The Existing Indian Family Exception: An Impediment to the Trust Responsibility to Preserve Tribal Existence and Culture as Manifested in the Indian Child Welfare Act

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THE EXISTING INDIAN FAMILY EXCEPTION: AN IMPEDIMENT TO THE TRUST RESPONSIBILITY TO PRESERVE TRIBAL EXISTENCE AND CULTURE AS MANIFESTED IN THE INDIAN CHILD WELFARE ACT

Christine Metteer*

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I. INTRODUCTION

"I was ripped away from my culture long before I was born.... In the '20s and '30s many of our people were migrant workers, but when the Industrial Revolution kicked in most of them wound up working in the cities .... [M]y mother was raised in the city because when her mother was growing up, she'd have been beaten in the residential schools if she spoke her native language. So, she came to believe it was important to teach her daughter to live like a white person."\(^{31}\)

This statement, made by a member of the Iroquois Nation in the spring of 1996, explains one of the past abuses\(^2\) by state welfare authorities against tribes and Indians and illustrates the long-lasting impact those abuses have had. Those abuses, and a fear of the "cultural genocide"\(^3\) they might cause, led to the enactment of the Indian Child Welfare Act in 1978.\(^4\) The Act's stated policy is to set standards to govern removal of Indian children from their families and provide "placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture."\(^5\) To accomplish its stated purpose, the Act sets out special rights and protections in custody proceedings involving any child who is either "(a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."\(^6\)

However, eighteen years later, and ignoring the fact that past abusive Indian child welfare practices often have a long-term ripple effect, the California Court of Appeal for the Second District determined that the Act did not apply to children whose parents had become "fully assimilated into non-Indian culture"\(^7\) and did

2. For a discussion of the abuses leading up to the Act, see infra notes 38-44 and accompanying text.
6. Id. § 1903(4). The Act effectively gives the tribes the right of first refusal in determining placement of children who, for whatever reasons, are not to remain with their Indian parent(s). See infra notes 42-54 and accompanying text.
7. In re Bridget R., 41 Cal. App. 4th 1483, 1507, 49 Cal. Rptr. 507, 526 (1996), review denied. While several recent cases have similarly invoked the exception, see, e.g.,
not have "a significant social, cultural or political relationship" with a tribe. The Indian children in *In re Bridget R.* are twin girls of an American Indian father who is a member of the federally-recognized Pomo tribe and a mother of the Mexican Indian Yaqui tribe. Although the twin's parents had initially consented to an adoption of the children, they soon changed their minds. Along with the Indian children's paternal grandmother and tribe, they petitioned under the ICWA to have the children returned and placed with the paternal Indian family, as required by the Act's placement preferences.

The California court's restriction of the Act to children whose parents have "significant" ties to their tribe exemplifies the "existing Indian family exception." The exception acts to deny the tribes the right to establish or renew ties with children born to tribal members who, because of the past abuses the ICWA was created to remedy, may have left the reservation and become assimilated into non-Indian culture. The exception is a state court...
creation, appended to a federal act which Congress passed to protect tribal existence and culture by preserving the tribes’ most vital resource—their children.\textsuperscript{11} It has been created by the state courts despite congressional findings that “the States and their courts [are] partly responsible for the problem [the ICWA was enacted] to correct.”\textsuperscript{12} And, since the exception changes the effect of the ICWA and creates law affecting Indian tribes and their members, it is judicial lawmaking that is expressly forbidden to the states.\textsuperscript{13}

\textbf{A. The General Trust Responsibility to Indians}

Congress has exclusive and “extraordinarily broad”\textsuperscript{14} power over Indian matters based on the special relationship that exists between the federal government and Indian tribes. This relationship is based on the fact that “Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.”\textsuperscript{15} This sovereignty “is of a unique and limited character.”\textsuperscript{16} It exists only at Congress’s will and is subject to complete dissolution.\textsuperscript{17} “But until Congress acts, the tribes retain their existing sovereign powers.”\textsuperscript{18} The United States Supreme Court has found this unique relationship underlying the tribes’ legal status “\textit{sui generis}.”\textsuperscript{19}

The tribes, as “quasi-sovereign nations . . . by government structure, culture, and source of sovereignty[,] are in many ways foreign to the constitutional institutions of the Federal and State Governments.”\textsuperscript{20} As recognized in the earliest cases dealing with Indians, “[t]he very term ‘nation,’ so generally applied to [Indians], means ‘a people distinct from others.’”\textsuperscript{21} A nation, therefore, is “a distinct community, occupying its own territory, . . . in which the laws of [a state] can have no force . . . .”\textsuperscript{22} Because of the tribes’

\begin{itemize}
\item\textsuperscript{11} See Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 49 (1989).
\item\textsuperscript{12} Id. at 45.
\item\textsuperscript{13} See infra note 24 and accompanying text.
\item\textsuperscript{14} Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978).
\item\textsuperscript{16} Wheeler, 435 U.S. at 323.
\item\textsuperscript{17} See id.
\item\textsuperscript{18} Id.
\item\textsuperscript{19} Morton v. Mancari, 417 U.S. 535, 554 (1974).
\item\textsuperscript{20} Martinez, 436 U.S. at 71.
\item\textsuperscript{21} Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).
\item\textsuperscript{22} Id. at 561.
\end{itemize}
status as sovereign nations, the United States Constitution therefore affords to Congress the sole authority to "regulate Commerce...with the Indian Tribes."\textsuperscript{23} The Indian Commerce Clause, in effect, makes all Indian relations "the exclusive province of federal law."\textsuperscript{24}

When exercising the power within its "exclusive province," the federal government's relation with the tribes, who have been "denominated domestic dependent nations[,]... resembles that of a ward to his guardian."\textsuperscript{25} And because this dependent nation "in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government...[,]"\textsuperscript{26} the U.S. government is said to have a "trust obligation"\textsuperscript{27} toward the tribes.

Congress's exercise of its "trust obligation" in recent years has been marked by a "legislative trend"\textsuperscript{28} toward tribal self-government. Beginning with the Indian Reorganization Act of 1934,\textsuperscript{29} Congress's "intent and purpose" has been "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a generation of oppression and paternalism."\textsuperscript{30} To this end, "Congress repeatedly has enacted various preferences...to give Indians a greater participation in their own self-government."\textsuperscript{31}

Since "[s]elf-government...is the right to choose culture,"\textsuperscript{32} it is not surprising that these "recent laws recognize distinctly In-

\begin{thebibliography}{99}
\bibitem{23} U.S. \textsc{Const.} art. I, § 8, cl. 3.
\bibitem{24} County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 (1985).
\bibitem{25} Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).
\bibitem{26} \textit{Worcester}, 31 U.S. at 561.
\bibitem{27} \textit{Mancari}, 417 U.S. at 541-42.
\bibitem{29} 25 U.S.C. §§ 461-479.
\bibitem{30} Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973) (quoting H.R. \textsc{Rep. No. 1804}, at 6 (1934)).
\bibitem{31} \textit{Mancari}, 417 U.S. at 541.
\bibitem{32} Donna J. Goldsmith, \textit{Individual vs. Collective Rights: The Indian Child Welfare Act}, 13 \textsc{Harv. Women's L.J.} 1, 9 (1990) (alteration in original) (quoting RUSSEL L. BARSH \& JAMES Y. HENDERSON, \textsc{The Road: Indian Tribes and Political Liberty} 118 (1980)).
\end{thebibliography}
ian cultural values as civil rights." However,

culturally, the chances of Indian survival are signifi-
cantly reduced if [Indian] children, the only real means
for the transmission of the tribal heritage, are to be raised
in non-Indian homes and denied exposure to the ways of
their People.... [T]hese practices seriously undercut the
tribes' ability to continue as self-governing communities.

Therefore, part of the "trust responsibility owed to the Indian
tribes by the United States [is] to protect their resources and fu-

three laws sought to promote the best interests of Indian children and to
promote the stability and security of Indian tribes and
families by the establishment of minimum Federal stan-
dards for the removal of Indian children from their fami-
lies and the placement of such children in foster or adopt-
tive homes which will reflect the unique values of Indian
culture, and by providing for assistance to Indian tribes in
the operation of child and family service programs.

This notion of "Indian sovereignty [is the] . . . backdrop against
which the applicable [Indian] statute[] must be read."

B. The Trust Responsibility as Manifested in the ICWA

The ICWA was enacted in response to Congress's "rising con-
cern in the mid-1970's over the consequences to Indian children,
Indian families, and Indian tribes of abusive child welfare practices
that resulted in the separation of large numbers of Indian children
from their families and tribes through adoption or foster care

33. COHEN, supra note 28, at 662 (citing the Indian Child Welfare Act as an exam-
ple of a law that recognizes Indian cultural values as a civil right).

(quoting The Indian Child Welfare Act: Hearings on S. 1214 Before the House of Repre-
sentatives Subcomm. on Indian Affairs and Public Lands, 95th Cong. 190, 193 (1978)
[hereinafter S. 1214 Hearing]) (statement of Chief Calvin Issac, member of the National
Tribal Chairmen's Association)).

in a Land of Individual Rights, 19 AM. INDIAN L. REV. 301, 312 (1994) (quoting 124
CONG. REC. 38,102 (1978)).


37. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973); see also
Mancari, 417 U.S. at 545 (analyzing the Indian preference in terms of the Equal Oppor-
placement, usually in non-Indian homes." 38 Congress was presented with statistical studies showing that "25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions." 39 One commentator has observed that "[t]he risk for Indian children of being involuntarily separated from their parents was in many states up to one thousand times greater than for non-Indian children." 40 Testifying before Congress, Chief Calvin Issac found such separation "[o]ne of the most serious failings" of the pre-ICWA system in which Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child. 41 Congress found these statistics so important that they were codified in 25 U.S.C. § 1901:

Congress finds—

. . . .

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . .

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction

38. Holyfield, 490 U.S. at 32.
39. Id. (citing Indian Child Welfare Program, Hearings before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs, 93d Cong. 14, 15 (1974) [hereinafter Program Hearings] (statement of William Byler)).
41. Holyfield, 490 U.S. at 34-35 (quoting S. 1214 Hearings, supra note 34, at 191-92).
over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.\textsuperscript{42} Thus, the Act is Congress's exercise of its trust responsibility to preserve the tribes as sovereign nations by protecting "the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society."\textsuperscript{43} The ICWA therefore enacts Congress's intent that "an Indian child should remain in the Indian community' . . . by making sure that Indian child welfare determinations are not based on 'a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family.'\textsuperscript{44}

The ICWA includes both procedural and substantive provisions to forward its purpose. It includes a dual jurisdictional scheme in which the tribe has exclusive jurisdiction "over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law."\textsuperscript{45} Additionally, § 1911(b) provides that when an Indian child is not domiciled on a reservation, "the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent . . . provided, [t]hat such transfer shall be subject to declination by the tribal court . . . ."\textsuperscript{46} The U.S. Supreme Court has found § 1911(b) to create "concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation."\textsuperscript{47}

The ICWA also provides, inter alia, that the child's tribe may intervene "at any point" in proceedings involving foster care

\begin{itemize}
\item \textsuperscript{42} 25 U.S.C. § 1901(3)-(5) (1994).
\item \textsuperscript{43} Holyfield, 490 U.S. at 37 (quoting H.R. Rep. No. 95-1386 at 23 (1978)) (hereinafter HOUSE REPORT); see also, Adams, \textit{supra} note 35, at 321 ("The legislative history [of ICWA] reflects a concern for the welfare of tribes and Indian children who grow up without a connection to their Indian culture.").
\item \textsuperscript{44} Holyfield, 490 U.S. at 37 (alteration in original) (quoting HOUSE REPORT at 24).
\item \textsuperscript{45} 25 U.S.C. § 1911(a).
\item \textsuperscript{46} Id. § 1911(b). "Good Cause" was intended to be a modified form of forum non conveniens. See \textit{In re} Appeal in Pima County Juvenile Action No. S-903, 635 P.2d 187, 191 (Ariz. Ct. App. 1981); \textit{In re} Adoption of S.S., 657 N.E.2d 935, 943 (Ill. 1995).
\item \textsuperscript{47} Holyfield, 490 U.S. at 36.
\end{itemize}
placement or termination of parental rights; that the tribe be given notice "[i]n any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved;" and that evidence establishes beyond a reasonable doubt "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" before involuntary termination of parental rights. Additionally, the ICWA provides stringent requirements for establishing voluntary termination of parental rights, including the requirement that consent to termination be "executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood."

Finally, it provides that in any adoption placement under state law, an Indian child be placed according to a set of preferences. These preferences provide that the child be placed "with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families," absent "good cause to the contrary."

The Supreme Court has found these placement preferences "[t]he most important substantive requirement imposed on state courts." If any of the provisions of 25 U.S.C. §§ 1911, 1912, or 1913 are violated, 25 U.S.C. § 1914 provides that a tribe may petition any court of competent jurisdiction to invalidate the action which violated the section.

II. THE TRUST RESPONSIBILITY THWARTED

A. The Existing Indian Family Exception

The Act specifically states that it applies to any child who is either "(a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." The only exceptions to applying the Act to

49. Id. § 1912(a).
50. Id. § 1912(a).
51. Id. § 1913(a).
52. Id. § 1915(a).
53. Holyfield, 490 U.S. at 36.
55. Id. § 1903(4).
such a child in a "custody proceeding" are "a placement based
upon an act which, if committed by an adult, would be deemed a
crime or upon an award, in a divorce proceeding, of custody to one
of the parents."56 "If these prerequisites are met, ICWA supplies
procedural requirements and substantive standards that must be
used by the state court instead of procedures and standards under
state law."57 However, some state courts have refused to apply the
Act where a child is not being removed from what they deem an
"existing Indian family."

This judicially created exception to the Act was first invoked in In re Adoption of Baby Boy L.58 In that case the Kansas Su-
preme Court refused to apply the Act to an illegitimate child of a
non-Indian mother and an Indian father, when the child was vol-
untarily given up for adoption to non-Indian parents by the
mother, over the objection of the father and his American Indian
tribe.59 The court reasoned that the intent of the Act was to pre-
vent "removal of Indian children from an existing Indian family
unit and the resultant breakup of the Indian family."60 The court
therefore found that the Act did not apply to "an illegitimate in-
fant who has never been a member of an Indian home or culture"
and "so long as the mother is alive to object, would probably never
become a part of the [father's] or any other Indian family."61

However, in one of the most recent cases to invoke the excep-
tion, In re Bridget R., the court faced a different scenario.62 In this
case the court refused to apply the Act to twin daughters of an
American Indian father who was a member of the Pomo tribe.63

56. Id. § 1903(1).
58. 643 P.2d 168 (Kan. 1982).
59. Baby Boy L. represents the most common scenario in which the exception has
been invoked: challenges by unwed Indian fathers, who are Tribal members, and their
tribes, to the adoption of their illegitimate children, born to non-Indian mothers.
Usually these children have never lived with the father or with any other Indian family,
and the mother wants the child placed with a non-Indian family. See, e.g., In re Adoption
of Baby Boy D., 742 P.2d 1059 (Okla. 1985); Claymore v. Serr, 405 N.W.2d 650
(S.D. 1987); In re Crews, 825 P.2d 305 (Wash. 1992); see generally Toni Hahn Davis,
The Existing Indian Family Exception to the Indian Child Welfare Act, 69 N.D. L. REV.
60. Baby Boy L., 643 P.2d at 175.
61. Id. at 175.
62. 41 Cal. App. 4th 1483, 49 Cal. Rptr. 2d 507 (1996). The court stated that "[t]he
facts... are... substantially undisputed."
Id. at 1492 n.3, 49 Cal. Rptr. 2d at 516 n.3.
63. The father is a member by virtue of his birth in 1972, at which time the tribe
recognized members "solely by custom and tradition, under which any lineal descen-
and a mother who was of the Mexican Indian Yaqui tribe. At the
time the twins were born, the father was twenty-one and the
mother twenty. They were living together with their two other
children but were not married. When they learned of this third
pregnancy, they decided to give up the twins for adoption.

During the course of the proceedings, the father told the at-
torney handling the case of his Native American ancestry. The
attorney allegedly told the Indian father that recording his ances-
try would make adoption more difficult and urged him to remove
reference to his Native American ancestry. The Indian father
then revised the form and omitted reference to his Native Ameri-
ancestry. The relinquishment documents listed the birth fa-
der as "white," and specified that the twins would be relinquished
to an Ohio couple who intended to adopt them.

The twins were born in November, 1993. Approximately one
month after the twins' birth, in December, 1993, the Indian father
told his mother of their birth and of his relinquishment of them.
In early February, 1994, she contacted the Pomo tribe about the
relinquishment, requesting intervention and applying for enrol-
ment in the tribe for herself, her son, and his twin daughters. She
told the tribe that she wished the twins placed within the extended
Indian family. She later explained to a reporter that "her whole
family and a tribe beyond, is prepared to receive the children with
love. 'I know the pain [the adoptive parents] feel [when faced with
the possibility of losing the children], because I felt the same pain

See id. at 1495, 49 Cal. Rptr. 2d at 518.
64. See id. at 1492, 49 Cal. Rptr. 2d at 516.
65. See id. at 1493, 49 Cal. Rptr. 2d at 517.
66. See id.
67. See id.
68. See id.
69. See id.
70. See id. These facts were reported in greater detail locally during the trial below. See James Rainey, Birth Parents to Get Twins, Judge Rules, L.A. TIMES, June 15, 1995, at A1.
71. See Bridget R., 41 Cal. App. 4th at 1494, 49 Cal. Rptr. 2d at 518. The California
court admits that "[i]t is undisputed that the relinquishments were not executed in the
manner required by ICWA." Id. at 1491, 49 Cal. Rptr. 2d at 516.
72. See id. at 1492, 49 Cal. Rptr. 2d at 516.
73. See id. at 1495, 49 Cal. Rptr. 2d at 518.
74. See id.
75. See id.
when I realized I had two granddaughters I didn’t even know.”\textsuperscript{76}

Within a few weeks, in late February or early March, 1994, the tribe contacted the attorney who had handled the case as well as the Los Angeles County Children’s Court, requesting intervention in the proceedings and asking that the twins’ father be allowed to rescind his relinquishment.\textsuperscript{77} The agency handling the placement refused, and the twins remained with the family seeking to adopt them.\textsuperscript{78} This family formally filed to adopt on May 4, 1994.\textsuperscript{79}

Given these facts, there seemed no question that the Act applied because the twins were by then enrolled members of their Indian tribe and had previously been eligible for membership as biological children of a member of the tribe, as required by 25 U.S.C. § 1903(4). Additionally, the proceeding was not a divorce or delinquency proceeding, the only Indian child custody proceedings to which the ICWA is inapplicable.\textsuperscript{80} At the June, 1995, trial, the judge blamed the entire proceeding on the attorney handling the case. The judge reasoned that the attorney “‘clearly failed in terms of his responsibility to his clients . . . . Had he addressed these issues in the initial interview, we would not all be here today.’”\textsuperscript{81} The judge therefore ordered the twins returned to their birth parents.\textsuperscript{82}

The prospective adoptive parents appealed.\textsuperscript{83} The California Court of Appeal for the Second District, sua sponte, raised eleven questions for the parties to address on appeal. Among them was whether the ICWA applies “in the context of the ‘Existing Indian Family’ where, as here, it appears that neither the children nor their birth parents have a meaningful connection with Indian tribal

\textsuperscript{76} Rainey, supra note 70, at A36 (quoting paternal grandmother, Karen Adams).
\textsuperscript{77} See Bridget R., 41 Cal. App. 4th at 1495, 49 Cal. Rptr. 2d at 518.
\textsuperscript{78} See id. at 1496, 49 Cal. Rptr. 2d at 518.
\textsuperscript{79} See id. at 1494, 49 Cal. Rptr. 2d at 518. The California appellate court presumed that at the time of its decision in January, 1996, this petition was still pending. See id.
\textsuperscript{80} See 25 U.S.C. § 1903(1).
\textsuperscript{81} Rainey, supra note 70, at A36 (quoting Judge John Henning). The bill recently passed in the Senate, S. 1962, would impose criminal sanctions on anyone making fraudulent misrepresentations about whether a child or parent is “Indian” for purposes of the Act. S. 1962, 104th Cong., 2d Sess. § 114 (1996).
\textsuperscript{82} See Rainey, supra note 70, at A1.
\textsuperscript{83} The adoptive parents also filed suit against the attorney who had advised the Indian father against revealing his ancestry, alleging, \textit{inter alia}, legal malpractice, breach of fiduciary duty, actual and constructive fraud, and misrepresentation and concealment. See Verified Complaint for Damages, at 6, 12-34, Rost v. Cook, No. BC133935 (Cal. Super. Ct. L.A. County Aug. 22, 1995).
or family life and where their primary cultural heritage is other than Indian. 84

In its subsequent decision the court found the issue in the case before it to be "whether the Act should be limited in its application . . . to children who not only are of Indian descent, but also belong to an 'existing Indian family.'" 85 Although the California Court of Appeal for the First District had thirteen years earlier rejected the "judicial creation" of the existing Indian family exception as undermining a major purpose of the Act, 86 the Second District Court of Appeal found that

under the Fifth, Tenth and Fourteenth Amendments to the United States Constitution, ICWA does not and cannot apply to invalidate a voluntary termination of parental rights respecting an Indian child who is not domiciled on a reservation, unless the child's biological parent, or parents, are not only of American Indian descent, but also maintain a significant social, cultural or political relationship with their tribe. 87

The court then remanded the case to determine whether the father's relationship with the tribe was "significant" enough to apply the ICWA, even though the court observed that "the events and circumstances . . . strongly suggest[] that no such relationship existed." 88 However, if the trial court were to find such a relationship, the appellate court dictated that "it will be necessary to conduct a further hearing on the question of whether there should be a change of custody," 89 despite the tribe's "presumptive[] . . . jurisdiction" 90 over the matter.

B. Problems with the Existing Indian Family Exception

As the California Court of Appeal for the First District rec-

85. Bridget R., 41 Cal. App. 4th at 1491, 49 Cal. Rptr. 2d at 515.
87. Bridget R., 41 Cal. App. 4th at 1492, 49 Cal. Rptr. 2d at 516.
88. Id. at 1522, 49 Cal. Rptr. 2d at 536. The court posed the question on remand as "whether [the Indian father], who, at all relevant times, resided several hundred miles from the tribal reservation, ever participated in tribal life or maintained any significant social, cultural or political relation with the Tribe." Id. at 1491, 49 Cal. Rptr. 2d at 515-16.
89. Id. at 1522, 49 Cal. Rptr. 2d at 536.
ognized, however, the problem with the existing Indian family exception is that "[t]he language of the Act contains no such exception to its applicability, and [it is] not . . . appropriate to create one judicially." Additionally, several courts have noted that Congress considered and rejected proposed language which would have restricted the application of the ICWA. "[W]hen a court ignores the clear provisions . . . in reliance on what the court believes the legislature must have meant to say, the court is improperly engaging in judicial lawmaking." This is especially true in Indian cases which, under the Indian Commerce Clause, are the "exclusive province" of federal law. But even if the language of the Act or the legislative intent behind it were not clear, the judicial creation of an exception to the Act's applicability would violate the canons of construction of federal Indian law. The United States Supreme Court has held that "[i]n interpreting Indian treaties and statutes, '[d]oubtful expressions are to be resolved in favor of the . . . people who are the wards of the nation, dependent upon its protection and good faith.'" Because the canons of construction of federal Indian laws require them to be construed "in a spirit which generously recognizes the full obligation of this nation to protect the interests" of the tribes, "statutes . . . dealing with Indian affairs have been con-

91. In re Junious M., 144 Cal. App. 3d 786, 796, 193 Cal. Rptr. 40, 46 (1983); see also In re Adoption of S.S., 657 N.E.2d 935, 953 (Ill. 1995) (McMorrow, J., dissenting) ("There is no provision in the ICWA requiring that an Indian child be born into or be living in an Indian family unit to be subject to its provisions. However much one might believe the ICWA should have been written that way, '[n]o amount of probing into what Congress 'intended' can alter what Congress said."); In re N.S., 474 N.W.2d 96, 100 n.(unnumbered) (S.D. 1991) (Sabers, J., concurring) (emphasis omitted) ("There is simply no statutory requirement for [the child] to have been born into an Indian home or an Indian community in order to come within the provisions of the ICWA, however much one might believe 25 U.S.C. § 1903(4) should have been written that way.").

92. See Nelson v. Hunter, 888 P.2d 124, 126 n.4 (Or. Ct. App. 1995) (citing 6 U.S.C.C.A.N. 7530, 7538-39, 7558-63 (1978)) (Congress rejected language in ICWA that would restrict application of the Act to enrolled members of the tribe); S.S., 657 N.E.2d at 951 (Congress rejected proposal that Indian children must have "significant contacts" with the tribe in order to invoke tribal jurisdiction under the ICWA); In re Ashley Elizabeth R., 863 P.2d 451, 454 (N.M. Ct. App. 1993) (lack of contact with tribe rejected in Bureau of Indian Affairs [BIA] Guidelines as "good cause not to transfer" proceedings to tribe).

93. N.S., 474 N.W.2d at 100 n.(unnumbered) (Sabers, J., concurring).

94. See supra note 24 and accompanying text.


strued liberally in favor of establishing Indian rights."

Using this liberal construction, the Supreme Court in Holyfield stated that

[w]e start, however, with the general assumption that "in the absence of a plain indication to the contrary, . . . Congress, when it enacts a statute is not making the application of the federal act dependent on state law." One reason for this rule of construction is that federal statutes are generally intended to have uniform nationwide application. . . . A second reason for the presumption against the application of state law is the danger that "the federal program would be impaired if state law were to control." For this reason, "we look to the purpose of the statute to ascertain what is intended."

The Supreme Court found Congress's "purpose" apparent, reasoning that "[t]he numerous prerogatives accorded the tribes through the ICWA[ ] . . . must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves." The Supreme Court embraced evidence that showed that "[r]emoval of Indian children from their cultural setting seriously impacts a long-term tribal survival and has damaging social and psychological impact on many individual Indian children." The Supreme Court therefore focused on Congress's intent to protect Indian children and tribes from "cultural" removal rather than removal from what the individual state courts might variously define as an existing Indian family. Such a focus parallels Congress's intent "to ensure the continued viability of Indian tribes by protecting Indian children from cultural genocide," since "[t]he preservation of Indian society and culture clearly involves Indian children . . . [who] necessarily sustain the culture of a people from one generation to the next." The Supreme Court therefore held that the Act applied even to twins who had been placed with a non-Indian family at

97. COHEN, supra note 28, at 224. For example, the canons have been used to recognize the existence of reserved water rights and hunting and fishing rights, and to make exemptions from the exercise of state taxing authority. See id.
99. Id. at 49.
100. Id. at 50 (emphasis added).
102. Id. at 161.
birth and had never been on the reservation or spent time with their Indian family.  

Accordingly, in 1989, it became the “holding of the United States Supreme Court that even without contact with the tribe or reservation since their births, and even though [the] Indian parents did not want tribal involvement . . . the tribal court was the appropriate forum to determine the custody of children of members of the tribe.”  

The Supreme Court reasoned that

[trib]al jurisdiction under § 1911(a) was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians.

Therefore, applying the existing Indian family exception violates the clear intent of Congress expressed in the Act because it posits as a determinative jurisdictional test the voluntariness of the conduct of the [parent(s)] . . . . [T]he Act itself specifies procedures for voluntary terminations of parental rights. . . . [T]he application of the ICWA to voluntary . . . adoptions is not inconsistent with the purposes of the Act . . . . The effect on both the tribe and the Indian child of the placement of the child in a non-Indian setting is the same whether or not the placement was voluntary.

The Bridget R. court, however, found it particularly significant . . . that in the months preceding the birth of the twins, the biological parents turned . . . to California’s legal process for the purpose of securing the adoption of the twins . . . . The biological parents did this voluntarily and for reasons which reflected that their primary concern was for the twins’ future . . . .

The court found that the voluntary placement, coupled with the Indian father’s coerced denial of his Native American heritage, “permits a very strong inference to be drawn about the absence of

103. See Holyfield, 490 U.S. at 53.
105. Holyfield, 490 U.S. at 49.
a significant relationship with the Tribe." The Supreme Court, in *Holyfield*, however, anticipated just such a reaction by the state courts. In concluding that Indian parents may not unilaterally defeat the jurisdictional scheme of the ICWA, the Supreme Court reasoned that "[o]ne of the effects of our national paternalism has been to so alienate some Indian [parents] from their society that they abandon their children at hospitals or to welfare departments rather than entrust them to the care of relatives in the extended family."109

The United States Supreme Court's opinion makes it clear, then, that the Act is not limited to children taken from an existing Indian family and that "Indian tribes still ha[ve] a legitimate interest in the welfare of members who [do] not have previous significant contact with the tribe or the reservation."110 By the terms of the Act itself,111 "[o]nly when a parent is not available and the child is over five years of age should a state court intervene and make a determination involving lack of contact with the tribe."112

The application of the judicial existing Indian family exception thus ignores Congress's admonition, codified in 25 U.S.C. § 1901(5), that "the States ... have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."113 In fact, the United States Supreme Court noted that "the States and their courts ... [are] partly responsible for the problem [Congress, through the ICWA] intended to correct."114 This is because state courts often do not understand the cultural and social standards informing Indian family life115 that underlie the Act's "fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected."116 In addition, studies pre-

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108. Id. at 1515, 49 Cal. Rptr. 2d at 532 (emphasis omitted).
110. *Yavapai-Apache Tribe*, 906 S.W.2d at 171.
112. *Yavapai-Apache Tribe*, 906 S.W.2d at 171.
resented in the congressional hearings on the Act showed “recurring developmental problems encountered during adolescence by Indian children raised in a white environment. . . . depriving the child of his or her tribal and cultural heritage.”

State courts applying the existing Indian family exception, however, do not understand that

the phrase “best interests of Indian children” in the context of the ICWA is different than the general Anglo-American “best interest of the child” standard . . . involving non-Indian children. Under the ICWA, what is best for an Indian child is to maintain ties with the Indian Tribe, culture, and family. By using the best interest of the child standard employed by state courts in cases involving non-Indian children, the . . . court engage[s] in the type of analysis that created the need for the Act in the first place.

In this type of analysis, the “underlying assumption is that relying on Indian determination . . . would not truly result in what is best for the Indian child. . . . [T]his [is] an arrogant idea that defeats the sovereignty of Indian tribes in custody matters; the very idea for which the ICWA was enacted.” In fact, the United States Supreme Court found the state courts’ “overly paternalistic approach [in Indian matters] . . . both exploitative and destructive” and therefore “determined that proper fulfillment of its trust [responsibility] required turning over to the Indians a greater control of their own destinies.”

Based on the interpretation of the ICWA by the Supreme


117. Holyfield, 490 U.S. at 50 n.24 (citations omitted).
118. Yavapai-Apache Tribe, 906 S.W.2d at 169 (citations omitted).
119. Id. at 170; see also In re M.E.M., 635 P.2d 1313, 1319 (Mont. 1981) (Sheehy, J., dissenting) (“[W]e cannot] refuse transfer of the proceedings to a tribal court on the perception that the tribal court may not act with respect to the child in the way we would wish it to act. The purpose of the Indian Child Welfare Act is to remove as far as possible the white man's perceptions in these matters where Indian values may conflict.”).
Court in *Holyfield*, many states have re-evaluated their prior use of the existing Indian family exception, or refused to invoke it for the first time. Oklahoma recently passed legislation calling for state courts to “recognize that Indian tribes and nations have a valid governmental interest in Indian children regardless of whether or not said children are in the physical or legal custody of an Indian parent or Indian custodian at the time state proceedings are initiated.”

Similarly, the North Dakota Supreme Court invalidated its previous holding in *Claymore v. Serr*, in which it had invoked the existing Indian family exception, stating,

> it is incorrect, when assessing ICWA’s applicability to a particular case, to focus only upon the interests of an existing [Indian] family. Such a practice fails to recognize the legitimate concerns of the tribe that are protected under the Act... "Holyfield also carries the clear message that [ICWA] would be read liberally, perhaps creatively, to protect the rights of the tribe even against the clearly expressed wishes of the parents."

The court in *Bridget R.*, however, ignored this line of reasoning and instead relied on the reasoning of *Baby Boy L.* and *Claymore* as authority for its holding.

The court’s refusal to follow the post-*Holyfield* cases is especially perplexing, given the facts of the case. In *Bridget R.*, both parents are ethnically “Indian,” the father and paternal grandmother lifetime members—and now enrolled members, as are the twins—of a federally recognized American Indian tribe. Both parents and the paternal grandmother want the children returned.
to them to join their two siblings and to be raised within the father's extended family. The twins' tribe, the Dry Creek Rancheria of Pomo Indians, joined their Indian family in the suit. Additionally, the Oglala Sioux Tribe filed an amicus brief in the case, which was joined by six other American Indian tribes, nineteen Alaskan Native villages, and one California Indian Organization which includes seven other tribes. These tribes felt compelled to address the court because "some of amici's Indian children were, are, and may be located in California. Some of these children are involved in custody proceedings. The decision in this case may determine the outcome of those proceedings." Thus, both the twins' parents, their paternal grandmother, their tribe, and a host of other Native American tribes argued for the return of the twins to their Indian family.

This fact scenario is quite unlike that of Baby Boy L., or a case factually similar to it, In re Crews, which the California court relied upon. In those cases the courts noted that even if the ICWA were applied, the Indian children would not be placed with their Indian families anyway. In fact, the Washington appellate court in In re M. John Doe did not apply the exception because it found Crews distinguishable on this fact. Similarly, Bridget R. should be distinguishable because the family and tribe seek to have the children returned to their Indian family.

The California Court of Appeal for the Second District's decision in Bridget R. is also perplexing since the California Court of Appeal for the First District recently rejected the exception, even when the non-Indian mother opposed tribal intervention. The Lindsay C. court found the Act applicable despite the fact that the child had never resided with the Indian father or been exposed to Indian culture. The court reasoned that "[a]fter the decision in Holyfield, it appears that the Kansas court in Baby Boy L. may

126. See supra notes 63-76 and accompanying text.
127. See Bridget R., 41 Cal. App. 4th at 1491, 49 Cal. Rptr. 2d at 515.
129. Id.
130. See In re Adoption of Baby Boy L., 643 P.2d 168, 175 (Kan. 1982); In re Adoption of Crews, 825 P.2d 305, 310 (Wash. 1992).
have given inappropriate weight to the wishes of the family.”

The court reasoned that the Act applied because the case did not fall within the Act’s two specific exceptions, divorce or delinquency proceedings, and because applying the Act . . . advances the stated purposes of the legislation—i.e. “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families. . . .” Additionally, it is in keeping with the tenor of Holyfield which stresses consideration of not only the wishes of the parents, but the well-being and interests of the child and the tribe.

In contrast, although agreeing that Holyfield had “explicitly rejected” limiting application of the ICWA to children who had themselves lived on a reservation, the Bridget R. court reasoned “it does not follow from Holyfield that ICWA should apply when neither the child nor either natural parent has ever resided or been domiciled on a reservation or maintained any significant social, cultural or political relationship with an Indian tribe.” Thus, even though the Indian father, the extended paternal family, and the tribe sought the return of the twins to be raised by the immediate Indian family and exposed to the tribe and Indian culture, the Second District Court of Appeal specifically concluded that absent the state court’s determination that the parents have significant ties with a tribe, application of the Act runs afoul of the Constitution in three ways: (1) it impermissibly intrudes upon a power ordinarily reserved to the states, (2) it improperly interferes with Indian children’s fundamental due process rights respecting family relationships; and (3) on the sole basis of race, it deprives them of equal opportunities to be adopted that are available to non-Indian children and exposes them, like the twin girls in this case, to having an existing non-Indian family torn apart through an after the fact assertion of tribal and Indian-parent rights under the ICWA . . .

133. Id. at 412, 280 Cal. Rptr. at 199 (citation omitted).
135. Lindsay C., 229 Cal. App. 3d at 415, 280 Cal. Rptr. at 201 (citation omitted).
137. Id. at 1511-12, 49 Cal. Rptr. 2d at 529.
III. THE CONSTITUTIONALITY OF APPLYING THE ICWA REGARDLESS OF SOCIAL, CULTURAL, OR POLITICAL TIES TO THE TRIBE OF AN INDIAN CHILD OR THE CHILD'S PARENTS

The California court's use of the existing Indian family exception to challenge, not only the Act's applicability, but its constitutionality, is unprecedented. However, a review of the United States Supreme Court's decisions reviewing Congress's broad plenary power to regulate Indian affairs shows that "[l]egislation with respect to these 'unique aggregations' has repeatedly been sustained."\(^\text{139}\)

The Supreme Court's refusal to overturn any congressional legislation regarding Indians first suggests that although the California court and other critics of the ICWA have argued that "the law might be subject to a reserved power of the states or Tenth Amendment challenge . . . in light of the reluctance of the Supreme Court . . . to enforce limits on the powers of the federal government vis-à-vis the states, one should not assume this to be the case."\(^\text{140}\) Secondly, Congress's power to enact legislation concerning Indian affairs, which often implicates the same due process or equal protection concerns addressed by the Bridget R. court, has been upheld by the High Court because "[a]s separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."\(^\text{141}\) As early as 1896 the Supreme Court held that "the Fifth Amendment did not 'operat[e] upon' 'the powers of local self-government enjoyed'"


\(^{140}\) Renner, supra note 139, at 150.

by the tribes.” And in 1978 the U.S. Supreme Court recognized, in *Santa Clara Pueblo v. Martinez*, that “[i]n ensuing years the lower federal courts have extended the holding of *Talton* to other provisions of the Bill of Rights, as well as to the Fourteenth Amendment.”

After *Talton*, federal courts of appeal that upheld equal protection or due process rights against Indian tribes “qualified their holdings by stating that no distinctly Indian tradition or cultural norm justified” exempting tribes from the applicable constitutional provisions in the action under review. In these cases the courts “correctly sensed that Congress did not intend that the equal protection and due process principles of the Constitution disrupt settled tribal customs and traditions.” Therefore, since Congress certainly intended to protect “settled tribal customs and traditions” when it enacted the ICWA to preserve the continued existence of the tribes by preventing their “cultural genocide,” no equal protection or due process principles are implicated.

A. The Indian Commerce Clause and the Tenth Amendment

In *Bridget R.* the California Court of Appeal questioned whether Congress exceeded its authority under Article I, section 8, clause 3, of the Constitution when it legislates on behalf of Indian tribes, children, and families when the Indian children’s parents “are of Indian descent, but . . . maintain no significant social, cultural or political relationships with Indian community life.” However, Congress’s powers are extremely broad and extend to defining tribal existence and membership, as well as to defining who is an Indian for purposes of determining applicability of federal legislation. Significantly, in 1978 the United States Supreme

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142. *Id.* (quoting *Talton v. Mayes*, 163 U.S. 376, 384 (1896)).
143. *Id.* (footnote omitted). The court noted specifically the Due Process Clause of the Fifth and Fourteenth Amendments and freedom of religion under the First and Fourteenth Amendments.
144. See *Cohen*, supra note 28, at 670 (footnote omitted).
145. *Id.* (footnote omitted).
148. See *supra* notes 14-27 and accompanying text.
151. Congress variously defines “Indian” in different statutes. See, e.g., the definition of “Indian” and “Indian child” in the ICWA, 25 U.S.C. § 1903(3)-(4); see also *Cohen*, supra note 28, at 23 (containing a full treatment of Congress’s statutory defini-
Court found, in *United States v. John*, that the Federal Crimes Act applied to an offense committed in an area designated a reservation for the Choctaw Indians and precluded state prosecution of the same offense.\(^{152}\)

The state of Mississippi argued that the Choctaw Indians residing in Mississippi had been “fully assimilated into the political and social life of the State” since 1830, and the “Federal Government long ago abandoned its supervisory authority over these Indians.”\(^{153}\) The State therefore reasoned that “the power given Congress ‘[t]o regulate Commerce . . . with the Indian Tribes,’ Const. Art. I § 8, cl. 3, cannot provide a basis for federal jurisdiction.”\(^{154}\)

The United States Supreme Court specifically rejected the State’s argument that Congress exceeded its enumerated powers if the Major Crimes Act’s definitions of Indians and Indian lands were applied to “assimilated” Indians. The Court stated:

we do not agree that Congress and the Executive Branch have less power to deal with the affairs of the Mississippi Choctaws than with the affairs of other [non-assimilated] Indian groups. Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision of them has not been continuous, destroys the federal power to deal with them.\(^{155}\)

However, like the Mississippi state court which argued that the “political and social life”\(^{156}\) of the subject Indians determined whether the federal government could exercise its power, the California court found no federal interests in applying the ICWA to Indian children whose parents had no “significant social, cultural or political relationship with the Tribe.”\(^{157}\) The court reasoned that the ICWA’s purpose is not furthered when the Act is applied to families when the “parents . . . have become fully assimilated into non-Indian culture.”\(^{158}\) The court therefore challenged the Act’s constitutionality under the Tenth Amendment, concluding that

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153. *Id.* at 652.
154. *Id.*
155. *Id.* at 652-53 (citation omitted) (footnote omitted).
156. *Id.*
158. *Id.* at 1507, 49 Cal. Rptr. 2d at 526.
Congress exceeds its authority when, acting under any of its enumerated powers, Congress legislates in matters generally within the jurisdiction of the states, in the absence of an adequate nexus to the enumerated power under which the legislation is enacted.

No such nexus exists respecting application of ICWA to children whose families . . . are in all respects indistinguishable from other residents of the state. 159

The United States Supreme Court in John, however, found an "adequate nexus" in the "elaborate history . . . of relations between the [Indian tribes] and the United States." 160 This history included the fact that "[i]n the early 1950's . . . federal Indian policy . . . emphasized assimilation," 161 rather than self-government. 162 Similarly, an adequate nexus can be found in the ICWA's provisions, which were "deemed by Congress to be essential for the protection of Indian culture and to assure the very existence of Indian tribes." 163 Congress's review of the elaborate history of Indian child custody abuse 164 led to its finding, codified in the ICWA, that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 165

The federal interest in preserving the very existence of the tribes by preventing the cultural removal of their children is therefore "clear and substantial," 166 and allowing state courts to reject application of the Act based on the Indian family's lack of "social, cultural, or political" ties to the tribe would do "major damage" to such interest. In fact, " . . . Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities." 167 Therefore, under a valid exercise of its power to regulate Indian affairs under Article I, section 8, clause 3 of the United States Constitution, "the public policy of th[e] State is subservient to Acts of Congress including the ICWA . . . [and] [i]t is incum-

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159. Id. at 1511, 49 Cal. Rptr. 2d at 529 (citation omitted).
160. John, 437 U.S. at 652.
161. Id. at 653 n.24.
162. See supra note 31 and accompanying text.
166. The court in Bridget R. determined that if the ICWA were to override state law in an adoption case, it would have to be shown that "application of the state law would do 'major damage' to 'clear and substantial federal interests.'" Bridget R., 41 Cal. App. 4th at 1510, 49 Cal. Rptr. 2d at 528 (citation omitted).
167. Holyfield, 490 U.S. at 45.
bent upon the [state] court to provide all . . . protections.”

B. Due Process Under the Fifth and Fourteenth Amendments

In Bridget R. the California court also addressed the question of “whether the tribal interests which ICWA protects are sufficiently compelling under substantive due process standards to justify the impact which ICWA’s requirements will have on [Indian children’s] constitutionally protected familial rights” when those children are not from an existing Indian family. The court reasoned that these special rights and protections would not apply unless, when applied, they served a “compelling government purpose . . . actually necessary and effective to the accomplishment of [Congress’s] purpose.” If they do not, the court reasoned, Indian children would be deprived of the due process of law protecting their rights under the Constitution. The court then found that the Act’s purpose of protecting “the unique values of Indian culture” (25 U.S.C. § 1902) will not be preserved in the homes of parents who have become fully assimilated into non-Indian culture. . . . [especially] where fully assimilated Indian parents . . . have previously concluded a reasoned and voluntary relinquishment of a child, which was valid and has become final under state law, and the child has become part of an adoptive or prospective adoptive family.

The court’s analysis of the question, however, centered around the fundamental liberty interests afforded all parents and children by both the United States Constitution and California law, rather than on the special liberty interests created by Congress for Indian children, parents, and tribes in the ICWA. The

170. Id. (citation omitted).
171. See id. The court, through labored analysis, found that the Indian parents had no constitutional rights to the children they had voluntarily relinquished under state law, or at least they had “voluntar[ily] subordinat[ed]” those rights. Id. Similarly, the court found that the tribe had no rights protected under the Constitution. See id. at 1508, 49 Cal. Rptr. 2d at 527. Thus, the court concluded that the only party with constitutional rights was “the twins . . . [who] have a presently existing fundamental and constitutionally protected interest in their relationship with the only family they have ever known.” Id. at 1507, 49 Cal. Rptr. 2d at 526.
172. Id.
173. See id. at 1501-07, 49 Cal. Rptr. 2d at 522-26.
174. The United States Supreme Court has determined that “[t]he numerous pre-
California Court of Appeal, in so reasoning, engaged in analysis in which, in the words of the trial judge in the case, "[t]he ingredient that was left out... was the interests of the tribe." 175

The substantive provisions of the ICWA provide Indians with rights beyond those constitutionally afforded to all other American families, 176 which carry their own due process requirements—the procedural provisions of the Act. The liberty interest of the tribes, which "is at the core of the ICWA" 177 and is protected by it, is the right of a tribe as a sovereign nation to retain "its children in its society." 178 As a sovereign it is "concerned with the welfare of all who are tribal members or who are eligible to be tribal members and who are not yet of an age to choose." 179 Because Congress was interested in protecting the tribes' interest vis-à-vis their children, not vis-à-vis these children's possibly assimilated parents, 180 "under the ICWA, even in instances where there is a total lack of contact with a child, an Indian tribe has a very real and substantive interest in each child." 181

The special rights and protections of the ICWA therefore constitute a liberty interest in retaining Indian culture, which has been found to be a civil right. 182 It is a right specially conferred by federal statute because of the emerging federal policy against the past policy of assimilation 183 and towards Indian "self-determination" and "self-government." 184 The ICWA enables tribes to achieve the federal goals of self-determination and self-government by protecting the "resource...[most] vital to the continued existence and integrity of Indian tribes" 185—their member children and children rogatives accorded the tribes through the ICWA's substantive provisions... must... be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves." Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 49 (1989).

175. Rainey, supra note 70, at A36 (quoting Los Angeles Superior Court Judge John Henning.)

176. For an explanation of the constitutionality of these provisions under the equal protection clause, see infra notes 246-59 and accompanying text.


178. Holyfield, 490 U.S. at 37 (citation omitted).

179. Adams, supra note 35, at 323.

180. I am indebted to Ms. Carol Abernathy for determining this focus of the ICWA and for pointing out the California court's inversion of this principle.


182. COHEN, supra note 28, at 662.


184. See supra notes 28-31 and accompanying text.

185. Holyfield, 490 U.S. at 49.
eligible for membership. These children, regardless and perhaps because of their parents' present lack of a significant relationship with the tribe, are "the only real means for the transmission of the tribal heritage. . . . [When] denied exposure to the ways of their People . . . these practices seriously undercut the tribes' ability to continue as self-governing communities."186

In order to protect these substantive interests, the ICWA also provides procedural safeguards. The procedural protections "[a]t the heart of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings."187 Additionally, the Act provides that a tribe shall have a right to intervene at any point in the [Indian child custody] proceeding."188 Finally, the Act provides that notice be given to the tribe "[i]n any involuntary proceeding in a State court" involving an Indian child.189 And, since "the tribe's right to assert jurisdiction over the proceeding or to intervene in it is meaningless if the tribe has no notice that the action is pending[,]"190 such notice presumably extends to voluntary proceedings as well.191 Because of the importance of notice to a tribe in order for it to intervene and/or eventually exercise jurisdiction, "[c]ourts have consistently held [that] failure to provide the required notice requires remand."192

Thus, because of its "broad remedial purposes,"193 the ICWA "creates a higher burden [in removing an Indian child from his or her Indian family or culture] than that imposed by State law."194 This higher burden of protecting the Indian child's cultural rights applies because "[t]he determination of a child's best interests under the Act clearly differs from the analysis required by state law when a parent who has consented to an adoption seeks to regain custody."195 Accordingly, the ICWA has been used to revoke involuntary termination of parental rights accomplished under state

186. Id. at 34 (quoting S. 1214 Hearings, supra note 35 (statement of Calvin Issac)).
187. Id. at 36; see 25 U.S.C. § 1911(a)-(b) (1994).
188. 25 U.S.C. § 1911(c).
189. Id. § 1912(a).
law, as well as to grant a petition by Indian parents to reopen a
case when the Indian parents had initially consented to termina-
tion of their parental rights under state law. In fact, one court
has found that under the ICWA “prospective adoptive parents
must be held to assume the risk that [the Indian] parent . . . might
change [his or] her mind [about relinquishing his or her rights] be-
fore the adoption is finalized.” Finally, the ICWA has been in-
voked to procure a hearing and the appointment of counsel in an
Indian child custody action. If a state court refuses to take on
the “higher burden” set upon it by the ICWA it “defeat[s] one of
the purposes of the Indian Child Welfare Act—that of granting
due process to those involved in the process.”

In the ICWA, then, Congress identified “two important, and
sometimes independent, policies[. . .] the interests of the Indian
child . . . [and] the stability and security of Indian tribes and fami-
lies.” The Bridget R. court, however, reasoned that
these two elements of ICWA’s underlying policy are in
harmony in the circumstance in which ICWA was pri-
marily intended to apply—where nontribal public and
private agencies act to remove Indian children from their
homes and place them in non-Indian homes or institu-
tions. But in cases such as this one, where, owing to non-
compliance with ICWA’s procedural requirements,
ICWA’s remedial provisions are invoked to remove chil-
dren from adoptive families to whom the children were
voluntarily given by the biological parents, the harmony is
bound to be strained . . . [especially where] the interests
of the tribe and the biological family may be in direct con-
trict with the children’s strong needs, which we find to be
constitutionally protected, to remain through their devel-
oping years in one stable and loving home.

The court therefore found no “compelling government pur-

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196. See id.
“higher standard” of protection to Indian parents in termination proceedings).
202. Bridget R., 41 Cal. App. 4th at 1502, 49 Cal. Rptr. 2d at 522-23 (citation omit-
ted).
pose" in applying the Act in situations where these competing interests would violate the children's interest in staying with their prospective adoptive family. In so reasoning, the court either determined that the children's "constitutionally protected" interests in staying in their adoptive home outweighed their interests in retaining their cultural heritage as protected by the Act, or that, under the ICWA, the children's interests were superior to the interests of both the Indian parent[s] and tribe. Both assumptions are incorrect.

First, "[t]he United States Supreme Court has never decided whether a child has a liberty interest... in maintaining his current relationship [with a foster family]." Although the Supreme Court refused to decide whether a child had a liberty interest in remaining with a foster family, it did make clear that any such interest on the part of the child was "substantially attenuated absent a finding of unfitness." Therefore, cases attempting to assert such rights on behalf of children have not met with success.

Additionally, even if the children had such a constitutionally protected right, "the Fifth Amendment [does] not 'operate[ ] upon' 'the powers of local self government enjoyed' by the tribes[.]" and tribal rights have consistently been held to take precedence over those of individual tribal members. In In re Adoption of Halloway, a case heavily relied upon by the Supreme Court in Holyfield, the Utah Supreme Court refused to allow a mother to facilitate a non-Indian placement when she wished to avoid having the child raised in an Indian environment. The court found that such an action would "conflict[] with and undermine[] the operative scheme established by subsections 101(a) and 103(a) . . . and weakens considerably the tribe's ability to assert its interest in its children[,]" which Congress intended to protect. In fact, "[t]he effect on both the tribe and the Indian child of the placement of the child in a non-Indian setting is the same whether or not the

203. See id. at 1507, 49 Cal. Rptr. 2d at 526.
205. Otakar Kirchner, 649 N.E.2d at 339 (citing Smith, 431 U.S. at 846-47).
208. See Halloway, 732 P.2d at 969.
209. Id.
placement [is] voluntary.”

Citing Halloway with approval, the United States Supreme Court later articulated the priority of the Act’s competing interests. It found that Congress intended to subject placements outside Indian culture “to the ICWA’s jurisdictional and other provisions, even in cases where the parents consented to an adoption, because of concerns going beyond the wishes of individual parents.”

The congressional “concern” that justified prioritizing the tribes’ rights over the parents’ was the “[r]emoval of Indian children from their cultural setting [which] seriously impacts a long-term tribal survival and has damaging social and psychological impact on many individual Indian children.”

Following the reasoning of Holyfield, other state courts have similarly prioritized the rights and interests protected under the ICWA. The Montana Supreme Court held that the tribe’s right to enforce statutory preferences and place an Indian child with a member of her Indian family took precedence over the mother’s wish for anonymity. And the California Court of Appeal for the Fifth District upheld not only the tribe’s right to the society of its children, but an Indian child’s right “not to be separated from the tribe[,]” despite the Indian mother’s failure to comply with the provisions of the Act and provide proof of the child’s membership. It is therefore clear that after the Supreme Court’s pronouncement in Holyfield, “the interests of the Tribe now are superior to the interests of the parents.”

Although the Montana justice quoted above found such priority “incredible,” it is completely within the framework that the United States Supreme Court has established for interpreting federal Indian legislation. Since Talton v. Mayes the Supreme Court has “repeatedly affirmed that the Constitution does not restrain the exercise of tribal sovereignty in Indian country.”

211. Holyfield, 490 U.S. at 50.
212. Id. (quoting S. Rep. No. 95-597, at 52 (1977)).
213. In re Baby Girl Doe, 865 P.2d 1090, 1095 (Mont. 1993) (“While a parent’s wish for anonymity can be considered where not otherwise in conflict with the Act’s principle purposes, it cannot be allowed to defeat the purposes for which this Act was created.”).
216. Id.
States v. Wheeler, for example, the Supreme Court found that an Indian tribe was an “independent sovereign,” and “since tribal and federal prosecutions are brought by separate sovereigns, they are not ‘for the same offense’ and the Double Jeopardy Clause thus does not bar one when the other has occurred.”218 The court therefore upheld an Indian tribal member’s conviction in federal court for rape despite having been tried in a tribal court on charges stemming for the same incident.219 Thus, the tribal right as a sovereign to separately try its member took precedence over the member’s constitutional protection against being subjected to double jeopardy.

Even more pointedly, in Santa Clara Pueblo v. Martinez the Supreme Court held that despite Congress’s enactment of the Indian Civil Rights Act,220 in which Congress imposed “restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment[,]”221 the federal relief granted by the Indian Civil Rights Act to individual tribal members against the tribe was limited to habeas corpus.222 The Court found that “. . . Congress’s failure to provide [specific] remedies other than habeas corpus was a deliberate one[,]”223 because “[t]wo distinct and competing purposes [of Congress] are manifest in the provisions of the ICRA: . . . [not only] its objective of strengthening the position of individual tribal members vis-à-vis the tribe . . . [but also] Congress[’s] . . . inten[t] to promote the well-established federal ‘policy of furthering Indian self-government.’”224

Thus, the Court upheld a tribe’s right to deny membership to children of female members who married outside of the tribe, in the face of respondents’ claim that such denial discriminated on the basis of sex and race, in violation of Title I of the ICRA, which extended equal protection rights to Indians.225 Though the ICRA expressly granted neither the tribal right of determining its membership nor the individual member’s right to equal protection un-

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219. See id. at 329-30.
221. Martinez, 436 U.S. at 57.
222. See id. at 58.
223. Id. at 61.
224. Id. at 62 (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)).
nder the federal law, the Court determined that "[w]here Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other."\textsuperscript{226} The Court gave tribal rights priority over those of individual tribal members and held that the "[c]reation of a federal cause of action for the enforcement of rights created in Title I ... plainly would be at odds with the congressional goal of protecting tribal self-government,"\textsuperscript{227}

Such reasoning is directly applicable to a due process attack against applying the ICWA to children a state court deems are not being removed from an existing Indian family. The ICWA clearly has "dual objectives": "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families[,]"\textsuperscript{228} although Congress did not specify which of these objectives was to take precedence if in competition. However, creating a state cause of action to protect any right Indian children might have to remain in the non-Indian home in which they have been placed would "plainly . . . be at odds with the congressional goal of protecting tribal self-government[,]"\textsuperscript{229} and self-determination by retaining their most vital resources—their member children and children who are eligible for membership.\textsuperscript{230} In such circumstances the United States Supreme Court decisions in \textit{Holyfield}, \textit{Martinez}, and \textit{Wheeler} make clear that the protected rights and interests of the tribes are at the heart of federal Indian legislation and will take precedence over those of an individual Indian member, even if otherwise constitutionally guaranteed.

In \textit{Bridget R.}, then, the children's right to stay with the family with whom they were placed at birth has never been established as a constitutional right and has never been given serious consideration as one absent proof of unfitness,\textsuperscript{231} which has not been established in this case. The children therefore have not been denied any constitutional right to due process of law if the ICWA is applied, even if the state court determines that they were not re-

\textsuperscript{226} \textit{Martinez}, 436 U.S. at 64; see also \textit{Mancari}, 417 U.S. at 549-50 (congressional silence in an amendment to an earlier statute conferring hiring preferences upon Indians held not to repeal that preference by implication).
\textsuperscript{227} \textit{Martinez}, 436 U.S. at 64.
\textsuperscript{228} 25 U.S.C. § 1902.
\textsuperscript{229} \textit{Martinez}, 436 U.S. at 64.
\textsuperscript{230} See 25 U.S.C. § 1901(3).
\textsuperscript{231} See supra notes 204-06 and accompanying text.
moved from an existing Indian family. Nor have their due process rights under the ICWA been denied. First, the congressional presumption underlying the Act is that preserving the cultural heritage of an Indian child is in that child’s best interest. Even if a state court were to disagree with that assessment, the United States Supreme Court has found that cultural heritage and tribal existence must sometimes be achieved even at the expense of some rights of individual members of the tribe that may be otherwise constitutionally protected. Therefore, the children are not denied due process by applying the Act and allowing the tribe to determine placement according to its preferences, and the ICWA must be applied regardless of whether or not a state court finds that the Indian children at issue have been removed from an existing Indian family.

Additionally, since the “compelling government purpose” of the Act is to protect tribal self-governance, self-determination, and the very existence of the tribes themselves, the application of the Act to preserve Indian tribes and children from “cultural genocide” is “absolutely necessary . . . to the accomplishment of [Congress’s] purpose.” It would therefore survive the strict scrutiny standard which the California court found necessary if application of the Act interfered with the children’s constitutional due process rights.

If a state court does not apply the ICWA according to the Act’s stated provisions, it may violate the due process rights of the tribe, to its children and therefore its future; of the Indian parents, to the higher burden imposed by the Act in effectuating voluntary terminations of parental rights; and of the Indian children, to their cultural heritage. Therefore, if the ICWA is not

232. See Pima County Juvenile Action S-903, 635 P.2d at 189.
233. See supra notes 208-28 and accompanying text.
236. See id.
237. “Reliance on a requirement that the Indian child be part of an Indian family for the Act to apply would undercut the interests of Indian tribes and Indian children themselves that Congress sought to protect through the notice, jurisdiction and other procedural protections set out in [the Act].” In re Adoption of T.N.F., 781 P.2d 973, 977 (Alaska 1989).
238. “[T]he interest of a parent in avoiding the termination of his parental rights is important enough to entitle him to the procedural protections [of] . . . Due Process.” Kickapoo Tribe of Oklahoma v. Rader, 822 F.2d 1493, 1497 (10th Cir. 1987).
239. See In re Junious M., 144 Cal. App. 3d 786, 193 Cal. Rptr. 40 (1983) (an Indian
applied in the Bridget R. case, the voluntary termination provisions of 25 U.S.C. § 1913(a) will have been violated, by the appellate court's own admission, and under 25 U.S.C. § 1914, the tribe may petition to invalidate the termination of parental rights that set the case in motion.

C. Equal Protection Under the Fifth and Fourteenth Amendments

Finally, the California court in Bridget R. found that it must determine "whether ICWA is constitutionally overbroad if applied to racially Indian children whose families have no social, cultural or political relationship with a tribal community." The court found that an equal protection challenge arose because ICWA requires Indian children who cannot be cared for by their natural parents to be treated differently from non-Indian children in the same situation. As a result of this disparate treatment, the number and variety of adoptive homes that are potentially available to an Indian child are more limited than those available to non-Indian children. To the extent this disparate and sometimes disadvantageous treatment is based upon social, cultural or political relationships between Indian children and their tribes, it does not violate the equal protection requirements of the Fifth and Fourteenth Amendments. However, where such social, cultural or political relationships do not exist or are very attenuated, the only remaining basis for applying ICWA rather than state law is the child's genetic heritage—in other words, race.

Once again, however, the California court has approached the issue of the federal statute's application by asking the wrong question. In fact, seen in light of the equal protection question posed by the California court, the existing Indian family requirement makes no sense. A newborn Indian child, and arguably any Indian child up to a certain age, whether or not raised in an existing In-

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240. See Bridget R., 41 Cal. App. 4th at 1491, 49 Cal. Rptr. 2d at 515.
242. Bridget R., 41 Cal App. 4th at 1509 n.13, 49 Cal. Rptr. 2d at 528 n.13 (emphasis omitted).
243. Id. at 1508, 49 Cal. Rptr. 2d at 527 (citations omitted).
dian family, will have no ties to the tribe at all. Clearly, the point of the ICWA is to ensure that the child and the child’s tribe have the opportunity to establish significant ties. This “opportunity interest” in establishing a relationship with a child is the same one that courts have upheld in non-Indian unwed father cases. In the case of an Indian child, not only is the parent’s constitutional right to a relationship or an opportunity to establish a relationship with the child protected, but the tribe’s right to stand in loco parentis and preserve or establish a relationship with its children is protected.

The determination of whether the statute’s application violates equal protection requirements is therefore not dependent upon the child’s “social, cultural or political” relationship with the tribe, but on the tribe’s historical political relationship with the federal government. “It is in this historical and legal context that the constitutional validity of the Indian preference [in this case, to be placed with an Indian family] is to be determined.”

The requirements of equal protection provide that persons similarly situated be treated alike under the law. Any disparate treatment must be justified by a reasonable difference in circumstance. This “circumstance” in federal law respecting Indians is the semi-sovereign status of the tribes and their special relationship with the federal government. Exercising its trust relationship with the tribes, “Congress repeatedly has enacted various preferences . . . to give Indians a greater participation in their own self-government.”

These preferences afforded to Indian tribes have spawned

244. See, e.g., In re Baby Girl Eason, 358 S.E.2d 459, 460-62 (Ga. 1987) (construing the United States Supreme Court decisions also relied upon by the In re Bridget R. court: Lehr v. Robertson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978); and Stanley v. Illinois, 405 U.S. 645 (1972)); see also In Re Adoption of Michael H., 10 Cal. 4th 1043, 1052, 898 P.2d 891, 896, 43 Cal. Rptr. 445, 450 (1995) (unwed father has a “constitutional right . . . to develop a parental relationship with his child”); In re Adoption of Kelsey S., 1 Cal. 4th 816, 838, 823 P.2d 1216, 1218, 4 Cal. Rptr. 2d 615, 627 (1992) (unwed father has “constitutional protection if the father grasps the opportunity to develop . . . [a] relationship”).


247. See COHEN, supra note 28, at 653.

248. See supra notes 14-37 and accompanying text.

249. Mancari, 417 U.S. at 541.
challenges based on the claim that such federal law singles out Indians either for perceived advantages or disadvantages as a legislative classification based upon race and therefore violates the equal protection requirements of the Fifth and Fourteenth Amendments. However, the United States Supreme Court has consistently upheld all federal legislation regarding Indians as not violating equal protection requirements because the preference at issue is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature.

Therefore, the Court has determined that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians, such legislative judgments will not be disturbed." 251

The Supreme Court has further determined that because the Indian tribes have been recognized as semi-sovereign nations, the federal government cannot extend the "political" classification beyond the tribes. The Court has noted that the legal status of the tribes is "sui generis," and refused to extend the "political" classification beyond the tribes. 252

250. See id. at 535 (employment placement preferences); United States v. Antelope, 430 U.S. 641 (1977) (regulation of crime in Indian country); Fisher v. District Court, 424 U.S. 382 (1976) (preference for tribal jurisdiction in an Indian child custody proceeding). However, challenges that the ICWA violates equal protection requirements have been made both by parties desiring the application of the ICWA and by parties seeking to avoid its application. The claims tend to fall into three categories. In the first category are individual members of Indian tribes who argue that the rights and protections afforded the tribe subject them to disadvantageous treatment and deny them equal status with non-Indians who are not subject to the provisions of the Act. See, e.g., In re D.L.L., 291 N.W.2d 278 (S.D. 1980). This is also the position the Bridget R. court takes on behalf of the Indian children. See 41 Cal. App. 4th at 1508-10, 49 Cal. Rptr. 2d at 527-28. The second category consists of Indian tribes who seek to have the Act applied in order to retain the equal protection afforded other Indians. See, e.g., Navajo Nation v. Hodel, 645 F. Supp. 825 (D. Ariz. 1986). The third category consists of non-Indians who argue that the special rights and protections conferred on Indians by the Act must also be afforded non-Indians or else the legislation violates non-Indians' equal protection rights. See, e.g., In re W.E.G., 710 P.2d 410 (Alaska 1985). This third category represents the basis for a growing movement among African-Americans and other minorities for same race adoption preferences. See generally Mike McKee, Fostering Color Blindness; A Legal and Political Backlash is Mounting Against California's Race-Conscious Adoption Policies, THE RECORDER, Aug. 25, 1995.


252. Id. at 555. However, because of this political affiliation between the tribes, as semi-sovereign nations, and the federal government, the Supreme Court has expressly limited such legislation to Indian tribes. The Court has noted that the legal status of the tribes is "sui generis," id. at 554, and refused to extend the "political" classification beyond the tribes. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 304 n.42 (1978).
preference afforded the tribes in federal legislation
does not derive from the race of the plaintiff but rather
from the quasi-sovereign status of the . . . Tribe under
federal law[,] . . . even if a . . . holding occasionally results
in denying an Indian plaintiff a forum to which a non-
Indian has access, such disparate treatment of the Indian
is justified because it is intended to benefit the class of
which he is a member by furthering the congressional
policy of Indian self-government.253
Therefore, even in a case which severely disadvantaged individual
tribal members—by subjecting them to a first degree murder
charge under the felony-murder provisions of the Major Crimes
Act rather than charging them under state law which had no fel-
ony-murder provisions—the Court found that individual Indians
were "not subject[] to the [federal criminal legislation] because
they are of the Indian race but because they are enrolled members
of the . . . tribe."254
In United States v. Antelope then, the Supreme Court ex-
tended its past rulings in Morton v. Mancari and Fisher v. District
Court, which based their holdings on the governmental purpose of
encouraging tribal self-government through hiring preferences and
jurisdiction over child custody proceedings, respectively. In Ante-
lopes the Court included as part of the "unique obligation to Indian
tribes," the "federal regulation of criminal conduct within Indian
country[,]"255 which benefits the "class of which [the individual In-
dian] is a member."256 This history of decisions by the United
States Supreme Court leaves no doubt that "federal legislation
with respect to Indian tribes, although relating to Indians as such,
is not based upon impermissible racial classifications."257 Rather,
"[t]he essential question [is] whether legislation which may oper-
ate to disadvantage Indians can be tied to the fulfillment of the

253. Fisher, 424 U.S. at 390-91 (holding, in a pre-ICWA case, that the tribe had ju-
risdiction over an Indian child custody proceeding, even though the Indian individuals
were denied access to state court, which would have been available to non-Indians).
254. Antelope, 430 U.S. at 646.
255. Antelope, 430 U.S. at 646.
256. Fisher, 424 U.S. at 391. Although in Antelope the Supreme Court did not reach
the question of "whether nonenrolled Indians are subject" to the federal legislation in
question, 430 U.S. at 646-47 n.7, a year later the Court held, in United States v. John,
437 U.S. 634 (1978) that federal legislation could be applied to Indians based on having
enrolled members of federally recognized tribes as ancestors. See id.
257. Antelope, 430 U.S. at 645.
federal government’s unique obligation to Indian tribes.\textsuperscript{258}

Although the Supreme Court did not have an equal protection challenge before it in the only case it has considered involving the ICWA,\textsuperscript{259} the history of decisions upholding federal Indian legislation from equal protection challenges has allowed state courts consistently to uphold the ICWA’s application also.\textsuperscript{260} These courts reason that “[t]he provisions of the ICWA were deemed by Congress to be essential for the protection of Indian culture and to assure the very existence of Indian tribes... [This protection] is a permissible goal that is rationally tied to the fulfillment of Congress’s unique guardianship obligation toward Indians.”\textsuperscript{261} And since the congressional obligation is toward the tribes, rather than the individual member—making the provisions of the ICWA dependent upon a political rather than racial classification—such obligation does not depend upon the “social, cultural or political” relationship of the individual Indian child or parent to the tribe. The Act can therefore be constitutionally applied regardless of whether the state court deems individual Indians to be an existing Indian family and regardless of whether the state court decides that application of the Act to a specific Indian child constitutes “disparate and . . . disadvantageous treatment” because the child is denied the opportunity to be placed in a non-Indian home.\textsuperscript{262}

Finally, even under the strict scrutiny test demanded by the California court in cases in which the Indian child is not removed from what the court determines to be an existing Indian family, the application of the Act passes constitutional muster. Although the California court finds application of the Act in such circumstances

\begin{itemize}
\item \textsuperscript{258} See Ralph W. Johnson & E. Susan Crystal, Indians and Equal Protection, 54 WASH. L. REV. 587, 603 (1979) (emphasis added).
\item \textsuperscript{259} See Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989). The United States Supreme Court did uphold an equal protection challenge in an Indian child custody case before the enactment of the ICWA in Fisher, 424 U.S. at 385, which was widely looked to by Congress in drafting the ICWA. Fisher, however, may be distinguished as a case in which all parties involved were members of the tribe living on the reservation.
\item \textsuperscript{260} See, e.g., In re Armell, 550 N.E.2d 1060 (Ill. App. Ct. 1990); In re Angus, 655 P.2d 208 (Or. Ct. App. 1982); In re D.L.L., 291 N.W.2d 278 (S.D. 1980).
\item \textsuperscript{261} Armell, 550 N.E.2d at 1068 (citations omitted); see also Angus, 655 P.2d at 213 (stating that “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children... [T]he protection of the integrity of Indian families is a permissible goal that is rationally tied to the fulfillment of Congress's unique guardianship obligation toward the Indians...” ) (citations omitted).
\item \textsuperscript{262} Bridget R., 41 Cal. App. 4th at 1508, 49 Cal. Rptr. 2d at 527.
\end{itemize}
“inherently suspect,” as being based solely on a racial classification, it admits that even in such circumstances the classification is constitutional if the legislation is a “narrowly tailored measure[] that further[s] compelling governmental interests.”

First, the ICWA is “narrowly tailored” in that it applies only to federally recognized tribes with whom the United States government has a political connection as a semi sovereign nation. The Act, and other federal Indian legislation, does not apply, for example, to Canadian or Mexican Indians to whom the United States government owes no trust responsibility. The narrow tailoring of the Act is apparent in Bridget R. itself. The children’s mother is racially “Indian,” as a member of the Mexican Yaqui tribe, but since she does not claim membership with the only federally-recognized Yaqui tribe in Arizona, it is the Indian children’s father’s tribe alone which has claim to the children under the Act and is a party to the suit.

Second, the Act is narrowly tailored to apply only to Indian children of members of a federally recognized tribe. And, like a tribe which may voluntarily terminate its political relationship with the federal government, “an individual Indian [tribal member] possesses the... right to withdraw from his tribe and forever live away from it, as though it had no further existence,” and therefore sever himself or herself from any unwanted application of federal law applying to the tribes.

263. Id. (quoting Bakke, 438 U.S. at 289-90).
264. Id. (citation omitted); see also Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972).
265. Eligible tribes are those recognized by the Secretary of the Interior. See 25 U.S.C. § 1903(8) (1994). Such tribes may lose their status as a federally recognized tribe by congressional termination of relations with the tribe, or by voluntary abandon-ment of tribal organization. See COHEN, supra note 28, at 17-18.
266. See, e.g., In re Wanomi P., 216 Cal. App. 3d 156, 264 Cal. Rptr. 623 (1989); see also Johnson & Crystal, supra note 258, at 603.
267. See Bridget R., 41 Cal. App. 4th at 1492 n.4, 49 Cal. Rptr. 2d at 516 n.4.
268. Membership may be established either through enrollment or by having ancestors who were enrolled members. See John, 437 U.S. at 650.
269. See supra note 265.
271. See Johnson & Crystal, supra note 258, at 593 n.45. For example, the Indian mother in Holyfield could presumably have renounced her membership with the tribe if she did not want the ICWA applied and her child raised on the reservation. However, renouncing tribal membership is rare, since the individual member may lose tribal privileges in addition to avoiding the unwanted federal Indian legislation. Therefore, termination of the tribal relationship “will not lightly be inferred.” COHEN, supra note 28, at 22 (citations omitted). Had the mother in Holyfield renounced her membership,
Finally, although the California court found that "ICWA's purpose is not served by an application of the Act to children who are of Indian descent, but whose parents have no significant relationship with an Indian community," the Act is a "measure[] that further[s] compelling government interests" in preserving the very "existence and integrity of Indian tribes" by preventing the removal of their children both physically and culturally. The congressional findings underlying the Act show Congress's concern with past state and federal policies and practices that put tribal self-government and self-determination, as provided for in the Indian Reorganization Act, at risk. "After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated." Therefore, the government interest is "compelling," and a showing has been made, as the California court would require, "that application of the state law in question would do 'major damage' to 'clear and substantial federal interests.'"

IV. CONCLUSION

Requiring that an Indian child be removed from what a state court deems an existing Indian family in order for the rights and protections of the ICWA to apply in a custody proceeding is a continuation of the abuse of tribal self-government and self-determination which gave rise to the ICWA and other federal legislation regarding Indians in the first place. The "prior abusive child welfare practices [that] may have cut off large numbers of

she would have had to leave the reservation herself. Instead, she attempted to avoid the application of the ICWA by giving birth to the child off the reservation. See Holyfield, 490 U.S. at 38-39. She apparently planned to move back to the reservation herself once the child had been placed for adoption.

The possibility for an individual Indian to renounce tribal membership and thus distance him or herself from federal legislation applied to federally recognized tribes and their members, has often been cited as another reason that federal legislation regarding Indians is not "racially" based. No members of any other race can voluntarily escape their status. See COHEN, supra note 28, at 656.

274. See supra notes 100-01 and accompanying text.
275. See supra notes 35-44 and accompanying text.
278. Bridget R., 41 Cal. App. 4th at 1510, 49 Cal. Rptr. 2d at 528 (citations omitted).
persons from their Indian heritage 279 are not only the reason the ICWA was enacted but may also account for the present generation of Indian parents' apparent "assimilation" into non-Indian culture. But for these practices, some Indian parents might have been raised on the reservation, or at least have managed to retain some ties to the tribe and their culture. 280 These past abuses, therefore, must not be parlayed into a reason to prevent tribes from trying to regain their children and exercise their "opportunity interest" 281 to create "social, cultural and political" ties with children who are members of the tribe or eligible for membership as children of a now-assimilated member. Nor should past abuses be used to prevail against the government's "fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected." 282 In an eloquent testimony of the need for the ICWA now as much as ever, a non-Indian woman who adopted an Indian child in the 1960's—before the ICWA—has written, "Before lawmakers encourage adoptions of Indian children by non-Indian families, before they remove tribal jurisdiction over child custody proceedings, before state courts interpret 'good cause' as economic superiority, they need to acknowledge the strength of the biological and cultural ties that Indian tribes can offer their children." 283 Her son's return to the tribe as an adult prompted her conclusion that "[a]lthough [he] grew up happy in our home, the positive change in my son once he touched his roots . . . makes me think that the pull of the ingrained cultural memory is stronger than even the most loving adoptive bonds." 284

This woman's Indian son did find his culture again, and some children who have been denied that chance initially by a state court's imposition of an existing Indian family requirement on the application of the ICWA, may do so also. But at best, a state

280. See id. at 521-22. The court distinguished In re Crews, 825 P.2d 305 (Wash. 1992), on the ground that the Indian parent in the case before it had been removed from the reservation as a child and placed in a non-Indian home. See id. However, his child still had relatives on the reservation with whom she could be placed, even though she was not being removed from an "existing Indian family." Id. at 521.
281. See supra note 244 and accompanying text.
284. Id.
court’s initial refusal to apply the ICWA delays conferring the special rights and protections afforded the tribes and Indian children, as a case works its way through the legal system. Even if the tribe eventually obtains jurisdiction over the matter, such a delay is often an impediment to applying the Act’s placement preferences. In Holyfield, for example, the United States Supreme Court lamented the fact that “over three years have passed since the twin babies were born and placed in the [non-Indian] home . . . [and] separation at this point would doubtless cause considerable pain.” However, as the Supreme Court felt compelled to point out:

> [h]ad the mandate of the ICWA been followed in 1986 [when adoption proceeding began] much potential anguish might have been avoided, and in any case the law cannot be applied so as automatically to “reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.”

The Court, clearly believing that hard cases make bad law, therefore applied the ICWA and turned the case over to the “experience, wisdom, and compassion of the . . . tribal courts.”

After so many years, however, the tribal court did not feel that it could remove the twins from their non-Indian home, and allowed the adoption of the children by the non-Indian mother. Similarly, in Halloway, the tribal court that eventually heard the case left the Indian child with the non-Indian parents who had adopted him in violation of the ICWA six years before, although making him legally the son of his Indian mother who would retain specified visiting rights. Thus, while the ICWA was finally found applicable, the placement preferences it provides to insure that an Indian child be placed with an Indian family were thwarted by the delay.

The same will be true in Bridget R., should the ICWA eventually be found applicable. The facts of the case are very much

286. Id. at 53-54 (quoting In re Halloway, 732 P.2d 962, 972 (Utah 1986)).
287. Id.
290. The delay in application of the Act in In re Bridget R. will continue. Although
like those in *Holyfield*, in that if the Act had been applied at the
time the adoption proceedings began, the children would never
have been placed with a non-Indian family. Even if the Act had
been applied three months later, when the parents and tribe inter-
vened to revoke consent to the adoption under § 1913(a), the twins
could easily have been returned to their Indian family. Finally,
even if one and one half years later, the trial judge’s application of
the Act and order to return the twins to their Indian family had
been upheld, the children might have been returned to their Indian
family, or at least returned with a provision for dual guardianship,
such as the one the tribal court fashioned in *Halloway*. Instead,
the twins have spent years being subjected to “extended judicial
torture,”291 and the adoptive parents have been rewarded by ob-
taining and maintaining custody throughout the protracted litiga-
tion.292

Such a result is a tragedy since this case involves a very real
“Indian family,” including the twins’ biological Indian parents,
their extended paternal Indian family, their tribal family, and their
broad Native American cultural family, all of whom are waiting to
have the twins return to them, physically and culturally.293 The
Pomo tribe currently has 225 members, only twenty-five of whom
live on the reservation.294 This case has provided them with at least
four more enrolled members, and has returned a family to them
which was separated from the reservation when the twins’ father
was seven.295 The tribe itself has argued the importance of this,
saying, “‘[w]e don’t want to lose a single one of our children. They
are our heart and soul.”’296 Under these facts, there seems no
question that the ICWA’s stated purpose “to protect the best in-
terests of Indian children and to promote the stability and security

the California Supreme Court denied review on May 15, 1996, the case has been sub-
titted to the United States Supreme Court for writ of certiorari. In *re Bridget R.*, 41
16, 1996).

291. James Rainey, *Court Blocks Transfer of Twins to Birth Parents*, L.A. TIMES,
292. See *Holyfield*, 490 U.S. at 54 (quoting *Halloway*, 732 P.2d at 972.)
293. See supra, note 126-28 and accompanying text.
295. See Appellant’s Answer to Petition for Review to the California Supreme
Court, at 12, In *re Bridget R.*, Nos B093520, B093694 (Mar. 7, 1996) (referring to clerk’s
transcript of deposition taken on Aug. 9, 1995).
tribal administrator, Marcellena Becerra).
EXISTING INDIAN FAMILY EXCEPTION

of Indian tribes would be fulfilled. However, the judicial creation of the existing Indian family exception has probably again thwarted congressional intent to fulfill its trust obligation towards the tribes.
