are serious problems associated with looking at *Santa Clara Pueblo* in this way. Pointing out the flaws in how the case has heretofore been presented, however, only illustrates what might be avoided, not what an alternative analysis — one that does not rely on the dualisms of the discourse — might look like. Thus, this Essay also engages in an alternative discussion of the federal courts' holdings in *Santa Clara Pueblo*. Finally, this Essay begins to envision how the courts might have discussed and decided *Santa Clara Pueblo* had they not been confined by the universalism-versus-relativism discourse.

Part I characterizes the binary discourse as a legal modernist narrative that requires a singularized account of culture and identity. In addition to offering critiques of the modernist discourse by deconstructionist theorists, this section suggests an interdisciplinary approach as an alternative to the legal narrative's view of particular groups' cultures, as well as postmodern alternatives to the discourse's categorization of Other/Third World women's identities. Building upon the theoretical insights introduced in Part I, Part II of this Essay argues that a situation-specific analysis is necessary in order to disrupt the modernist narrative when discussing the "rights" of Other/Third World wo-

Bringing Women's Perspective into the International Debate, 65 S. CAL. L. REV. 2449, 2501 (1992); see L. Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275, 280 (1997). Likewise, both Michel Rosenfeld in "Can Human Rights Bridge the Gap Between Universalism and Cultural Relativism? A Pluralist Assessment Based on the Rights of Minorities," and Tracey E. Higgins in "Regarding Rights: An Essay Honoring the Fiftieth Anniversary of the Universal Declaration of Human Rights," find the universalism versus relativism debate in *Santa Clara Pueblo v. Martinez*. See Rosenfeld, *supra* note 2, at 251; Tracy E. Higgins, *Regarding Rights: An Essay Honoring the Fiftieth Anniversary of the Universal Declaration of Human Rights*, 30 COLUM. HUM. RTS. L. REV. 225, 244 (1999) (stating that *Santa Clara Pueblo* illustrates on the domestic level, the international "conflict [which] arises when groups invoke religious or cultural justifications for the practice of polygamy or female genital surgery or the maintenance of strict rules of purdah.").

men. Part III introduces *Santa Clara Pueblo* through the eyes of the courts and scholars in order to demonstrate how hegemonic voices have packaged the case into the binary discourse, and consequently, how Julia Martinez has been depicted as choosing between her gender and her culture/community/nation. Finally, Part IV begins the difficult work of re-envisioning the case outside of the legal modernist narrative by using historical, anthropological, and ethnographic materials to tease out complexities that are homogenized by the binary discourse. This Part does not attempt to replace the legal metanarrative with other modernist discourses; rather, it aims to disrupt any singularized account of the 1939 Ordinance, the role of gender in the Pueblo, and Martinez's motives in bringing a lawsuit against Santa Clara Pueblo.

I. PART I

The universalism/relativism discourse is a modernist narrative that puts forth a cohesive and rigidly organized explanation for complex human behavior in the international arena. While the term "modernism" can be used to describe everything from a particular historical period to art to literature to architecture, "modernism" as applied to the binary discourse refers to a worldview that generally accepts the use of theories that provide totalizing explanations of given phenomena.⁸ These totalizing theories — or "metanarratives" — operate through the use of monolithic categories, which tend to focus on similarities rather than on differences and on the global rather than the local. More importantly, difference is viewed suspiciously by modernist metanarratives, which find meaning within structure and organization and fear dissonance and (apparent) contradiction.

A.

In order to fully understand how the debate between universalism and relativism constitutes a modernist narrative, it is helpful to look at the origination and structure of each component of the binary discourse. The notion of universal human rights standards, as they are understood today, came about as a result of the

8. See JEAN-FRANÇOISE LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (Geoff Bennington & Brian Massumi trans., 1984).

1945 creation of the United Nations.⁹ Responding to the atrocities of World War II, proponents of universal human rights put forth the claim that certain rights are universally applicable to all persons everywhere,¹⁰ and that all individuals are entitled to certain rights that cannot be (or should not be) violated by one's government. Thus, human rights in the international context refers almost exclusively to rights an individual has from certain types of governmental action; universal human rights standards, at least as they were originally conceived, are only concerned with the rights of individuals.

While it is possible to discern the moment in time when universal human rights made an entry onto the international stage, the relativist portion of the binary discourse has a somewhat more complicated history. The term "cultural relativism" can be traced to a debate within the field of anthropology during the early part of the twentieth century.¹¹ Anthropologists such as Frank Boas and Ruth Benedict employed cultural relativist theory as a method by which to question "broad generalizations about human beings" and to challenge "the notion of the natural superiority of Western civilization."¹² During the Cold War, the Communist World employed the idea of cultural relativism to critique the United Nations and the human rights norms established by predominantly Western democracies.¹³

Today, non-Western governments who believe that their actions should not be evaluated by the Western world's view of universal human rights continue to evoke relativist arguments in the international arena. Both anthropological notions of cultural relativism and non-Western governments' relativist arguments against international human rights question the universality of Western norms, decline to condemn non-Western practices that do not comport with Western sensibilities, and recognize a group right to self-determination free from outside (Western) interfer-

9. See Burns H. Weston, *Human Rights*, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 13 (Richard Pierre Claude and Burns H. Weston eds., Oxford Univ. Press 1989).

10. See J. Roland Pennock, *Rights, Natural Rights, and Human Rights — A General View*, in HUMAN RIGHTS 6 (J. Roland Pennock & John W. Chapman eds., 1981).

11. Elizabeth M. Zechenter, *In the Name of Culture: Cultural Relativism and the Abuse of the Individual*, 53 J. ANTHROPOLOGICAL RES. 319, 324 (1997).

12. *Id.*; see also Ruth Benedict, *PATTERNS OF CULTURE* (1934).

13. See INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 193 (Henry J. Steiner & Philip Alston eds., 1996) [hereinafter INTERNATIONAL HUMAN RIGHTS].

ence.¹⁴ The possibility that discourses of cultural relativism in anthropology have influenced contemporary relativist arguments seems likely because the former originated from the study of non-state or sub-state entities such as Indian tribes, whose customs differ from those of their Western colonizers. Similarly, cultural relativism in the international arena is non-Western countries' response to what they consider to be the West's neo-imperialist human rights regime.¹⁵

This brief description of universalism and relativism allows a glimpse into some of the assumptions that inform each half of the modernist narrative. For instance, the notion of universal human rights is based on a liberal humanist discourse infatuated with the rights and abilities of the individual. Implicit in this discourse is what an individual looks/thinks/acts like: she is a rational, autonomous, unified self.¹⁶ From this vantage point, an individual does not appear to depend on community for her existence, nor does she experience subject-hood as divided and multiplicitous.¹⁷ Relativism, on the other hand, operates by presuming that individuals generally agree with the will of their community/culture/nation. Furthermore, the will of the community appears to be representative of everyone because relativism does not include an account of marginalized or non-dominant voices that may disagree with the particular characterization of one's community/culture/nation that a government official or spokesperson may put forth.¹⁸

B.

The latent features that make up the binary discourse raise questions as to whether the categories set forth by the discourse actually constitute two totally opposite and incongruent ideas. In a deconstructionist fashion, L. Amede Obiora's *Bridges and Barri- cades: Rethinking Polemics and Intransigence in the Campaign*

14. Carol Nagengast, however, suggests that the original understanding of cultural relativism, which grew out of concerns within anthropological discourse, can be distinguished from cultural relativist arguments against universal human rights standards. Carol Nagengast, *Women, Minorities, and Indigenous Peoples: Universalism and Cultural Relativism*, 53 J. OF ANTHROPOLOGICAL RES. 349, 353 (1997).

15. See INTERNATIONAL HUMAN RIGHTS, *supra* note 13, at 194.

16. Dean Toni Massaro, Lecture, *Constitutional Law* (Tucson, Ariz. 2001).

17. See Norma Alarcón, *The Theoretical Subject(s) of This Bridge Called My Back and Anglo-American Feminism*, in MAKING FACE, MAKING SOUL 356, 359 (Gloria Anzaldúa ed., 1990).

18. See Zechenter, *supra* note 11, at 327.

against *Female Circumcision*, confronts this very issue.¹⁹ Obiora's article, which is set against the backdrop of the United Nations World Conference on Women, is concerned with claims that "[denounce] culture as a principle source of gender-based violence" with respect to various African practices collectively referred to as female circumcision.²⁰

Realizing that practices such as female circumcision are immediately framed within a debate between an individual woman's human rights and her community's/culture's/nation's right to self-determination, Obiora expresses her concern with "the implicit suggestion that individual and collective rights are binary opposites."²¹ She goes on to write that "individual and collective rights are not binary opposites. They do not merely function to threaten and repudiate each other. In many respects they affirm and reproduce each other; they can be convergent, interdependent, and mutually reinforcing."²² In other words, Obiora recognizes that individuals seldom function outside of some communal or cultural context, and that communities are made up of individuals who shape, to one degree or another, the customs and beliefs of that community. To posit the incompatibility of individual rights and group rights, as does the binary discourse, ignores the interplay that constantly occurs between an individual and her community/culture/nation.²³

Taking Obiora's critique one step further, Michel Rosenfeld's article, *Can Human Rights Bridge the Gap Between Universalism and Cultural Relativism?: A Pluralist Assessment Based on the Rights of Minorities*, unravels the universalism/relativism binary altogether.²⁴ Rosenfeld states that "the opposition between a universalist conception of human rights and its cultural relativist counterpart is altogether miscast" because "there is no single version of universalism" and there are several degrees of relativism as well.²⁵ In this way, the attempt by binary discourse to fit everything into either a universalist camp or a relativist camp is an example of "monism roughly defined as the view that there is

19. Obiora, *supra* note 7.

20. *Id.* at 275.

21. *Id.* at 279.

22. *Id.*

23. See Ruth L. Gana, *Which "Self"? Race and Gender in the Right to Self-Determination as a Prerequisite to the Right to Development*, 14 WIS. INT'L L.J. 133 (1995).

24. See Rosenfeld, *supra* note 2.

25. *Id.* at 250.

a single conception of the good that is correct and that all normative issues are to be resolved in terms of that conception."²⁶ Thus, Rosenfeld builds upon Obiora's critique of the binary discourse — that universalism (in the form of individual rights) and relativism (in the form of group rights) can and do co-exist — by questioning the very viability of the categories "universalism" and "relativism" as points of reference that provide meaning in a myriad of situations.

As a whole,²⁷ the universalism/relativism debate can be described as a modernist narrative not only because it constructs binaries in which each category functions to the exclusion of the other, but because it insists that the world can — indeed, must — be understood through one of two sharply focused lenses. When this totalizing theory is used as a framework for evaluating the lives of non-Western women, the result is a distorted one-dimensional image of Other/Third World women's identities and cultures.

The modernist narrative has been and continues to be employed in debates surrounding the issue of women's human rights. The universalist portion of the discourse, exemplified by the United Nations' Convention on the Elimination of all Forms of Discrimination Against Women ("CEDAW"), asserts, among other things, that all women everywhere are entitled to equal rights vis-à-vis their male counterparts regardless of culture, custom, and tradition.²⁸ Meanwhile, the cultural relativists' arguments, such as those put forth by the Taliban in Afghanistan,²⁹ defend group rights to self-determination, irrespective of whether certain cultural attitudes and practices discriminate against women.

26. *Id.* at 266-67.

27. It should also be noted that other criticisms of both universalism and relativism abound in legal theory as well as anthropological discourse, but my point here has to do with the binary discourse as a whole.

28. U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, art. 2(a), G.A. Res. 34/180, U.N. GAOR, 34th sess., Supp. No. 46, at 193, U.N. Doc. A134/46 (1979) [hereinafter CEDAW]. Article 2(a) embodies "the principle of the equality of men and women . . ." and in its preamble states that "a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women." *Id.*

29. See Shefali Desai, Note, *Hearing Afghan Women's Voices: Feminist Theory's Re-Conceptualization of Women's Human Rights*, 16 ARIZ. J. INT'L. & COMP. L. 805 (1999).

Largely left out of this tug-of-war are the non-Western women about whom the debate is waged. When Other/Third World women do appear, they can only be seen within the confines of the binary discourse because the modernist narrative does not allow for deviation from the strictly defined categories of universalism and relativism. Thus, the binary discourse portrays Other/Third World women as having to choose between their concerns/identities as women (universalism) and their concerns/identities as members of a distinct cultural group (relativism); they can admonish their culture's practices as violative of equal rights standards or they can embrace their cultures' traditions regardless of how those traditions affect them.

At first glance, the problem with the binary discourse as it is applied in this context appears to be its insistence that Other/Third World women must choose one of their identities over another. Cherrie Moraga illustrates a similar dilemma in the poem *La Guera* in which she writes, "I think: what is my responsibility to my roots — both white and brown, Spanish-speaking and English?"³⁰ Although she is not choosing between a gender and an ethnic identity, Moraga still feels like she has to choose between *identities*. Moraga's solution to the dilemma is reflected in the following line of the poem where she states, "I am a woman with a foot in both worlds; and I refuse the split."³¹ By declaring that she will not allow one of her identities to be "split" from another, Moraga employs what might be thought of as "metaphors of intersectionality." While this type of intervention begins to point out the flaws of the binary discourse, it does not dismantle the modernist narrative because it fails to question the narrative's construction of identity categories.

Metaphors of intersectionality that describe women of color as having multiple identities (i.e. race, ethnicity, class, gender, sexuality) actually reify the very identity categories employed by the universalism/relativism framework.³² The operation of the

30. Cherrie Moraga, *La Güera*, in *THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR* 27, 34 (Cherrie Moraga & Gloria Anzaldúa eds., 1981).

31. *Id.*

32. For instance, Leticia Hernández-Linares explains that she is struggling with the identity boxes such as "*Chicana, Latina, Salvadoran, feminist, working class*" because "[w]hile discovering the meaning behind these identifications has been necessary for me and will continue to be necessary for others, I feel confined by having to pick one and claim that "I am _____" as each adjective by itself is so insufficient and invites the assumptions and conclusions of others." Leticia Hernández-Linares,

binary discourse is dependent upon the creation of static and narrowly defined identity categories (the category "woman" and various non-Western cultural categories). Although metaphors of intersectionality disrupt the dualisms of the binary discourse by asserting that Other/Third World women need not choose between their identities as women and members of particular cultural groups, they rely on the use of identity categories when describing Other/Third World women.

Ella Shohat begins to point out the underlying problem with metaphors of intersectionality in her introduction to *Talking Visions: Multicultural Feminism in a Transnational Age* by stating that "genders, sexualities, races, classes, nations and even continents exist not as hermetically sealed entities but rather as parts of a permeable interwoven relationality."³³ Both the binary discourse and metaphors of intersectionality *do* envision genders and various cultural categories as "hermetically sealed entities." The universalist portion of the narrative defines the category "woman" through a set of civil and political rights, and the cultural relativist portion creates various cultural categories by choosing one account of a given community's customs and traditions. Though metaphors of intersectionality may not define "woman" or different ethnic identities in the same way as the modernist narrative, they still view Other/Third World women as merely the sum of several monolithic predetermined, albeit intersecting, identities.

Rejecting the identity categories created by the binary discourse (and reinforced by metaphors of intersectionality) requires deconstruction of the category "woman" as well as racial/ethnic categories based on limited views of non-Western cultures/communities/nations. Several scholars have interrogated the overarching category "woman" as a general description of everyone with certain physiological and biological characteristics.³⁴ As an alternative to static conceptions of what it means to be a woman, Judith Butler suggests thinking about "*woman* itself [as]

Gallina Ciega: Turning the Game on Itself, in THIS BRIDGE WE CALL HOME: RADICAL VISIONS FOR TRANSFORMATION 110, 112 (Gloria E. Anzaldúa & AnaLouise Keating eds., 2002).

33. Ella Shohat, *Introduction to TALKING VISIONS: MULTICULTURAL FEMINISM IN A TRANSNATIONAL AGE* 1, 1 (Ella Shohat ed., 1998).

34. See SIMONE DE BEAUVOIR, *THE SECOND SEX* 267 (1952); JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1999); Linda Alcoff, *Cultural Feminism Versus Poststructuralism: The Identity Crisis in Feminist Theory*, 13 *SIGNS* 405 (1988).

a term in process . . . an ongoing discursive practice . . . open to intervention and resignification."³⁵

Just as it is important to question the representation of "woman" as a fixed and stable category, Uma Narayan and Trinh T. Minh-ha question singular accounts of a given culture/community/nation that lead to racial/ethnic categorizations. Narayan, in *Dislocating Cultures: Identities, Traditions, and Third World Feminism*, points out that because cultural contexts are "capacious and suffused with contestation,"³⁶ it is important to be aware of cultural accounts that may "differ in significant ways from the culture's own dominant accounts of itself."³⁷ Similarly, Trinh's book, *Woman, Native, Other*, criticizes the quest for "uncontaminated aspects of culture, whose marrow is believed to lie hidden somewhere behind the 'fundamental' beliefs, ideology, and behavior of its members"³⁸ when representing non-Western cultures/communities/nations.³⁹ Together, Narayan and Trinh advocate ways of viewing a given community's culture and history that do not require one version of the facts or a search for authenticity. This ultimately hinders the binary discourse's ability to manufacture circumscribed racial/ethnic identities for Other/Third World women.

Eliminating predetermined identity categories is only the first step towards disrupting the universalism versus relativism binary. This is because, in addition to creating discrete identity categories and then splitting one identity from the other, the modernist narrative is also responsible for inscribing these identities within the bodies of Other/Third World Women. Under the rubric of modernism, identity is viewed as inherent to the individual, and social processes which contribute to the construction of an individual disappear.⁴⁰ Norma Alarcón questions this mod-

35. BUTLER, *supra* note 34, at 43.

36. UMA NARAYAN, *DISLOCATING CULTURES: IDENTITIES, TRADITIONS, AND THIRD WORLD FEMINISM* 9 (1997).

37. *Id.*

38. TRINH T. MINH-HA, *WOMAN, NATIVE, OTHER* 56 (1989).

39. *Id.*

40. See Allan C. Hutchinson, *Identity Crisis: The Politics of Interpretation*, 26 *NEW ENG. L. REV.* 1173, 1191 (1992). Hutchinson states that:

[I]n modernist discourse, an identity is something that each person has by virtue of their existence as unique individuals. At its most extreme and historical, there still seems to persist the idea that each subject is born normatively full-grown, like Zeus' children, with a raw set of values, preferences and characteristics.

Id.

ernist conception of identity in *The Theoretical Subject(s) of This Bridge Called My Back and Anglo-American Feminism*, when she writes that "[t]hrough feminism has problematized gender relations . . . it has not problematized the subject of knowledge and her complicity with the notion of consciousness as 'synthetic unificatory power' . . . [t]he subject (and object of knowledge) is now a woman, but the inherited view of consciousness has not been questioned at all."⁴¹ Here, Alarcón suggests that it is dangerous to locate identity or identities within Other/Third World women because this implies that Other/Third World women's many neatly categorized identities "exist apart from the discourses about them,"⁴² and that these identities come together to form a coherent whole.⁴³

Instead of viewing Other/Third World women as "autonomous, self-making [and] self-determining"⁴⁴ subjects or as a series of "selves,"⁴⁵ Alarcón urges a more complicated understanding of identity that includes actions, experiences and relationships that occur *outside* Other/Third World women's bodies.⁴⁶ Alarcón is not alone in problematizing modernist conceptions of identity. For example, Allan C. Hutchinson states in *Identity Crisis: The Politics of Interpretation*, that we must recognize identity as "multiple, contextual and protean,"⁴⁷ and Ella Shohat writes that "[m]ulticultural feminism is . . . less concerned with identities as something one has than in identification as something one does."⁴⁸

While Alarcón and others recognize "[c]onsciousness as a site of multiple voicings,"⁴⁹ Chela Sandoval's piece, *U.S. Third World Feminism: The Theory and Method of Oppositional Consciousness in the Postmodern World*, actually demonstrates ways in which Other/Third World women's identities are constructed rather than inherent.⁵⁰ Talking about the involvement of women of color in the 1970's women's liberation movement in the

41. Alarcón, *supra* note 17, at 357.

42. Judith G. Greenberg, *Introduction* to MARY JOE FRUG, *POSTMODERN LEGAL FEMINISM* at ix, xix (1992).

43. *Id.*

44. Alarcón, *supra* note 17, at 357.

45. *Id.*

46. *Id.*; see also Greenberg, *supra* note 42, at xix.

47. Hutchinson, *supra* note 40, at 1185.

48. Shohat, *supra* note 33, at 9.

49. Alarcón, *supra* note 17, at 365.

50. Chela Sandoval, *U.S. Third World Feminism: The Theory and Method of Oppositional Consciousness in the Postmodern World*, 10 *GENDERS* 1 (1991).

United States, Sandoval repeats what was a common refrain at that time: “[w]hen [women of color] *were* there, they were rarely there for long . . . ‘they seemed to shift from one type of women’s group to another’.”⁵¹

It was precisely this faculty for mobility among women of color, Sandoval goes on to state, that shattered conventional notions of identity and demanded “a new subjectivity, a political revision that denies any one ideology as the final answer, while instead positing a *tactical subjectivity* with the capacity to recenter depending upon the kinds of oppression to be confronted.”⁵² In other words, women of color who participated in the 1970’s feminist movement not only refused to belong to any one identity category, but their “tactical subjectivity”⁵³ and “recentering”⁵⁴ illustrates that identity-formation is a dynamic process informed by many different circumstances including political necessity/personal survival. Similarly, Paula Gunn Allen suggests that “Native American” and “feminist” are not fixed identities that reside within her, but rather, positions she assumes depending on what context she finds herself in: “if I am dealing with feminism, I approach it from a strongly tribal posture, and when I am dealing with American Indian literature, history, culture, or philosophy I approach it from a strongly feminist one.”⁵⁵

Employing postmodernist strategies to rethink modernism’s rational unitary subject, as Alarcón, Hutchinson, Shohat, Sandoval and Allen do, ultimately leads to a critique of the modernist universalism/relativism narrative. When used as a framework for discussing the rights of women in non-Western cultures/communities/nations, the binary discourse allows Other/Third World women to be portrayed *either* as gendered individuals who desire equal rights for men and women *or* as members of a distinct ethnic group who favor the group’s right to decide what is and is not

51. *Id.* at 13.

52. *Id.* at 14.

53. PAULA GUNN ALLEN, *THE SACRED HOOP: RECOVERING THE FEMININE IN AMERICAN INDIAN TRADITIONS* 222 (1992).

54. *Id.*

55. Although the term “postmodern” is not amenable to strict definitions, postmodernism can generally be thought of as “a flat rejection of universal knowledge and an outright denial of essential truths.” Hutchinson, *supra* note 40, at 1184; see also Janet E. Ainsworth, *Categories and Culture: On the “Rectification of Names” In Comparative Law*, 82 CORNELL L. REV. 19, 25 (1996) (stating that “the postmodern sensibility can fairly be characterized as one of epistemological anti-foundationalism, rejecting the belief that human knowledge can be grounded in eternal or universal truths.”).

acceptable behavior. In essence, Other/Third World women are forced to choose between the identity "woman" and the identity of "non-Western *other*." Postmodern re-conceptualizations of identity disrupt the binary discourse by contesting the notion that Other/Third World women must choose between two pre-developed identities. Such re-conceptualizations also assert that instead of "having" an inherent identity, Other/Third World women simultaneously enact various identities while constantly re-defining what those identities represent.

C.

If Other/Third World women cannot be viewed through exclusive, monolithic identity categories as postmodern critiques of the universalism/relativism discourse suggest, then the very term "Other/Third World women" is also problematic. In other words, the term "Other/Third World women" can be seen as an extension of the modernist narrative because it places all non-Western women in a single, overarching identity category. While Part II details how a situation-specific analysis that runs counter to the binary discourse's penchant for generalization avoids the need to employ the category "Other/Third World women," the term itself can be useful.

In this Essay, for instance, "Other/Third World women" functions as a trope for the inadequacies of the binary discourse, an act of resistance through reclamation and renaming, and the forging of alliances to subvert the universalism-versus-relativism paradigm. The epistemological framework of the binary discourse depicts non-Western women as faceless, voiceless creatures wholly constituted either by their "enlightened" acceptance of women's rights or by their "submission" to cultural customs and traditions. Because the term "Other/Third World women" conveys the anonymity and impersonality mandated by the binary discourse, it makes sense to use this term when describing the consequences of the binary discourse.

A second and related reason for utilizing "Other/Third World women" is to emphasize the binary discourse's modernist desire for universal meaning, whether that meaning be in the form of universal human rights standards or cultural relativist attitudes. This mode of analysis leads to declarations that the "truth" of non-Western women's lives *can* be ascertained. Consequently, the term "Other/Third World women" becomes a symbol for the existence of this "truth." Thus, my use of the

term is meant, in part, to be a reminder that adherence to the dualistic framework universalizes Other/Third World women so that the category "Other/Third World women" can be used as an analytical tool.

Another equally compelling reason for my use of the term "Other/Third World women" is informed by a long tradition of women of color re-claiming discriminatory, racist, and oversimplified categories as a site for self-identification and alliance-building. For instance, Ella Shohat explains that "[a] product shaped by the civil rights and women's movement,"⁵⁶ the use of the representational label "women of color" was at once a critique of the flaws in nationalist and Anglo-feminist movements, a strategy to resist "the act of naming"⁵⁷ by hegemonic forces, and a show of solidarity.⁵⁸ Similarly, Chela Sandoval employs the term "U.S. Third World feminism" to simultaneously refer to an entire body of literature by writers such as Audre Lorde, Nellie Wong, Gloria Anzaldúa, Paula Gunn Allen, Cherrie Moraga, Toni Morrison, Mitsuye Yamada and bell hooks: "political alliances made during the 1960s and 1970s between a generation of U.S. feminists of color who were separated by culture, race, class, or gender identifications but united through similar responses to the experience of race oppression,"⁵⁹ as well as to "an insurgent movement which shatters the construction of any one of the collective ideologies as the single most correct site where truth can be represented."⁶⁰ Thus, in addition to pointing out the flaws of the binary discourse, my use of the term "Other/Third World women" exemplifies the discursive practice employed by generations of women of color/U.S. Third World feminists of "re-naming so as to un-name."⁶¹

A final reason why I employ "Other/Third World women" throughout this Essay is to draw a parallel between the binary discourse's treatment of non-Western women in the international arena and its treatment of women of color, specifically Native American women, within the United States. Although the image of women both within and outside the U.S. is invoked by Sando-

56. Shohat, *supra* note 33, at 5.

57. *Id.*

58. *Id.*; see also *THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR* (Cherrie Moraga & Gloria Anzaldúa eds., 1981).

59. Sandoval, *supra* note 50, at 14

60. *Id.*

61. TRINH T. MINH-HA, *WHEN THE MOON WAXES RED: REPRESENTATION, GENDER AND CULTURAL POLITICS* 14 (1991).

val's term "U.S. third world feminism,"⁶² she does not overtly link the two. Trinh Minh-ha, however, does highlight the connection between women of color in the United States and women from so-called "Third World" countries. She does so by pointing out the discomfort that is aroused when the term "Third World women" is used to describe women of color *within* the United States:

[W]henver it is a question of "Third World women" or, more disquietingly, of "Third World Women in the U.S.," the reaction provoked among many whites almost never fails to be that of annoyance, irritation, or vexation. "Why Third World in the U.S.?" they say angrily; "you mean those who still have relatives in South East Asia?"⁶³

This is not to suggest that there are no differences between U.S. women of color and women from non-Western countries, or that it is not important to pay attention to those differences. Rather, it is a recognition that forging some kind of a link between the two groups, while remaining aware of their differences, "gives us access to ever new and dynamic tactics for intervening in the systems which oppress us."⁶⁴ Using the term "Other/Third World women" to imply a connection between non-Western women and U.S. women of color is one such interventionist strategy because it allows us to apply critiques of the binary discourse on the international level to the domestic arena. It also generates new approaches for looking at and understanding complex relations without relying on modernist categories and notions of identity.

II. PART II

In order to begin envisioning alternatives to the binary discourse when discussing the lives of Other/Third World women, it is necessary to understand the methodological underpinnings that lead to the binary discourse's epistemological framework.⁶⁵ In other words, it is important to understand why the modernist

62. Sandoval, *supra* note 50, at 1.

63. MINH-HA, *supra* note 38, at 99.

64. JANET R. JAKOBSEN, *WORKING ALLIANCES AND THE POLITICS OF DIFFERENCE: DIVERSITY AND FEMINIST ETHICS* 3 (1998).

65. Sandra Harding explains that "discussions of method (techniques for gathering evidence) and methodology (a theory and analysis of how research should proceed) have been intertwined with each other and with epistemological issues (issues about an adequate theory of knowledge or justificatory strategy)." Sandra Harding, *Introduction to FEMINISM AND METHODOLOGY* 2 (Sandra Harding ed., 1987).

narrative limits its analysis to the universalism/relativism binary, so that alternatives to the discourse can pursue different methods and strategies. One immediately evident methodological feature of the binary discourse is its failure to contextualize the women who form the subject of its analysis. For example, the binary discourse's discussion of women's human rights disregards or only gives a superficial description of Other/Third World women, their communities, and their experiences within these communities.⁶⁶ In addition, the discourse's cursory description of Other/Third World women often functions as merely a backdrop from which to launch into an argument supporting either universalism or relativism.⁶⁷

A.

Nancy Kim and Tracy E. Higgins are scholars concerned with issues surrounding discussions of women's human rights. Both Kim and Higgins, at least initially, question modernism's ability to satisfactorily explain complex social interactions between Other/Third World women and their communities/cultures/nations. Kim's and Higgins' respective law review articles, however, show that even those who attempt to problematize the modernist narrative have a tendency to employ the terms and methods of the binary discourse, thereby reproducing the discourse's categories and generalizations.

As the title of Nancy Kim's article, *Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism*, indicates, Kim sets out to "[explore] how feminist theory, as an alternative to both relativism and liberal human rights theory, can be used to reconceptualize women's rights as human rights."⁶⁸ Kim's attempt at using feminist theory to bypass universalist and relativist points of view, however, begins to look very much like universalism. For instance, Kim devotes a large portion of her article to arguing that "[r]elativist criticism of feminism as a form of Western impe-

66. An example of superficial treatment of Other/Third World women and their communities is provided below, *infra* Part II.A, in the discussion of Nancy Kim's article, *Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism*, 25 COLUM. HUM. RTS. L. REV. 49 (1993).

67. As set forth below, *infra* Part II.A, Nancy Kim's article argues for a type of feminist universalism without providing any context for the Other/Third World women's lives in which she seeks to intervene.

68. Kim, *supra* note 66, at 49.

rialism is misguided because gender oppression is systemic and cross-cultural"⁶⁹ and that "feminism is a multicultural response"⁷⁰ to this universal oppression of women.⁷¹

Judith Butler cautions Western feminists against these types of statements because the notion of patriarchal oppression as "a universalizing concept . . . overrides or reduces distinct articulations of gender asymmetry in different cultural contexts."⁷² Since Kim's strategy is to replace theories of universal human rights with Western feminist concepts of patriarchy and oppression, her "alternative" is merely another form of universalism. She is once again confined to arguing for universalism and against relativism.

Taking a closer look at the article's methodology, it becomes clear that Kim does not focus her attention on one woman or group of women, and therefore nothing prevents her from asserting that all gender oppression is the same. Instead, Kim repeatedly refers to Other/Third World women in a vague manner when she makes the following types of statements: "[t]he rhetoric of cultural relativism . . . effectively forecloses any opportunity that women might have to fully participate in their culture."⁷³ Here, we do not know which group of women she is talking about or what she means by "their culture."

Even when she refers to specific Other/Third World women, Kim fails to provide a context for her analysis. For example, Kim writes that "African women are organizing an educational campaign to combat sexual surgery"⁷⁴ and "[m]any Muslim feminists are fighting against conservative Muslims."⁷⁵ Though these passages provides more information than the previous one, they still do not tell us *who* these women are vis-à-vis their social status. Moreover, they do not tell us anything about the cultural practice in question other than a vague reference to "sexual surgeries." Finally, they completely ignore the role that forces such as colonialism and imperialism might have played in shaping the "cultural" practices that are now being condemned by unnamed

69. *Id.*

70. *Id.*

71. *Id.*

72. BUTLER, *supra* note 34, at 45-46.

73. Kim, *supra* note 66, at 50.

74. *Id.* at 94.

75. *Id.*

and highly symbolized “African women” and “Muslim feminists.”⁷⁶

Equally troubling is Kim’s implicit assumption that Other/Third World women who disagree with the singularized account of their culture as portrayed by the binary discourse must be “feminists,” or as she states elsewhere, “Westernized Third World” women.⁷⁷ Kim’s word choice conveys a belief that Other/Third World women who refuse cultural relativism must be doing so because they have chosen Western feminism. This in turn reinforces static, one-dimensional caricatures of non-Western communities/cultures/nations.

Like Kim, Tracy E. Higgins in *Anti-Essentialism, Relativism, and Human Rights* sets out to address the shortcomings of the binary discourse by putting forth an alternative to universalism and relativism — “global feminism.”⁷⁸ Higgins points out that a global feminist “approach to international human rights . . . leads in two apparently conflicting directions at once: (1) increased awareness universally of the importance of cultural and economic rights for women . . . and (2) increased respect for cultural difference based on an awareness of the partiality of perspective.”⁷⁹ Higgins goes on to explain that because these seemingly opposing concerns reflect universalist and relativist positions and because global feminism embodies *both* concerns at the same time, global feminism presents a solution to the debate between universalism and relativism.

Higgins begins to make an important point here — that universalism and relativism do not work independently of one another and, in fact, rely on each other — global feminism, as an ideology that embraces both halves of the binary discourse, does not ultimately reject the premises upon which universalism and relativism are constructed. For instance, Higgins views global feminism as “a critique that respects the agency of the oppressed without ignoring the oppression.”⁸⁰ Here, Higgins demonstrates that despite her discomfort with having to choose *either* universalism *or* relativism, she has no objection to employing both of these positions at the same time. In addition, Higgins fails to

76. *Id.*

77. *Id.* at 61.

78. Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN’S L.J. 89 (1996).

79. *Id.* at 104.

80. *Id.* at 116.

engage in any discussion of the term "oppression" or the Other/Third World women who are the subject of her article before conclusively asserting that they are, in fact, "oppressed." Finally, because Higgins fails to provide any context for her argument (Higgins, unlike Kim, doesn't even attempt to identify the Other/Third World women about whom she writes), her suggestion that global feminism enforces "a combined strategy that respects both commonality and difference"⁸¹ passes over a potentially rich and nuanced discussion for an oversimplified narrative concerned only with similarities (universalism) and differences (relativism).

Although both Kim and Higgins are aware of the inadequacies of the binary discourse, their lack of contextualization and situation-specific analyses perpetuate the very narrative they seek to critique. Furthermore, Kim and Higgins' failure to provide examples of specific women and their situations moves the inquiry away from Other/Third World women's experiences. Instead, it places the focus upon how Western feminists should perceive, write about, and depict Other/Third World women. Thus, the fact that Other/Third World women are only vaguely summoned to illustrate Kim and Higgins' struggle with universalist and relativist viewpoints shows that the authors' main concern is *not* about whether it makes sense to frame Other/Third World women's concerns within the binary discourse. Instead, the authors seem to question whether Western feminists are justified in wanting Other/Third World women to choose universalism over relativism — an inquiry which *already* assumes that Other/Third World women are caught between universal human rights standards and cultural relativism.

B.

Kim's and Higgins' articles make clear that an analysis seeking to transcend the confining epistemological implications of the modernist narrative must reject the binary discourse's propensity for discussing the issue of women's human rights in a virtual vacuum. In marked contrast to both Kim and Higgins, L. Amede Obiora's article, *Bridges and Barricades* grounds the debate over women's human rights in the practice of female circumcision. It also describes variations in the practice, variations in the reasons given for continuing the practice, and specific African women's as well as their communities' differing perspectives on circumci-

81. *Id.* at 126.

sion.⁸² Obiora starts out by stating that female circumcision has “[been] placed . . . at the center of a world-wide controversy”⁸³ and that “[t]he debate is divided between universalists, who invoke monolithic categories and constructions of dignity, integrity, and empowerment to condemn genital surgeries, and relativists, who argue for locally autonomous and culturally sensitive reformatory strategies.”⁸⁴ Yet, Obiora’s analysis, itself, does not rely on the binary discourse.

Instead of using the modernist universalism/relativism narrative to evaluate female circumcision, Obiora devotes a substantial portion of her article to the sociological framework in which various forms of circumcision practices arose. Obiora writes that “[f]emale circumcision is embedded in an intricate web of habits, attitudes, and values, along with having both functional and symbolic connotations,” and then goes on to describe these habits, attitudes and values as they relate to specific (and named) African communities.⁸⁵ In addition to providing geographical and ethnographic contexts for her analysis, Obiora situates her discussion historically by examining the role of “outside interventionists, whether colonialist or missionary[,]”⁸⁶ in Africa prior to the present Western feminist intervention into the practices of female circumcision.⁸⁷

Finally, Obiora does not portray African women as faceless, voiceless Other/Third World women who must choose between universalism and relativism. Rather, Obiora presents African women by giving voice to their concerns: “village women are asking for better health facilities and lower infant mortality rates, pipe borne water and access to agricultural credit.”⁸⁸ She notes that even for Africans “who support the abolition of genital surgeries, the practice is not considered the ultimate or the most urgent of the indicators of the poverty of the material realities of women.”⁸⁹ Thus, Obiora shifts the focus away from the binary discourse — that would have African women choose between falsely created dichotomized identities — to the actual women themselves.

82. Obiora, *supra* note 7.

83. *Id.* at 284

84. *Id.*

85. *Id.* at 295.

86. *Id.* at 329.

87. *Id.*

88. *Id.* at 363.

89. *Id.* at 363-64.

As Obiora's article demonstrates, the methodological and epistemological pitfalls of the binary discourse may be avoided by conducting analyses of Other/Third World women's lives and communities *within* specific geographical, sociological, political, and historical contexts. One way of doing this is to draw from several different disciplines instead of adhering to a legal perspective, which often ignores or oversimplifies historical, ethnographic and anthropological material. Janet Jakobsen observes that "[t]his world is marked by diversity and complexity — diversity created by differences within and among persons and a correlative complexity created by multiple criss-crossing power relations and resulting contradictions."⁹⁰

The binary discourse flattens this diversity and complexity through its reliance on modernist categorizations and its lack of an interdisciplinary, context-specific analysis. By providing her audience with details surrounding the issue of female circumcision from several different viewpoints, Obiora makes it increasingly difficult to confine discussions of female circumcision to African women's rejection of circumcision by embracing women's human rights or blindly accepting circumcision as an inextricable part of their cultures. Following Obiora's example, this paper seeks to complicate the modernist narrative's account of *Santa Clara Pueblo* as a case in which Pueblo women have to choose between women's rights to equal protection and their tribe's sovereignty and customs.

III. PART III

In *Santa Clara Pueblo*, Julia Martinez, a Santa Clara Pueblo member, brought an equal protection claim against her Pueblo because the Pueblo's 1939 Ordinance prohibited the children of female Pueblo members who married outside the Pueblo from becoming Pueblo members, without imposing the same prohibitions on the children of male Pueblo members who married outside the Pueblo.⁹¹ Based on these facts and issues, *Santa Clara Pueblo* has been read "to present a conflict between the prerogatives of the tribe to define its membership and the rights of individuals within the group to the civil liberties . . ."⁹² In addition, *Santa Clara Pueblo* has been cited as the domestic

90. JAKOBSEN, *supra* note 64, at 4.

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

92. Higgins, *supra* note 7, at 244.

equivalent of the international debate between universalism and cultural relativism because the courts and most legal scholars depict the issues surrounding the case as presenting an either/or choice between individual rights and group rights.⁹³

The two viewpoints that make up the binary discourse in *Santa Clara Pueblo* — civil rights and tribal sovereignty — closely parallel the components of the international human rights discourse — universalism and relativism. Martinez based her claim against the Pueblo on section 1302(8) of the Indian Civil Rights Act of 1968 (the “ICRA”). Under the ICRA, a number of civil rights embodied in the U.S. Constitution’s Bill of Rights are extended to Native Americans. Among these, the right to equal protection is applied to tribal governments to prohibit them from denying “to any person within its jurisdiction the equal protection of its laws or depriv[ing] any person of liberty or property without due process of law.”⁹⁴

The language of the ICRA’s equal protection clause is strikingly similar to universal human rights standards promulgated by CEDAW. In Article 2, section c, CEDAW requires that State Parties to the Convention “establish legal protection of the rights of women on an equal basis with men.”⁹⁵ Article 15, section 1, states that “State Parties shall accord to women equality with men before the law.”⁹⁶ Because both universalism, on the international level, and civil rights, on the domestic level, contain the mandate that governments treat women the same as men and because Martinez’s claim is based on the latter, Martinez’s case against the Pueblo has been viewed strictly in terms of civil rights/universalism. Put simply, the legal discourse portrays Martinez as elevating her equal protection concerns as a woman above any concerns she might have as a member of the Santa Clara Pueblo.

Conversely, the depiction of Santa Clara Pueblo’s defense against Julia Martinez’s equal protection suit can be compared to cultural relativist positions adopted by non-Western communities/cultures/nations when criticized for violating human rights, and in particular, women’s human rights. The cultural relativist position is concerned with protecting cultural practices that do

93. See Rosenfeld, *supra* note 2, at 251; Smith, *supra* note 7, at 2501; Obiora, *supra* note 7, at 280; Higgins, *supra* note 7, at 244.

94. 25 U.S.C. §1302(8) (2004).

95. CEDAW, *supra* note 28, art. 2(c).

96. *Id.* at art. 15(1).

not comport with universal human rights standards, but are felt to be an important component of a community's/culture's/nation's identity and way of life.⁹⁷ Another component of cultural relativism, stemming from nationalist reactions to imperialism, is non-Western nations' desire to promulgate their own rules and laws unhindered by what is perceived as Western influence.⁹⁸ Since the Pueblo upheld the 1939 Ordinance by citing both tradition and tribal sovereignty⁹⁹, the Pueblo represents the relativist half of the binary discourse, implying that the Pueblo is only concerned with the group's right to self-determination.

In addition to portraying *Santa Clara Pueblo* as a debate between universalism (in the form of civil rights and, specifically, equal protection) and relativism (in the form of tribal sovereignty and the Pueblo's right to self-determination), the legal discourse and scholarly commentary surrounding the case implies that Julia Martinez, an Other/Third World woman presumed to have distinct gender and ethnic identities, had the choice to *either* fight for equal protection *or* to accept the 1939 Ordinance and affirm her allegiance to the Santa Clara Pueblo. According to the modernist narrative, she chose the former. The purpose of this Part is to call into question and offer alternatives to the framework that forced Martinez and the Pueblo to be viewed within the narrow confines of universalism and relativism.

A.

The first step in re-thinking *Santa Clara Pueblo* is to take a closer look at how the courts and scholars employ the modernist universalism/relativism narrative when discussing the issues in this case. This exercise not only reveals the complexity compromised by the binary discourse, but also is instructive as to how one might go about constructing alternatives. I begin with the case law, because the placement of *Santa Clara Pueblo* within the binary discourse originated in the courts, and these courts' opinions have largely dictated the academic discussions surrounding the case.

97. See INTERNATIONAL HUMAN RIGHTS, *supra* note 13, at 192.

98. See L. Amede Obiora, *New Skin, Old Wine: (En)gaging Nationalism, Traditionalism, and Gender Relations*, 28 IND. L. REV. 575, 576-79 (1995).

99. *Santa Clara Pueblo*, 436 U.S. at 53-54.

1.

The U.S. District Court for the District of New Mexico first heard and decided *Martinez v. Santa Clara Pueblo* on June 25, 1975.¹⁰⁰ There were two questions before the court in this case: (1) whether the federal courts had jurisdiction to hear the case¹⁰¹ and (2) if the court could hear the case, whether the Pueblo's 1939 Ordinance violated section 1302(8) of the ICRA.¹⁰² Thus, before it could consider Martinez's substantive claim that the Pueblo had violated her right to equal protection, the court had to decide whether a federal court had the authority to hear an equal protection claim levied against an Indian tribe.

Laying the foundations of federal Indian law and policy in *Cherokee Nation v. Georgia*, the Supreme Court held that Indian tribes have been "denominated domestic dependent nations."¹⁰³ This decision has been interpreted to mean that Indian nations enjoy broad powers of self-government vis-à-vis their internal affairs, and as a result, U.S. Indian tribes "have traditionally been exempt from compliance with the Bill of Rights of the American Constitution and from [federal] judicial review of their internal decisions."¹⁰⁴ Thus, in its argument against Martinez's claim, Santa Clara Pueblo relied on *Cherokee Nation* and its progeny to argue that because membership rules promulgated by the 1939 Ordinance constituted a purely intra-tribal matter, the district court had no jurisdiction to hear the case.¹⁰⁵ In contrast, Julia Martinez argued that the ICRA, and more specifically the equal protection clause of the ICRA, "abrogates a tribe's sovereign immunity for purposes of suit under the Act."¹⁰⁶

In determining whether the federal court system had jurisdiction to hear a controversy arising out of what had previously been considered a purely internal tribal matter — here, the tribe's ability to promulgate its own membership rules — the District Court observed that "[t]he Indian Civil Rights Act is relatively new, and the law concerning its applicability and particu-

100. *Martinez v. Romney*, 402 F. Supp. 5 (D.N.M. 1975), *rev'd sub nom. Martinez v. Santa Clara Pueblo*, 540 F.2d 1039 (10th Cir. 1976), *rev'd* 436 U.S. 49 (1978).

101. *Id.* at 7.

102. *Id.* at 6.

103. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); for a more complete understanding of the relationship between Indian tribes and the federal government, see DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW* (1998).

104. Rosenfeld, *supra* note 2, at 264.

105. *Martinez*, 402 F. Supp. at 7.

106. *Id.* at 8.

larly the effect of the equal protection clause . . . is unclear."¹⁰⁷ However, after reviewing several cases upholding federal jurisdiction where plaintiffs based their claims on the ICRA, the District Court held that "this Court has jurisdiction [over Martinez's claim] and must proceed to decide this case on its merits."¹⁰⁸

The Court next turned its attention to the question of whether the 1939 Ordinance violated section 1302(8) of the ICRA and hence, Martinez's right to equal protection. The Court began its analysis by restating that "absent Congressional restrictions, an Indian tribe has the power to determine its own membership, at least for purely internal purposes."¹⁰⁹ It warned, however, that although Congress's enactment of the equal protection clause of the ICRA seemed to limit the tribe's exclusive ability to make membership determinations, "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."¹¹⁰ With this background in mind, the Court went on to enunciate the test it would employ to reach its decision: the equal protection clause of the ICRA "should not be construed in a manner that would invalidate a tribal membership ordinance *when the classification attached is one based on criteria that have been traditionally employed by the tribe in considering membership questions.*"¹¹¹ In fashioning this test, the Court created for itself the task of determining what constituted Pueblo tradition and then of deciding whether this tradition was a motivating factor behind the 1939 Ordinance.

During the trial, the Court heard testimony from a small number of anthropologists, historians, and tribal members.¹¹² From the information presented by these witnesses, the parties' briefs, and undoubtedly the Court's own perception of the Pueblo people, the Court engaged in the following historical and anthropological discussion of Santa Clara Pueblo:

In its early days, Santa Clara culture made no distinction between what Anglo-Americans would term 'political' and 'religious' matters. However, with the Spanish invasion in the early seventeenth century, the Pueblo instituted a 'secular'

107. *Id.* at 9.

108. *Id.* at 11.

109. *Id.* at 17.

110. *Id.*

111. *Id.* at 18 (emphasis added).

112. *Id.* at 12-13, 16.

government to distract Spanish attention from the caciques (religious leaders) who were the real authorities in the Pueblo. The membership of the Pueblo is and has been organized into what the anthropologists refer to as 'moieties,' specifically the Winter people and the Summer people . . . The precise function and significance of the membership is not clear on the record; it is, however clear that it is primarily a religious grouping . . .

During the early part of the twentieth century sharp conflicts developed in the Pueblo over the importance of traditional customs and values in the life of the Pueblo. For example, a major source of controversy was whether the Governor should be an older, highly respected man who was well versed in the traditional ways, or a younger man, educated in Anglo-American schools, who could speak English and would be able to deal more effectively with non-Pueblo society. The disagreement literally split the Pueblo . . . during the late 1920's and early 1930's . . .

The members of the Pueblo did agree to have the resident BIA agent, Elizabeth Sargent, help settle the difference. At her suggestion, and after much discussion, the Pueblo . . . adopted a Constitution and By-Laws in 1935. As reorganized the secular government retained many of its traditional institutions . . . while at the same time incorporating and instituting certain Anglo-American institutions . . . Thus, the present Pueblo government is neither wholly traditional nor wholly anglicized . . .

Whether or not the Ordinance is an embodiment of pre-existing ancient Pueblo custom is less clear. Before 1939 mixed marriages were relatively rare in the Pueblo, and consequently there was no need for a hard and fast rule concerning membership; rather, the Council considered each case separately. In that sense, the establishment of any one rule must be seen as a break with tradition.

On the other hand, the criteria employed in classifying children of mixed marriages 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 generally 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 . . . it is apparent that membership of the parents and marriage, either within or out of the Pueblo, has always been considered a highly significant factor in membership determinations . . ."¹¹³

113. *Id.* at 12-16.

This passage, which purports to present a complete and accurate account of Santa Clara Pueblo history and culture, formed the basis for the Court's analysis of Martinez's claim.

The Court addressed the first prong of its test, the determination of what constitutes Pueblo tradition, by citing the portion of the above passage which states that "Santa Clara was traditionally patrilineal and patrilocal."¹¹⁴ The Court then used this information to answer the second prong of its test: whether the 1939 Ordinance was the result of Pueblo tradition. The court observed that in cases where Pueblo members married non-members, the 1939 membership rule distinguished between male and female Pueblo members by stating that only children born to male Pueblo members could become Pueblo members themselves. According to the court, this distinction was in line with patrilineal Pueblo tradition whereby membership could only be transmitted through the male line. Because section 1302(8) of the ICRA was not meant to "abrogate tribal decisions . . . in the delicate area of membership"¹¹⁵ when those tribal decisions are based on the Pueblo's "traditional values"¹¹⁶ and "cultural identity,"¹¹⁷ the Court determined that the Ordinance constituted authentic Pueblo tradition and culture and held that the ICRA could not be used to invalidate the 1939 Ordinance.¹¹⁸

2.

Julia Martinez appealed the District Court's decision in favor of the Pueblo to the United States Court of Appeals for the Tenth Circuit.¹¹⁹ The Tenth Circuit's opinion begins by evaluating the District Court's holding that the ICRA provides federal courts with jurisdiction over intratribal matters.¹²⁰ Like the District Court, the Tenth Circuit held that the ICRA abrogates the Pueblo's sovereign immunity and allows tribal members to sue their tribes in federal court even if the contested action is a purely intratribal matter.¹²¹ The Tenth Circuit then went on to review the District Court's decision to uphold the Pueblo's 1939

114. *Id.* at 16.

115. *Id.* at 19.

116. *Id.* at 18.

117. *Id.* at 19.

118. *Id.*

119. *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039 (10th Cir. 1976), *rev'd* 436 U.S. 49 (1978).

120. *Id.* at 1042.

121. *Id.*

Ordinance by discussing whether section 1302(8) of the ICRA guarantees the same degree of equal protection to Indians as the U.S. Constitution provides to non-Indians.¹²²

Looking to congressional hearings which took place before the passage of the ICRA, the Tenth Circuit noted that one of the primary reasons behind Congress's creation of the ICRA was the belief that the rights of individual Indians needed protection from "infringement by tribal government."¹²³ Thus, Congress felt that "an Indian tribe in exercising its powers of local self-government [should be] subject to the same limitations and restraints as those which are imposed on the Governments, Federal and State, by the United States Constitution."¹²⁴ At the same time, the Tenth Circuit recognized that "Congress actually considered the various rights contained in the Bill of Rights [when constructing the ICRA] and retained those it considered essential and *eliminated those parts which it deemed to be out of harmony with Indian culture.*"¹²⁵ This led the Court to state that Congress did not forget that "the cultural autonomy and integrity of the tribes were entitled to be weighed" when it passed the ICRA.¹²⁶ Based on this view of congressional intent and history, the Tenth Circuit stated that in fashioning the ICRA, Congress weighed its desire to protect the civil rights of individual Indians with its desire to respect tribal sovereignty.

The emphasis Congress put on balancing individual rights with group rights, in turn, led the court to promulgate a general rule by which to evaluate tribal actions that allegedly conflict with the ICRA: "About the only way to resolve this conflict is to recognize the necessity to evaluate and weigh both of these interests. Thus, the scope, extent and importance of the tribal interest is to be taken into account. The individual right to fair treatment under the law is likewise to be weighed against the tribal interest by considering the clearness of the guarantee together with the magnitude of the interest generally and as applied to the particular fact."¹²⁷

Extrapolating from this general rule, the Tenth Circuit enunciated its own test: that the equal protection clause of the ICRA

122. *Id.*

123. *Id.* at 1044.

124. *Id.* at 1043.

125. *Id.* at 1044 (emphasis added).

126. *Id.* at 1045.

127. *Id.*

should not be given the same force as the equal protection clause of the U.S. Constitution *in instances "where the tribal tradition [being questioned] is deep-seated."*¹²⁸ Thus, in order to decide whether or not to strike down the 1939 Ordinance as violative of the equal protection clause of the ICRA, the Tenth Circuit, like the District Court, put itself in the position of determining whether the membership rule was a "deep-seated" Pueblo tradition.

Although it relied on the same record that had been before the District Court, the Tenth Circuit's notion of what constituted Pueblo culture and tradition substantially differed from the District Court's understanding of Pueblo culture and tradition. In the Tenth Circuit's version of Santa Clara Pueblo's social and political history, the court stated that "[i]t is important to note . . . that prior to the adoption of [the 1939 Ordinance] the mixed marriage problem was dealt with on an individual case basis. The evidence shows that under this policy there were situations in which the offspring of a Santa Clara woman [and a non-member man] were admitted to the Pueblo and so historically the 1939 ordinance cannot be said to represent the Santa Clara tradition."¹²⁹

As a result of the Tenth Circuit's view of Pueblo culture and tradition, the court found that the membership rule in question was of recent origin and thus, "does not merit the force that would be attributable to venerable tradition."¹³⁰ Because the 1939 Ordinance did not merit the force of tradition, the equal protection clause of the ICRA guaranteed Martinez the same degree of equal protection as the Bill of Rights guaranteed to non-Indian women. Accordingly, the Tenth Circuit determined that the 1939 Ordinance violated Martinez's right to equal protection under section 1302(8) of the ICRA.

3.

The divergence in the District and Circuit Courts' holdings in this case belie the fact that both courts followed the same line of analysis to reach their respective conclusions. The District Court stated that the equal protection clause of the ICRA did not invalidate Santa Clara Pueblo's Ordinance because that

128. *Id.* at 1046 (emphasis added) (citations omitted).

129. *Id.* at 1047.

130. *Id.* at 1048.

membership rule upheld traditional Pueblo culture, while the Appellate Court held that the Ordinance was in violation of the ICRA because the rule was not an authentic component of Pueblo culture. In this way, both courts framed the question as one of cultural authenticity: if the Ordinance represents Pueblo culture, it does not violate the equal protection mandate of the ICRA; but, if it does not reflect Pueblo culture, it violates Martinez's civil rights.

The universalism/relativism binary sustains the idea presented by the two lower courts: that the legality of the Ordinance hinges on its proximity to authentic Pueblo culture and tradition. For instance, both courts' tests are based on the notion that there is a universal norm (equal protection) which may be violated if and only if culture and custom are what necessitate a deviation from that norm (cultural relativism). Furthermore, the courts' search for whether the Ordinance is in fact an example of true Pueblo culture relies on the modernist narrative's assumption that authentic culture exists and can be described as a contained entity that is then differentiated (and split from) the universal norm.

In its opinion, the District Court remarks that “[f]rom a practical political standpoint, the result [of colonization] has been a tension in the life of the Pueblo between traditional Pueblo customs and values and the ‘modern’ customs and values of Anglo-American society.”¹³¹ The Court's statement not only defines the Pueblo as “traditional” and Anglo-American as “modern,” thereby evoking static images of each, but it also implies that there is a conflict between Pueblo and Anglo-American *identities*. Finally, the question over which the lower courts disagreed — whether the Pueblo's membership rule did indeed embody traditional cultural values of the Santa Clara people — only becomes significant when the case is viewed through the binary discourse. In other words, once the courts erect a framework under which the outcome must be dictated by mainstream Anglo-American values of equal protection or tribal values of self-determination, the courts have no choice but to elevate one viewpoint over the other, thereby further entrenching themselves within the modernist narrative.

131. *Martinez v. Romney*, 402 F. Supp. 5, 15 (D.N.M. 1975), *rev'd sub nom. Martinez v. Santa Clara Pueblo*, 540 F.2d 1039 (10th Cir. 1976), *rev'd* 436 U.S. 49 (1978).

4.

The district and appellate courts both held that this case was within the purview of the federal courts and focused most of their discussion on whether the 1939 Ordinance violated the ICRA. However, the Supreme Court's treatment of *Santa Clara Pueblo* revolved solely around the jurisdictional issue before the lower courts.¹³² Thus, the only question that the Court addressed was whether the ICRA authorizes federal courts to "pass on the validity of an Indian tribe's ordinance denying membership to the children of certain female tribal members"¹³³ — a presumably jurisdictional, as opposed to substantive, issue.¹³⁴

Referring to the district court's opening discussion in which the court described the status of Indian tribes vis-à-vis the federal government, the Supreme Court began its analysis by stating that "Indian tribes are 'distinct, independent political communities, retaining their original natural rights'"¹³⁵ in matters of local self-government.¹³⁶ To emphasize its points, the Court went on to explain that "[a]lthough no longer 'possessed of the full attributes of sovereignty,' [Indian tribes] remain a 'separate people, with the power of regulating their internal and social relations.'"¹³⁷ In this section of its opinion, then, the Court firmly established that as separate sovereigns, Indian tribes have traditionally been unconstrained by constitutional provisions, such as the Equal Protection Clause of the Fourteenth Amendment, which might ordinarily limit state and federal authority.¹³⁸ Having said this and implying a great deal of deference to tribal decisions regarding intra-Pueblo issues, the opinion takes a step back from its generous interpretation of tribal sovereignty by stating that "Congress has plenary authority *to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess* . . . Title I of the ICRA, 25 U.S.C. §§1301-1303, represents an exercise of that authority."¹³⁹

After revisiting the federal Indian law doctrine that tribal sovereignty can only be limited by an express Congressional

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

133. *Id.* at 51.

134. *Id.*

135. *Id.* at 55.

136. *Id.* (citing *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)).

137. *Id.* (citing *United States v. Kagama*, 118 U.S. 375, 381-82 (1886)).

138. *Id.* at 56-57.

139. *Id.* at 55-56 (emphasis added) (citations omitted).

mandate and concluding that the ICRA constitutes such a mandate, the Court added an unexpected twist to its opinion. The Court held that just because Congress intended the ICRA to limit tribal sovereignty, (i.e., by decreeing that tribal governments recognize and enforce equal protection rights), does not mean that Congress intended to subject tribal governments to suit in federal court.¹⁴⁰ Put another way, the Court, after searching through the congressional record, found that Congress never *expressly* stated that the ICRA gave federal courts jurisdiction over disputes arising out of a tribe's alleged non-compliance with a portion of the ICRA.

Specifically, the Court held that "Indian tribes have long been recognized as possessing common-law immunity from suit traditionally enjoyed by sovereign powers [T]his 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 from suit.'"¹⁴¹ The Court ruled that Santa Clara Pueblo's immunity from suit as a sovereign nation was not abrogated by section 1302(8) of the ICRA. Therefore, the Court dismissed Martinez's claim without ever reaching the issue of whether the Ordinance violated certain Pueblo women's rights to equal protection.¹⁴²

5.

From a distance, it appears that while the District Court adopted a relativist position by upholding the 1939 Ordinance as a Pueblo tradition and the Tenth Circuit aligned itself with a universalist viewpoint by finding the Ordinance violative of the ICRA, the Supreme Court avoided the binary discourse altogether by holding that federal courts lacked jurisdiction to hear the case in the first place. This is one interpretation of the work performed by the Court's opinion in *Santa Clara Pueblo v. Martinez*. Viewed from another angle, however, the Court's so-called jurisdictional decision is actually predicated upon a substantive determination of whether Santa Clara Pueblo's compliance with the ICRA should be enforced by the federal courts, since Indian

140. *Id.* at 56-58.

141. *Id.* at 58. The court later reinforces this point by stating: "[i]t has been said, in a court of claims context, that a waiver of the sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Id.* (citing *United States v. Testan*, 424 U.S. 392, 399 (1976)).

142. *Id.* at 72.

tribes have cultural values that are distinct from and often in conflict with more universal principles of civil rights, such as equal protection. In other words, the Court's finding that the federal judiciary cannot hear claims alleging violations of the ICRA's equal protection clause *amounts to a substantive decision informed by the binary discourse* by first distinguishing between Indian tribes — non-Western *others* — and Western notions of equal protection, and then employing this distinction to elevate the rights of the tribe (relativism) over the civil rights of individuals within the tribe (universalism).¹⁴³

Although all three courts' decisions employ the logic of the binary discourse, the Court's reasoning differs from the lower courts' opinions in that the Supreme Court does not find it necessary to inquire into the authenticity of the Pueblo's 1939 rule. According to the District Court and the Tenth Circuit, an Indian tribe may be free from the equal protection dictate of the ICRA *only* if the tribe demonstrates that its deviation from "universal" civil rights norms is rooted in custom and tradition. The Supreme Court, on the other hand, imputes that Indian tribes are *a priori* excluded from civil rights norms, unless Congress explicitly legislates to the contrary.

It is important to notice the Court's use of the binary discourse. This is important not because the Court tangentially determines if and when universalism trumps relativism and vice versa, but because it begins to reveal the modernist attempt to definitively resolve issues surrounding the complicated relationship between tribes and the federal government through the use of the binary discourse. This is an exercise that invariably simplifies the picture because it imagines a separate, distinct, and static Indian culture/identity and an Anglo-American culture/identity.¹⁴⁴

B.

The Supreme Court's decision in *Santa Clara Pueblo* was immediately followed by numerous law review articles and books discussing the case. Although some of this literature begins to question the Court's use of the binary discourse to understand

143. See Rosenfeld, *supra* note 2, at 265.

144. In a portion of its opinion, the Court actually states that "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." *Santa Clara Pueblo*, 436 U.S. 49, 71-72 (1978)(emphasis added).

and wrestle with the issues presented in the case, a majority of scholars reinforce the Court's analysis by: 1) advocating either that the Ordinance should have been trumped by the equal protection clause of the ICRA or that the Court was correct when it held in favor of tribal sovereignty, and 2) continuing to rely on oversimplified images of Pueblo history, culture and identity.¹⁴⁵

1.

One text that replicates the courts' treatment of *Santa Clara Pueblo* is Catharine MacKinnon's *Feminism Unmodified: Discourses on Law and Life*. MacKinnon devotes a small portion of one chapter to "raise and consider . . . some of the issues from the case of Julia Martinez against the Santa Clara Pueblo."¹⁴⁶ MacKinnon's analysis, however, fails to consider more than one view of the Pueblo's social and political history.

For example, in a single paragraph, MacKinnon purports to definitively delineate the origin of the Pueblo's 1939 Ordinance. She writes, "I am told that the rule was made in 1939 after the General Allotment Act divided up communal lands into individually held parcels" and that since this resulted in Indian land "being taken away by white men marrying Native women . . . [t]he Santa Clara rule was passed to prevent women who married out from passing land out, in an attempt to secure the survival of a culture for which land is life."¹⁴⁷ MacKinnon then adds that she presents this account of the Ordinance's genesis "[w]ithout knowing this, *which I have by word of mouth*."¹⁴⁸ More disturbing than MacKinnon's willingness to base her analysis on information she received by "word of mouth," is the fact that the 1939 Ordinance was probably *not* a reaction to the General Allotment Act because, as Karen Anderson and others have pointed out, "[o]f those Santa Clara women who married

145. See Alison Bernstein, *A Mixed Record: The Political Enfranchisement of American Indian Women During the Indian New Deal*, 23 J. OF THE WEST 13 (1984); Carla Christofferson, *Tribal Courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act*, 101 YALE L.J. 169 (1991); Dennis R. Holmes, *Political Rights Under the Indian Civil Rights Act*, 24 S. DAKOTA L. REV. 419 (1979); Robert C. Jeffrey, *The Indian Civil Rights Act and the Martinez Decision: A Reconsideration*, 35 S.D. L. REV. 355 (1990); Alvin J. Ziontz, *After Martinez: Civil Rights Under Tribal Governments*, 12 U.C. DAVIS L. REV. 1 (1979).

146. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 65 (1987).

147. *Id.* at 66-67.

148. *Id.* at 67. (emphasis added).

[outside the tribe], all married other Indians."¹⁴⁹ Anderson goes on to state that "[t]he later claim by some Pueblos that the issue was the loss of land to whites who married Santa Clara women is not sustained by the ethnographic evidence."¹⁵⁰

In addition to the flimsy evidence MacKinnon presents as the reason for the 1939 rule, the very fact that MacKinnon attempts to discern the "true" origin of the Ordinance reflects her desire to conduct a modernist search for cultural authenticity as a way of choosing between universalist and relativist positions. Since MacKinnon's "evidence" tells her that the Ordinance was not based on Pueblo tradition — MacKinnon even goes so far as to state that she thinks the "rule . . . is male supremacist" — she argues that the Ordinance should have been struck down by the Court.¹⁵¹ To make her point MacKinnon writes, "I imagine the tribe saying, we need this rule. I imagine Julia Martinez replying . . . this is a male supremacist solution to a problem male supremacy created . . . The tribe says: how can you apply the white cultural idea of equality to take us into this foreign court . . . Julia Martinez responds . . . why do you make me choose between my equality as a woman and my cultural identity?"¹⁵²

MacKinnon's ventriloquist act, in which she states that the tribe's interest in preserving its culture is pitted against Martinez's desire for equal rights, makes clear that MacKinnon agrees with the binary discourse's creation of separate ethnic and gender identities as well as the discourse's assumption that Martinez must choose one or the other. Furthermore, MacKinnon does not just state that she herself views the case as a struggle between universalism and relativism, instead she asserts that this is how Julia Martinez views the situation as well. In actuality, it is MacKinnon who depicts Martinez as having to choose between equal protection and tribal sovereignty, and it is MacKinnon who would have Martinez choose the former over the latter.

Judith Resnik's article *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts* discusses the Supreme Court's opinion in *Santa Clara Pueblo*. Like MacKinnon, she employs

149. KAREN ANDERSON, *CHANGING WOMAN: A HISTORY OF RACIAL ETHNIC WOMEN IN MODERN AMERICA* 246 n.65 (1996). See also ELSIE CLEWS PARSONS, *THE SOCIAL ORGANIZATION OF THE TEWA OF NEW MEXICO* 31-40 (1929); *AN ETHNOGRAPHY OF SANTA CLARA PUEBLO, NEW MEXICO* 19-21 (Charles Lange, ed., Univ. of New Mexico Press 1982) [hereinafter *AN ETHNOGRAPHY*].

150. ANDERSON, *supra* note 149.

151. MACKINNON, *supra* note 146, at 68.

152. *Id.* at 67.

the binary discourse to state that the Court made a mistake in choosing relativism over universalism. Following in MacKinnon's footsteps, Resnik's first inquiry concerns the origins of the 1939 rule:

In *Santa Clara Pueblo*, the Court held that sovereignty interests trumped inquiry about the legality, under federal law, of rules that (at least from a feminist perspective) subordinate women. Justice Marshall's protection of the Santa Clara Pueblo's 'ability to maintain itself as a culturally and politically distinct entity' has a good deal of appeal. Membership rules can readily be understood as the core of any group's identity, and, hence, as appropriately outside the realm of consideration by any other 'sovereign' . . . But the issue of membership in the Santa Clara Pueblo requires further examination. How did the concept of membership in the Pueblo develop? . . . Was this particular rule a 'tribal tradition'?¹⁵³

In order to answer this question, Resnik delves into a brief summary of federal Indian law and the history of Santa Clara Pueblo. She highlights the General Allotment Act, as does MacKinnon, and she describes the Indian Reorganization Act of 1934 ("IRA") that was passed, in large part, as a reaction to the Allotment Act. The IRA, Resnik explains, "stopped allotment and required the Secretary of the Interior to attempt to restore 'surplus' tribal lands acquired during allotment. The IRA also . . . provided for the creation of tribal constitutions and laws . . . The Santa Clara Pueblo was among those tribes that organized under the provisions of the IRA."¹⁵⁴ Resnik goes on to state that when the Pueblo adopted a constitution under the auspices of the IRA in 1934, it provided a mechanism for amendment, and the Ordinance at issue in *Santa Clara Pueblo* was passed in accordance with this provision of the Santa Clara Constitution.¹⁵⁵

Resnik provides this selective view of federal Indian law and Pueblo history in order to argue that since the origin of the 1939 Ordinance can be traced to the U.S. government's policy towards Indian tribes during the first half of this century, the Ordinance is more a product of Anglo-American law and less a result of Pueblo culture and tradition. For this reason, Resnik states, she "cannot share the ease with which the Supreme Court in *Santa Clara Pueblo* assumed the 1939 Ordinance to be an artifact of

153. Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*. 56 U. CHI. L. REV. 671, 702-03 (1989).

154. *Id.* at 704.

155. *Id.* at 704-705.

Santa Clara sovereignty.”¹⁵⁶ Instead, Resnik asserts that since “[t]he ‘Santa Clara Rule’ is intertwined with United States’ rules and culture,”¹⁵⁷ the rule becomes amenable to federal court review, and as a result, should have been struck down as violative of the equal protection clause of the ICRA.¹⁵⁸

Resnik’s “solution” for resolving *Santa Clara Pueblo* is problematic on several levels. To begin with, Resnik, like MacKinnon, admits that she cannot definitively determine the reason behind Santa Clara Pueblo’s adoption of its 1939 Ordinance. She writes, “I do not know the genesis of this rule. Some suggest that the rule reflects the gendered hierarchy of the Pueblo, that the male members of the Pueblo wanted to deter women from marrying non-Santa Claran men.”¹⁵⁹

Despite this admission that she does not possess the evidence necessary to state that the rule was solely or even partially the product of Anglo-American law and policy toward Indian tribes, Resnik goes on to state that:

[Q]uestions need to be asked about how the Pueblo’s gendered hierarchy came into being . . . Santa Claran men might have held the power to make rules at least in part because the United States assumed men and only men could be rulemakers. The 1939 Santa Clara membership rules are also congruent with United States’ traditions of subordination of women.”¹⁶⁰

Thus, Resnik’s argument for why the Court should have applied “universal” civil rights standards to the Pueblo is dubious because she gives no evidence about how the 1939 Ordinance came into existence while simultaneously asserting that the Ordinance is somehow linked to Anglo-American patriarchy.

Resnik’s lack of documentation and evidentiary material, however, are not the only difficulties one must overcome in order to accept her analysis. Although Resnik aligns herself with the universalist position, her argument contains a good deal of relativism in that her view of culture is very much akin to the Supreme Court’s belief in insulated, authentic, and never-changing culture. Resnik seems to be saying that whenever authentic Pueblo culture is influenced and/or altered by Anglo-American ideas, the resulting Pueblo practice can no longer be regarded as

156. *Id.* at 725.

157. *Id.* at 726.

158. *Id.*

159. *Id.* at 721.

160. *Id.* at 721-23.

part of Pueblo culture and identity and consequently, that practice cannot be protected as a component of tribal sovereignty or the right to self-determination. Similarly, Resnik's argument is not so different from the lower courts' opinions because Resnik believes that the outcome of the case should be predicated upon whether the practice in question is based on Pueblo tradition, and then appoints herself to determine what constitutes that tradition. Lastly, Resnik's reference to the Pueblo's "gendered hierarchy" and her description of the 1939 Ordinance as subordinating Pueblo women suggests that Resnik conducts her analysis entirely within a narrow, Western women's rights context.

Although Resnik does not give substantial consideration to other avenues for discussing and understanding *Santa Clara Pueblo*, she manages to briefly escape the universalist viewpoint by stating:

While one reading of [Julia Martinez's] decision to go to federal court . . . could be that [she] found the Santa Clara Pueblo to be oppressive to women, many interpretations are possible . . . [t]he decision to seek federal court help could be understood as demonstrating how deep Ms. Martinez's affiliation with the Pueblo was, for she was willing to risk a good deal of hostility to enable her children to continue to live on the Pueblo."¹⁶¹

Resnik's move here is an important one. In momentarily setting aside the notion that the 1939 Ordinance is oppressive to Pueblo women (a universalist position), Resnik does not resort to the relativist position by stating that the Ordinance should be upheld as an expression of Pueblo culture and sovereignty. Instead, by envisioning an alternative that has little to do with either universalism or relativism, Resnik hints at the possibility of discussing *Santa Clara Pueblo* unfettered by the confines of the modernist narrative.

2.

At least two scholars have pursued the idea that *Santa Clara Pueblo* has been limited by the binary discourse. Though they do not spend a great deal of time on the case, Robyn C. Smith and Angela P. Harris lay the foundation upon which to construct alternative understandings of the issues presented by the case. In her article, *Female Circumcision: Bringing Women's Perspective*

161. *Id.* at 751-52.

into the *International Debate*, Robyn C. Smith observes that “[i]n Santa Clara Pueblo and in the case of female circumcision, two abstract rights as defined by Western law come into conflict — the woman’s individual right to equality and the tribal group’s right to sovereignty in maintaining traditions central to tribal identity.”¹⁶² Smith’s insight — that notions of individual rights contained in Martinez’s equal protection claim as well as concepts of group rights embodied in tribal sovereignty arguments both stem from the Western concept of “rights” — suggests it is not useful to discuss the case within the “rights” framework because Other/Third World women’s concerns may not neatly fit into one or the other category of “rights” as constructed by the binary discourse.

Taking Smith’s critique one step further, Angela P. Harris’ article, *Race and Essentialism in Feminist Legal Theory* specifically derides the courts and MacKinnon for viewing *Santa Clara Pueblo* through the modernist lens of unitary consciousness which depicts Julia Martinez as being *either* gendered *or* raced. Instead, Harris recommends looking at the case by employing “a jurisprudence based on multiple consciousness.”¹⁶³ Harris is referring not only to a “theory that can shift focus from gender to race and other facets of identity and back again,”¹⁶⁴ but also a method which recognizes the different and dynamic constructions of these identities as they are performed by various Other/Third World women.¹⁶⁵ Thus, a re-conceptualization of the case according to Harris must include “the abandonment of the quest for a unitary self” in addition to the “realization that . . . identity is always relational, not inherent.”¹⁶⁶ Finally, although Harris herself does not begin to construct an alternative analysis of *Santa Clara Pueblo*, she advises that the goal is not to search for a “true” account of the case but to subvert and complicate the traditional legal discourse through “narratives and stories, accounts of the particular, the different, and the hitherto silenced.”¹⁶⁷

162. Smith, *supra* note 7, at 2501.

163. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 594 (1990).

164. *Id.* at 594-97.

165. *Id.* at 610.

166. *Id.* at 615-16.

167. *Id.* at 615.

IV. PART IV

The modernist narrative tells the story of *Santa Clara Pueblo* from a single point of view: the binary discourse of universalism-versus-relativism. While the first three Parts of this Essay aim to disrupt this telling by uncovering the discourse's assumptions and problematizing its outcomes, the purpose of this section is to provide an alternative approach to those employed by the modernist version of the *Santa Clara Pueblo* story. This approach does not attempt to replace the existing story with another that boasts greater accuracy or insight; instead, it recognizes and addresses the various threads running through *Santa Clara Pueblo* — threads that are lumped together and homogenized by the binary discourse.

Additionally, this approach does not supplant one modernist discourse with another; rather, it presents multiple, sometimes inconsistent discourses by employing an interdisciplinary method that takes historical, anthropological, ethnographic, and legal perspectives into account. Finally, this approach allows us to begin envisioning both Julia Martinez and the Santa Clara Pueblo outside the confines of universalism-versus-relativism. In doing so, this approach results in an understanding of Julia Martinez not as *either* a woman *or* a Pueblo member, but as a person with the capacity to enact multiple identities for a variety of reasons. At the same time, this approach results in an understanding of Santa Clara culture as something other than fixed, static, and one-dimensional.

In her reconstruction of the life of Carl Akeley, Donna Haraway, in an essay entitled *Teddy Bear Patriarchy: Taxidermy in the Garden of Eden, New York City, 1908-1936*, writes “[t]here is a polyphony of stories, and they do not harmonize.”¹⁶⁸ I found myself facing a similar situation when I started looking through the available anthropological and ethnographic material on the Pueblos of the Southwest. Curious about claims such as those made by the courts and Resnik that the 1939 Ordinance either was or was not based on “patriarchal” Pueblo traditions, I decided to look into the matter myself. What I found was a wide degree of uncertainty and disagreement among scholars about everything from pre-historical Pueblo society to what constitutes

168. DONNA HARAWAY, PRIMATE VISIONS: GENDER, RACE, AND NATURE IN THE WORLD OF MODERN SCIENCE 35 (1989).

contemporary Pueblo life and culture.¹⁶⁹ These scholarly controversies and inconsistencies are not very significant in and of themselves (except of course to illustrate the futility of the search for authentic Pueblo culture). Their importance lies in demonstrating that Pueblo people, as well as Pueblo women and Pueblo culture, are multiplicitous, and that the difficulties (or perceived difficulties) in acknowledging and discussing their multiplicity make them particularly vulnerable to translation via the binary discourse.

A.

Most anthropological texts on the Pueblo Indians begin by dividing and categorizing the Pueblos of what is today the Southwestern United States.¹⁷⁰ For instance, the Pueblos are geographically split into two groups: the Western Pueblos (located in Northwestern New Mexico and Northern Arizona) and the Eastern Pueblos (located in northeastern New Mexico).¹⁷¹ The Eastern Pueblos have been further divided into three subgroups based on the lingual variations of what anthropologists have dubbed the Kiowa-Tanoan language family.¹⁷² These subgroups are the Tiwa, Tano and the Tewa. Anthropologists state that there are six Tewa villages, one of which is Santa Clara Pueblo.¹⁷³ This, however, is the extent to which various sources converge on their description of Pueblo life and culture.

One of the most theorized aspects of the Southwestern Pueblos is the role of gender within the Pueblos. This is reflected in discussions of Pueblo patterns of descent and inheritance (matrilateral, patrilineal, and bilateral), patterns of residence (matrilocal and patrilocal), and the status afforded to male and female members of the Pueblo. In *The Sacred Hoop: Recovering the Feminine in Native American Traditions*, Paula Gunn Allen writes that pre-contact Pueblos were "more often gynocratic than not, and

169. See *infra* Part IV.A.

170. See Fred Eggan, *Pueblos: Introduction*, in 9 HANDBOOK OF NORTH AMERICAN INDIANS, THE SOUTHWEST 224, 226 (Alfonso Ortiz ed., Smithsonian Institution 1979); AN ETHNOGRAPHY, *supra* note 149; PARSONS, *supra* note 149; EDWARD H. SPICER, CYCLES OF CONQUEST: THE IMPACT OF SPAIN, MEXICO, AND THE UNITED STATES ON THE INDIANS OF THE SOUTHWEST, 1533-1960 (1967).

171. See Eggan, *supra* note 170, at 227.

172. See *id.*

173. See *id.*

they [were] never patriarchal.”¹⁷⁴ Teresa D. LaFramboise, Anne-liese M. Heyle and Emily J. Ozer in *Changing and Diverse Roles of Women in American Indian Culture* agree that “matrilineal patterns of inheritance was observed” in the Eastern Pueblos.¹⁷⁵ As evidence, the article states that “the [Pueblo’s] land, crops, houses, and tools were owned by the women, while the men cultivated the gardens and were responsible for much of the labor.”¹⁷⁶

On the other hand, W.W. Hill’s observations, recorded in *An Ethnography of Santa Clara Pueblo New Mexico*, conclude that “the pattern of house inheritance [at Santa Clara Pueblo] was prevalingly patrilineal.”¹⁷⁷ Texts describing the moiety system of the Pueblos¹⁷⁸ support Hill’s view of the Pueblos. For instance, the *Handbook of North American Indians, Volume 9: The Southwest* states that “[a] woman marrying a man of opposite [moiety] affiliation must join her husband’s moiety”¹⁷⁹ thereby indicating that the Pueblos followed patrilineal patterns of social organization.¹⁸⁰ Alfonso Ortiz, in *The Tewa World: Space, Time, Being and Becoming in a Pueblo Society*, concurs that the Pueblos are patrilineal when he writes that “[i]f the bride is of the moiety opposite to that of her husband, she must convert to his.”¹⁸¹

Providing yet another viewpoint, Ramón Gutiérrez’s book, *When Jesus Came the Corn Mothers Went Away: Marriage, Sexuality, and Power in New Mexico, 1500-1846*, asserts that while pre-contact Pueblo societies were matrilineal and matrilocal, this

174. ALLEN, *supra* note 53, at 3-4. According to Allen, gynocracies are “woman-centered tribal societies in which matrilocality, matrifocality, matrilinearity, maternal control of household good and resources, and female deities of the magnitude of the Christian God were and are present and active features of traditional tribal life.” *Id.*

175. Teresa D. LaFramboise et al., *Changing and Diverse Roles of Women in American Indian Cultures*, 22 *SEX ROLES* 455, 460 (1990).

176. *Id.*

177. AN ETHNOGRAPHY, *supra* note 149, at 20.

178. Moieties are the basic units of social, ceremonial and political organization among the Tewa people. According to sources, each Pueblo traditionally consisted of two moieties, a Summer Moiety and a Winter Moiety. Every person was born into either the Summer or the Winter Moiety. See Eggan, *supra* note 170, at 227; PARSONS, *supra* note 149.

179. Nancy S. Arnon & W.W. Hill, *Santa Clara Pueblo*, in 9 *HANDBOOK OF NORTH AMERICAN INDIANS, THE SOUTHWEST* 296, 298 (Alfonso Ortiz ed., Smithsonian Institution 1979).

180. *Id.*

181. ALFONSO ORTIZ, *THE TEWA WORLD: SPACE, TIME, BEING, AND BELONGING IN A PUEBLO SOCIETY* 47 (1969).

began to change with the advent of Spanish rule.¹⁸² Referring to pre-contact Pueblos, Gutiérrez writes that Pueblo Indians lived within a matrilineal structure where “[t]he typical household unit consisted of a grandmother and her husband, her sisters and their husbands, her daughters and their husbands, various young children.”¹⁸³ Gutiérrez then goes on to state that although “all of the Puebloans were matrilineal at the time of conquest . . . those Puebloans who were in closest contact with Spanish towns became patrilineal or bilateral.”¹⁸⁴ Paula Gunn Allen similarly remarks that “[d]uring the five hundred years of Anglo-European colonization, the tribes have seen a progressive shift from gynocentric, egalitarian, ritual-based social systems to secularized structures closely imitative of the European patriarchal system.”¹⁸⁵

Commenting more specifically on men’s and women’s respective roles in Pueblo life, M. Annette Jaimes and Theresa Halsey’s article, *American Indian Woman: At the Center of Indigenous Resistance in Contemporary North America*, asserts that “[t]raditionally . . . women were never subordinate to men” and that women held and continue to hold important social and political positions in Pueblo societies.¹⁸⁶ Sue-Ellen Jacobs, whose study of San Juan Pueblo (a Tewa Pueblo just north of Santa Clara Pueblo) is published as a chapter in *Women and Power in Native North America*, also implies that women enjoy the same status as men when she writes that “Tewa ideology emphasizes . . . [that] [n]o single individual, and no class or cohort of people, can be said to be inferior or superior to another.”¹⁸⁷

Unlike Jaimes, Halsey and Jacobs, Gutiérrez asserts that though Pueblos were egalitarian societies in which “all men and women had equal access to those things a person of either sex needed in life”¹⁸⁸ and that the “relations between the sexes [was]

182. RAMÓN A. GUTIÉRREZ, WHEN JESUS CAME THE CORN MOTHERS WENT AWAY: MARRIAGE, SEXUALITY, AND POWER IN NEW MEXICO, 1500-1846 (1991).

183. *Id.* at 15.

184. *Id.* at 79.

185. ALLEN, *supra* note 53, at 195.

186. M. Annette Jaimes & Theresa Halsey, *American Indian Women: At the Center of Indigenous Resistance in Contemporary North America*, in DANGEROUS LIAISONS: GENDER, NATION, AND POSTCOLONIAL PERSPECTIVES 305 (Anne McClintock et al. eds., Univ. of Michigan Press 1998).

187. Sue-Ellen Jacobs, *Continuity and Change in Gender Roles at San Juan Pueblo*, in WOMEN AND POWER IN NATIVE NORTH AMERICA 177, 181 (Laura F. Klein and Lillian A. Ackerman eds., Univ. of Oklahoma Press 1995).

188. GUTIÉRREZ, *supra* note 182, at 12.

relatively balanced,"¹⁸⁹ the Pueblo's hierarchically structured theocracy gave men precedence over women and "as men saw it . . . women, children, slaves and strays"¹⁹⁰ were "at the margins"¹⁹¹ of the Pueblo social order.¹⁹² Writing specifically about Santa Clara Pueblo, Hill similarly wrote that "[w]omen were considered second-class citizens at Santa Clara Pueblo."¹⁹³

Closely linked to issues surrounding gender roles and women's status in the Pueblos are accounts of factionalism within Pueblo Indian communities. Edward P. Dozier's article *Factionalism at Santa Clara Pueblo* is just one of several sources that document the high degree of factionalism that allegedly "appears to be characteristic of all Pueblo communities."¹⁹⁴ According to Dozier, "[t]he highly conservative nature of Pueblo communities indicates that the authoritarian, totalitarian characteristics of these societies are deeply rooted"¹⁹⁵ and that "opposition to the compulsory dictates of the Pueblo authorities [caused and will cause] factionalism both in the past as well as in the present."¹⁹⁶ Although Dozier writes that Pueblo factionalism was prevalent before European colonization,¹⁹⁷ Gutiérrez and Edward H. Spicer claim that European rule was the major reason behind factionalism within the Pueblos because colonization resulted in some Pueblo members' departure from traditional ways, while other Pueblo members rejected Spanish, and later Anglo-American, influences.¹⁹⁸

Furthermore, Gutiérrez and Spicer suggest that factionalism caused by Spanish and Anglo-American rule was particularly ap-

189. *Id.* at 13.

190. *Id.* at 22.

191. *Id.*

192. *Id.* at 22.

193. AN ETHNOGRAPHY, *supra* note 149, at 167-68.

194. Edward P. Dozier, *Factionalism at Santa Clara Pueblo*, 5 ETHNOLOGY 172, 183 (1966).

195. *Id.* at 175.

196. *Id.*; see also AN ETHNOGRAPHY, *supra* note 149, at 190 (observing that since Pueblos were small, close communities, this "created hostile social environment[s] and fostered an unusual number of personal animosities. While ideally aggressions could only be expressed covertly, feelings were invariably close to the surface, ready to erupt, and frequently manifested themselves in political factionalism"); GUTIÉRREZ, *supra* note 182, at 24 (stating that "factionalism was the normal state of affairs" in Pueblo society).

197. See Dozier, *supra* note 194, at 175 (stating that "[a]lthough disputes [within the Pueblos] have sometimes been sparked by influences from the outside, Pueblo factionalism cannot be considered a result of acculturative factors alone").

198. See GUTIÉRREZ, *supra* note 182, at 65; SPICER, *supra* note 170, at 177.

parent in issues concerning Pueblo women.¹⁹⁹ Looking to Spanish colonial documents, Gutiérrez cites several incidences in which Spanish friars evoked notions of "women's rights" to empower Pueblo women. According to Gutiérrez, the friars instructed Pueblo women "that men and women were equal before God"²⁰⁰ and allowed Pueblo women "to continue to worship the Corn Mother, albeit transmogrified as the Blessed Virgin Mary,"²⁰¹ in order to win female support among their Pueblo subjects.²⁰² The result of this favoritism, Gutiérrez suggests, was the "disruption of Pueblo social life"²⁰³ and Pueblo notions of gender roles.²⁰⁴ On another level, Gutiérrez writes that Spanish rule resulted in "[c]hanges in the sexual division of labor . . . Traditionally, men spun, wove, hunted, and protected the community. Women cared for hearth and home and undertook all building construction."²⁰⁵ After colonization, Gutiérrez claims that the Spanish rearranged Indian men and women's duties to reflect European notions of what was masculine and feminine work so that Pueblo men were forced "to toil in the building arts" while women "were to weave."²⁰⁶

Spicer's book *Cycles of Conquest: The Impact of Spain, Mexico, and the United States on the Indians of the Southwest 1533-1960*, goes one step further by directly connecting colonizers' beliefs regarding Pueblo women with factionalism within the Pueblos. Describing a dispute that occurred at San Ildefonso Pueblo (a Tewa Pueblo just south of Santa Clara Pueblo), Spicer writes that "[a]n important factor in the division at San Ildefonso was the growth of pottery-making as a new source of economic support. Women who had become independent of their husbands through this source of income were said to have taken positions which influenced their husbands and prevented them from compromising for the settlement of the various issues which had arisen."²⁰⁷ Similarly, Karen Anderson, in *Changing Woman: A History of Racial Ethnic Women in Modern America*, indicates that Pueblo factionalism may have also taken the form of dis-

199. GUTIÉRREZ, *supra* note 182, at 78; SPICER, *supra* note 170, at 179.

200. GUTIÉRREZ, *supra* note 182, at 78.

201. *Id.*

202. *Id.*

203. *Id.*

204. *See id.* at 78-80.

205. *Id.* at 76.

206. *Id.*

207. SPICER, *supra* note 170, at 179.

putes arising out of Pueblo women's rebellion, encouraged by Anglo-American culture, against marriages arranged by their parents.²⁰⁸

B.

Not only do these texts disagree with one another, but any one of them can be criticized for pretending to present wholly accurate views of Pueblo life and culture. Claims by authors such as Allen and Gutiérrez that pre-contact Pueblo cultures were matrilineal, matrilocal, and generally gynocratic have been called into question by those who caution against making broad generalized claims about all Pueblos (or even all Native Americans for that matter). Anderson, who acknowledges that some tribes were egalitarian and matrilineal, also writes that "one cannot begin with the a priori assumption that all Native American societies were egalitarian . . . certain forms of male dominance predated contact with European cultures".²⁰⁹

Additionally, several critics have pointed out that sources describing Pueblo culture fail to distinguish the practices that may have occurred in one Pueblo from those of another Pueblo. Rina Swetzall, a Santa Clara Pueblo member writes, "Gutiérrez did not even make himself familiar enough with the Pueblo world to acknowledge the variations that exist among the Pueblos. Instead, he uses information from one pueblo and then makes assumptions about all of them based on that information."²¹⁰ Similarly, Glenabah Martinez of Taos Pueblo comments:

[Her] major concern with Ramón Gutiérrez's [book] is the generalizations he makes about Pueblo culture and the lack of references in relation to those of values for one group of people . . . may not be found among other pueblos . . . there is a serious lack of acknowledgement of the diversity that existed and continues to exist among the Pueblo people.²¹¹

This does not mean, however, that sources which focus primarily on Santa Clara Pueblo, like the *Handbook on North*

208. See ANDERSON, *supra* note 149, at 7-8.

209. *Id.* at 19-20.

210. Rina Swetzall in *Commentaries on When Jesus Came, the Corn Mothers Went Away: Marriage, Sex, and Power in New Mexico 1500-1846* by Ramón A. Gutiérrez, 17 AM. INDIAN CULTURE AND RES. JOUR. 141, 169 (1993).

211. Glenabah Martinez in *Commentaries on When Jesus Came, the Corn Mothers Went Away: Marriage, Sex, and Power in New Mexico 1500-1846* by Ramón A. Gutiérrez, 17 AM. INDIAN CULTURE AND RES. JOUR. 141, 171 (1993).

American Indians, Volume 9, Hill's ethnography, and Dozier's essay, cannot be scrutinized as well. For instance, much of the information documented in the volume on Southwest Indians is derived from "[t]he first information Europeans had regarding the Pueblo people."²¹² Thus, even material on a specific Pueblo culture is related through the eyes of Spanish officials and missionaries, and, as such, "artificially [projects] the cultural bias and machinations of the Spanish colonial interpretation upon a Pueblo worldview."²¹³ Obtained through Spanish mediums, information on a given Pueblo's patterns of lineage and residence is particularly suspect because "it is male conquerors defining who Pueblo women are"²¹⁴ based on their own views of gender.²¹⁵

Furthermore, observations by Elsie Clews Parsons, who lived among the Tewa from 1923-27, Dozier's article, and Hill's own data from when he lived in Santa Clara Pueblo in the 1940s and 1960s, suggest that *Volume 9's* statements concerning moiety association and hence, the patrilineal organization of the Pueblo, may not be as convincing as they seem. For instance, Parsons notes that from 1926 to 1927, forty-two of the houses in Santa Clara Pueblo were owned by men and twenty of the houses were owned by women,²¹⁶ and only six of these twenty were inherited by women from their deceased husbands.²¹⁷ While this is a far cry from demonstrating that Santa Clara Pueblo is matrilineal, it supports Dozier's statement that "[t]here is no evidence of a lineage principle in the organization of kinship terms, in the family structure, or in the behavior of [Santa Clara Pueblo] members."²¹⁸

212. Marc Simmons, *History of Pueblo-Spanish Relations to 1821*, in 9 HANDBOOK OF NORTH AMERICAN INDIANS, THE SOUTHWEST 296, 298 (Alfonso Ortiz ed., Smithsonian Institution 1979).

213. Ted Jojola in *Commentaries on When Jesus Came, the Corn Mothers Went Away: Marriage, Sex, and Power in New Mexico 1500-1846* by Ramón A. Gutiérrez, 17 AM. INDIAN CULTURE AND RES. JOUR. 141, 165 (1993); see also SPICER, *supra* note 170, at 21 (cautioning that "what purports to be a record of the native viewpoint is actually what the European writers thought the natives were thinking").

214. Rina Swentell in *Commentaries on When Jesus Came, the Corn Mothers Went Away: Marriage, Sex, and Power in New Mexico 1500-1846* by Ramón A. Gutiérrez, 17 AM. INDIAN CULTURE AND RES. JOUR. 141, 167 (1993).

215. *Id.*

216. PARSONS, *supra* note 149, at 39.

217. *Id.* at 39 n.103.

218. Dozier, *supra* note 194, at 172.

Like Parsons, Hill documented instances in which patriarchal tribal organization might not have applied. Specifically, Hill wrote that marriages involving Santa Clara Pueblo members and non-members “adhered to no consistent rule of residence.”²¹⁹ Rules for moiety affiliation, which has been associated with patrilineal rules of descent, have also been called into question by Dozier’s assertion that although one’s moiety was usually determined by looking to one’s father, one’s moiety “may be changed at marriage *and for other reasons as well.*”²²⁰ Additionally, those sources that describe Santa Clara Pueblo as patrilineal based on what occurs to a woman’s moiety affiliation when she marries do not attempt to describe how moiety affiliation is handled in situations where Santa Clara Pueblo members marry non-members, and in particular, when Santa Clara women marry non-members.

Finally, this Essay does not dispute that Spanish and Anglo-American attempts to assimilate Pueblo Indians led to “deep and complex divisions over who was to define the terms of [Pueblo Indians’] relationships to whites and, therefore to each other.”²²¹ However, it is necessary to question the assumptions about both pre-contact and post-contact Pueblo peoples implicit in accounts that claim to reveal *how* Pueblo culture has been changed and/or disrupted by European colonization. For example, comments that Pueblos were matrilineal and matrilocal until the Spanish conquest imply that contemporary Pueblos are patrilineal and patrilocal, while statements that European rule caused factionalism among Pueblo people assumes that pre-contact society was free from internal disagreements and change.

C.

When discussing the role of gender in the Pueblos, some sources insist that Pueblo culture was matrilineal/matrilocal prior to European contact, other sources state that the Pueblos have always been patrilineal/patrilocal, and a few sources altogether decline to definitively mark both pre- and post-contact Pueblos as either patrilineal/patrilocal or matrilineal/matrilocal. Second, some texts state that factionalism occurred within the Pueblos because colonizers replaced matrilineal/matrilocal systems with patrilineal/patrilocal ones; other texts describe Pueblo factionalism as a battle between “primitive” Pueblo traditionalists and

219. AN ETHNOGRAPHY, *supra* note 149, at 161.

220. Dozier, *supra* note 194, at 173 (emphasis added).

221. ANDERSON, *supra* note 149, at 25.

more “progressive” Pueblo modernists influenced by European ways; and, yet another group of texts indicates that factionalism always existed in the Pueblos despite the fact that it might have been exacerbated by Western colonization. Clearly, there are a plethora of opinions as to how Pueblo Indians viewed the role of gender in their communities and whether these views were altered by European colonization, ultimately leading to factionalism within the Pueblos. More importantly, these sometimes widely differing scholarly accounts and criticisms suggest that there has never been only one definition of what it means to be a Pueblo woman, just as there has never been a singular way to define Pueblo culture.

There is a strong case for viewing Pueblo women and culture as multiplicities. Yet, the extreme and oversimplified depictions of Pueblos as idealistically egalitarian societies or as patriarchal societies have shaped Anglo-American attitudes towards Pueblo Indians, as well as U.S. Indian law and policy. These viewpoints have also been used to formulate the binary discourse in *Santa Clara Pueblo* and subsequently, to portray Pueblo women as Other/Third World women.

1.

Margaret Jacobs' book *Engendered Encounters: Feminism and Pueblo Cultures, 1879-1934*, illustrates one process by which the variety and nuance of Pueblo life became eclipsed by the singular and dichotomized version of Pueblo women's identity and Pueblo culture we find in *Santa Clara Pueblo*. Jacobs traces the lives of two groups of women — female moral reformers and antimodern feminists. The book begins by describing “a new, white, middle-class women's reform organization”²²² that was born in 1882 to address “the plight of Native American women”²²³ and rescue their “sisters” from the degradation of their “heathen” cultures.²²⁴ These white female moral reformers, as Jacobs calls them, were largely a product of the nineteenth century notion of the “cult of true womanhood” — an ideology which functioned both as a tool as well as a constraint for white middle-class women.²²⁵ While the “cult of true womanhood” allowed women to work in the public realm, it limited the kind of

222. JACOBS, *supra* note 3, at 1.

223. *Id.*

224. *Id.*

225. *Id.* at 25.

work they could perform because women were regarded as different from men in the sense that women's roles were thought to be that of "the cultural and moral guardians" of the home, and as such, women could only respectably engage in the type of public work which involved social reform.²²⁶

Although Jacobs does not explicitly state that the limitations embodied in the "cult of true womanhood" compelled white middle-class women to concentrate their efforts on the plight of Indian women, Jacobs' research suggests that many of these women were drawn to "reform organizations, mission societies, and the Bureau of Indian Affairs (BIA) to uplift Indian women"²²⁷ in the 1920s, at least in part because it afforded them an unprecedented chance to work outside the home.²²⁸ Additionally, white middle-class women's beliefs that the "cult of true womanhood" granted women in Anglo-American culture higher status (or at least comparable status) to that of men enabled female moral reformers to look upon Indian women — who were anything but the ideal woman of the "cult of true womanhood" — as oppressed.²²⁹

The observations of female moral reformers, who worked for the BIA and spent several years living among the Pueblo peoples of Northern New Mexico, contributed to this view of Indian women as oppressed by their cultures.²³⁰ For instance, "[w]hile working at Santo Domingo Pueblo, [Mary Disette] claimed that the Indian women there were 'almost hopelessly dominated by the male animal' and were 'trained from infancy to consider themselves as created solely for his use.'"²³¹ Thus, when instructing Pueblo Indian women in "civilized home life, stimulating their intelligence, rousing ambition, and cultivating refinement,"²³² female moral reformers working for the BIA thought they were helping Pueblo women by teaching them to act and think like white middle-class women.

In stark contrast to the female moral reformers who sought to uplift Pueblo women from a state of patriarchal subservience and ignorance, antimodern feminists viewed "Pueblo culture as a

226. *Id.*

227. *Id.* at 24.

228. *Id.*

229. *See id.* at 25.

230. *See id.* at 32-35.

231. *Id.* at 34.

232. *Id.* at 27.

feminist utopia"²³³ and regarded Pueblos as egalitarian societies in which women had power over their own sexuality as well as considerable status among their people.²³⁴ Just as female moral reformers' opinion of Pueblos were shaped by their circumstances and the "cult of true womanhood," antimodern feminists were drawn to the Pueblos as a result of their *rejection* of the "cult of true womanhood," conventional gender roles, female sexual purity, and an overall distaste of modern industrialization and Western civilization's cities.²³⁵ In short, antimodern feminists flocked to the Pueblos to find an alternative (albeit romanticized utopian ideal) to Western patriarchy.

While it is difficult to know exactly what led antimodern feminists to view Pueblos as egalitarian, feminist utopias, Jacobs suggests that antimodern feminists picked up the notion that Pueblos were matrilineal and matrilocal from documentation of particular Pueblos by early anthropologists.²³⁶ Antimodern feminists, however, paid no attention to the specific time period or Pueblo which might have led anthropologists to believe that a given Pueblo was matrilineal/matrilocal. Instead, "antimodern feminist writers focused on matrilineality and matrilocality as fixed and unvarying Pueblo traditions."²³⁷

2.

Jacobs' main purpose in presenting female moral reformers and antimodern feminists side-by-side is to illustrate that each group of women espoused their respective views — female moral reformers "cast Pueblo women largely as victims of male lust, who must gain education and an independent wage in order to uplift themselves"²³⁸ and antimodern feminists saw Pueblo women as free from the concerns of "marriage, divorce, sexuality, and the relation of the home to modern women's lives"²³⁹ that plagued Anglo-American women — to further their respective goals as women struggling in Western society.²⁴⁰ My purpose in presenting Jacobs' analysis is to demonstrate that universalism-versus-relativism emerges as the framework for *Santa Clara*

233. *Id.* at 72.

234. *Id.*

235. *See id.* at 56-75.

236. *See id.* at 72.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 81.

Pueblo, not because it is inevitable that we depict Pueblo culture, society, and peoples in this way. *Instead*, it has become a relevant framework because voices such as those of female moral reformers and antimodern feminists, who held the power to define Pueblo women and culture, desperately needed Pueblo women to either be oppressed or enlightened and Pueblo culture to either be patriarchal or matriarchal.

Female moral reformers needed to believe that Pueblos were patrilineal/patrilocal environments that were oppressive to women and, therefore, could benefit from their assistance, European intervention, and law. For instance, female moral reformers who worked for the BIA inadvertently endorsed the BIA's "civilizing mission" towards all Indian tribes.²⁴¹ One important justification for the BIA's agenda urging the Pueblo peoples to adopt Anglo-American legal structures was the alleged factionalism that occurred within the Pueblos.

In his article, *Factionalism at Santa Clara Pueblo*, Dozier describes what he refers to as a "major schism" at Santa Clara Pueblo from 1894-1935.²⁴² Dozier writes that during this time period, "there persisted in Santa Clara a number of families who opposed the dictates of the pueblo authorities. They formed a core within the more 'progressively' oriented Winter Moiety."²⁴³ Among other things, Dozier alleges that this group advocated the separation of religion from secular activities, insisted on the right to wear Western clothes, to cut their hair in European fashion, and protested the right of Pueblo authorities to restrict their absences from the Pueblo, while the Summer Moiety rejected the Winter Moiety's demands and adhered to more traditional Pueblo beliefs.²⁴⁴ Parsons, observing the same disruption, stated that the disagreement between the two Moieties resulted in the breakdown of community cooperation both in ceremonial rituals as well as political appointments.²⁴⁵

With the passage of the IRA, the federal statute which allowed for the creation of tribal constitutions and laws modeled after the Anglo-American legal system, the BIA encouraged Santa Clara Pueblo to draft an IRA constitution as a means for

241. See *id.* at 33-34.

242. Dozier, *supra* note 194, at 172.

243. *Id.* at 176.

244. See *id.*

245. See PARSONS, *supra* note 149, at 179.

ending the factionalism and uniting the Pueblo.²⁴⁶ From the point of view of the BIA and female moral reformers, when Santa Clara Pueblo became the first Pueblo "to incorporate under the Indian Reorganization Act . . . [this] ended more than 200 years of religious and political conflict within the pueblo."²⁴⁷ Consequently, the moral reformers' belief that Pueblo women were oppressed by their Pueblos and the BIA's belief that the Pueblos could not govern themselves successfully resulted in a policy against traditional forms of tribal self-government — a policy which is reflected in the civil rights/equal protection argument in *Santa Clara Pueblo*.

Meanwhile, antimodern feminists needed to cling to the view of Pueblos as egalitarian, matrilineal/matrilocal utopias that were disrupted by patriarchal European forces. When they wrote about the Pueblos and when they fought for reform in U.S. Indian policy, antimodern feminists "often constructed Pueblo women as the repositories of tradition"²⁴⁸ but denied to them "the flux, change, and historical agency inseparable from the lives of 'Westerners.'"²⁴⁹ One antimodern feminist described in Jacobs' book, Mary Austin, believed that Pueblo Indians could lose their "Indianness" if they "engaged in nonfarming occupations or moved to the city, [if they] challenged the leadership of the tribal officials, [if they] desired an education, [if they] wore American clothes or cut their hair, or [if they] simply struggled to balance the claims of both Pueblo and modern American culture."²⁵⁰ Thus, just as female moral reformers' attitudes towards the Pueblos embody one half of the binary discourse in *Santa Clara Pueblo*, antimodern feminists' notions of cultural authenticity reflect the relativist arguments made by the courts to refute Martinez's equal protection claim.

3.

The alternative analysis of *Santa Clara Pueblo* presented here sets forth a variety of identities, cultural attitudes, and traditions espoused by Pueblo women and their communities. Instead of searching for the "true" identity/culture/tradition when faced

246. Dozier, *supra* note 194, at 180-82.

247. *Id.*, at 182.

248. JACOBS, *supra* note 3, at 77.

249. Micaela di Leonardo, EXOTICS AT HOME: ANTHROPOLOGIES, OTHERS, AMERICAN MODERNITY 13 (1998).

250. JACOBS, *supra* note 3, at 104.

with inconsistent views and practices, this analysis favors recognition of an entire spectrum of identity/culture/tradition among Pueblo peoples. This alternative also demonstrates, at least partially, why multiplicitous conceptions of Pueblo culture and identity have not been allowed to thrive.

Specifically, both those who align themselves with the equal protection/civil rights position (such as female moral reformers, the BIA, the Tenth Circuit) as well as those who take the tribal sovereignty/cultural relativist position (such as antimodern feminists, the district court and the U.S. Supreme Court), need to define Pueblo Indians in relation to an unspoken Western norm. The former *justifies intervention* of Anglo law and policy because Pueblo culture and tradition is different from the Western norm of equal protection while the latter *argues against intervention* because Pueblo Indians' "primitive" culture and traditions differentiate them from other U.S. citizens. Thus, this alternative analysis reveals that at its very core, the binary discourse is built upon what Micaela di Leonardo, in *Exotics at Home: Anthropologies, Others, American Modernity*, refers to as "Western modernity's superiority and [the] legitimation of Western white domination."²⁵¹ Finally, in addition to providing the insight that "ethnological antimodernism and imperialistic racism are twins,"²⁵² this approach traces the process whereby voluminous and varying historical, anthropological, and ethnographic materials on Pueblo culture and peoples gets translated into neat and tidy bifurcated categories. It thus suggests the rejection of simplified categories and pursue multidisciplinary, multitudinal, sometimes inconsistent, and perhaps problematic analyses.

CONCLUSION

Part IV provides an alternative way of making sense of *Santa Clara Pueblo* by setting forth historical and anthropological materials that resist resolution through the use of simplified categories, while simultaneously demonstrating the vulnerability of this complexity when mediated/translated/relayed through individuals, governments, courts, and scholars operating within the universalism-versus-relativism binary. Viewing and presenting *Santa Clara Pueblo* through the binary discourse is not inevitable. Thus, the temptation arises to speculate how a court might

251. Leonardo, *supra* note 250, at 3.

252. *Id.* at 12.

have employed the alternative analysis set forth in Part IV to discuss and ultimately resolve the conflict between Julia Martinez and the Santa Clara Pueblo.

If the court presented with Julia Martinez's claim against the Santa Clara Pueblo had conducted the interdisciplinary review set forth in Part IV and comprehended the impossibility associated with discerning the "truth" with respect to the role gender plays within the Santa Clara Pueblo, and by extension, the difficulty of accepting any singular account of what constitutes Santa Clara Pueblo culture, it could have refused to employ the analysis of whether the 1939 rule reflected Pueblo culture and tradition in order to determine whether the rule was susceptible to an equal protection analysis by the federal courts. Next, it could have inquired into the parties' underlying reasons for either wanting to reject or retain the rule *without* allowing the parties to invoke broad totalizing theories (such as the universalist argument that retaining the rule would prohibit gender equality or the relativist argument that rejecting the rule would jeopardize the Pueblo's cultural integrity).

For example, the court could have asked Julia Martinez why she believed her children would benefit from Pueblo membership and whether those benefits could be obtained by some mechanism other than official membership. Similarly, the court could have asked the Pueblo what negative effects it feared would result if Martinez's children were allowed to become Pueblo members and whether those concerns outweighed the benefits both to the Pueblo and Martinez's children if the children were allowed to become Pueblo members. Additionally, both Martinez and the Pueblo could have been asked to consider whether this particular situation could be treated as an exception to the 1939 rule without requiring complete eradication of the rule.

If the parties would have been required to respond to fact-intensive, situation-specific inquiries, they may have realized that their respective legal positions (equal protection and tribal sovereignty) could not adequately represent the real concerns of their daily lives. These questions might also have prompted Martinez, her children, Pueblo members, and Pueblo leaders to re-think their relationships with one another and consider how they might mutually benefit from those relationships. Moreover, a court's decision to address the conflict between Julia Martinez and the Santa Clara Pueblo in this way would have signaled to the parties

that they were not expected nor encouraged to view themselves through the universalist and relativist discourses created about them — Martinez could be more than an Other/Third World woman seeking liberation through the rhetoric of equal rights, and the Pueblo could be more than an Other culture defined by its opposition to and difference from Western norms.

There are many possible outcomes that might have resulted had the *Santa Clara Pueblo* courts proceeded in the ways suggested above. However, perhaps more important than theorizing about these possible outcomes is to recognize that by affirming the complexity involved in discussing not-so-static notions of gender, Pueblo culture, and Pueblo identity, we are able to (re)locate Julia Martinez and the Santa Clara Pueblo outside the universalist-versus-relativist discourse. And it is this outside space — a place AnaLouise Keating refers to as *El Mundo Zurdo*²⁵³ — that we must strive to reach when faced with cases like *Santa Clara Pueblo*.

253. Literally, the “Left-Handed World,” *El Mundo Zurdo* “is a visionary place where people from diverse backgrounds with diverse needs and concerns co-exist and work together to bring about revolutionary change.” AnaLouise Keating, *Forging El Mundo Zurdo: Changing Ourselves, Changing the World*, in *THIS BRIDGE WE CALL HOME: RADICAL VISIONS FOR TRANSFORMATION* 520 (Gloria Anzaldúa and AnaLouise Keating eds., 2002).

