The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children

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Pretend for a moment that War of the Worlds is not science fiction, but rather reality. Instead of the Martians dying, they actually live and govern humans. At first, the policy of the Martian government toward humans is assimilation. They want all humans to think and act like Martians. Therefore, they passed rules and regulations to further that policy. The policy of assimilation targets the youngest and most vulnerable humans, our children. This policy resulted in human children being taken from their human parents’ homes and raised by Martian families. Human children began to lose their identity as humans but could not take on the identity of Martians, because they did not look like Martians. So the human children tended to lack an identity, which resulted in cultural confusion, rejection by Martian society, and drug and alcohol abuse.

After several decades of this policy, the Martians enact a new policy that favors humans raising human children. However, some of the courts on Mars, refused to apply this policy to human children if the children or the parents are not “human enough.” Despite the Martian government’s desire to rectify past policies of assimilation with the new law, some of the Martian judicial
officers believe they know what is best and ignore the interests of
the children, the parents, and the human race.

Fortunately for us, Martians are science fiction. However the
previous scenario imitates what has happened to American Indian
tribes and American Indian children over the years. The federal
government had a policy of assimilation that resulted in Indian
children being removed from their Indian homes and placed in
non-Indian homes or boarding schools. The federal government
tried to rectify this past policy of assimilation with the Indian Child
Welfare Act (ICWA or the Act). The ICWA provided special rules
for the removal or the adoption of Indian children. The ICWA
gave tribes interests and rights regarding Indian children. In doing
so, the federal government recognized that the tribes have the most
to lose.\(^2\) The ICWA assumed that state courts would observe the
federal mandate and apply the statute uniformly.\(^3\)

Unfortunately, some state courts have created a judicial
exception to the ICWA, known as the "existing Indian family" exception. These courts use this exception to avoid applying the
ICWA to the detriment of the tribes and the Indian children.
Despite the Act's clear definitions and determination of when it
applies, the exception was fashioned to ignore the plain language
and policies of the Act. This exception, in violation of the Act,
places the determination of whether a child is an Indian and subject
to the Act in the hands of state court judges, who are least likely to
be able to answer the question.

The first section of this article discusses the enactment of the
Indian Child Welfare Act, including the history that led up to the
Act and the congressional policy behind it. The second section of
this article discusses the relevant portions of the ICWA. The third
section of this article introduces and defines the "existing Indian
family" exception. The fourth section argues that the "existing
Indian family" exception is wrong for five reasons. First, it
ignores tribal interests. Second, it violates the plain language of

\(^2\) Wendy Therese Parnell, Comment, The Existing Indian Family
Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act, 34

\(^3\) B.J. Jones, The Indian Child Welfare Act: In Search of a Federal
Forum to Vindicate the Rights of Indian Tribes and Children Against the
the ICWA. Third, it perpetuates an Anglo stereotype of American Indians. Fourth, the ICWA does not need the exception to be constitutional. Finally, the exception violates the principle of uniformity that Congress was trying to achieve. The final section presents what California has done, or attempted to do, in response to the exception and will then argue that it is a model for the nation.

I. ENACTMENT OF THE ICWA

A. Historical Background

The "wholesale separation of Indian children from their families" was widely viewed as the "most tragic and destructive aspect of American Indian life." The separation started with white-run boarding schools dating back to the 1800s, when American Indian children were removed from their homes in an attempt to assimilate them into white culture. It continued in the 1960s and 1970s, when state welfare workers and other officials worked hard to find non-American Indian homes for American Indian children, because of a lack of cultural sensitivity, and paternalistic and assimilationist motives.

The state officials used high rates of alcoholism and poverty, as well as poor housing, lack of modern plumbing, and overcrowding as justifications for removing these American Indian children from their homes. When judging the fitness of an American Indian parent, many social workers made decisions based on white middle class norms that were not appropriate in the

6. *Id.* at 603.
context of an American Indian family. Social workers cited low-income, joblessness, poor health, and low educational attainment as reasons to remove an American Indian child from his or her American Indian home. These factors resulted in the social worker finding neglect or abandonment where none actually existed. By 1978, over ninety percent of adopted American Indian children had been placed in non-American Indian homes. Surveys in 1969 and 1974 conducted by the Association of American Indian Affairs (AAIA) found that approximately twenty-five to thirty-five percent of all American Indian children were separated from their families and placed in non-American Indian foster homes, adoptive homes, or institutions.

B. Congressional Intent

These issues led Congress to enact the Indian Child Welfare Act. Congress was concerned with not only American Indian families, but also the American Indian community. The ICWA was established to aid tribes in keeping American Indian children in their American Indian community.

Congress made an explicit policy statement in the ICWA that it was to “protect the best interests of Indian children . . . by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.” This policy statement requires states to

10. Id. at 7534.
11. Id. at 7532.
14. Parnell, supra note 2, at 419.
15. Id.
consider American Indian culture when determining what is in the best interest of an American Indian child.17

1. Congressional Findings

When it enacted the ICWA, Congress made specific findings within the Act itself. First, Congress recognized that there is a "special relationship between the United States and the Indian tribes and their members."18 That relationship is a trustee relationship in which Congress has a direct interest "in protecting Indian children who are members of or are eligible for membership in an Indian tribe."19

Second, Congress also recognized a "Federal responsibility to Indian people."20 That responsibility arises from Congress' general course of dealing with American Indian tribes, statutes, and treaties.21 This responsibility includes "the protection and preservation of Indian tribes and their resources."22 The resources at issue in the ICWA are American Indian children, because this resource is "vital to the continued existence and integrity of Indian tribes."23

Third, Congress stated that its power to enact the ICWA came from its plenary power over Indian affairs through clause 3, section 8, article I of the United States Constitution and other constitutional authority.24 It enacted the ICWA in response to an alarmingly high percentage of American Indian families destroyed by the unwarranted removal of their children by non-tribal public and private agencies which placed these children with non-American Indian foster and adoptive homes and institutions.25

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17. Id.
19. Id. § 1901(3).
20. Id. § 1901.
21. Id. § 1901(2).
22. Id.
23. Id. § 1901(3).
24. Id. § 1901(1).
25. Id. § 1901(4).
enacting the ICWA, Congress acknowledged that the states had “often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”\(^2\)

2. Congressional Declaration of Policy

Congress declared that it is the policy of the United States to:

[P]rotect the best interests of [American] Indian children and to promote the stability and security of [American] Indian tribes and families by the establishment of minimum Federal standards for the removal of [American] Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of [American] Indian culture, and by providing for assistance to [American] Indian tribes in the operation of child and family service programs.\(^2\)

II. THE INDIAN CHILD WELFARE ACT

A. Definitions

The ICWA takes great care to lay out key definitions of its vital terms.

1. Who is an Indian?\(^2\)

The ICWA defines an “Indian” to mean “any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of title 43.”\(^2\)

\(\)\(^26\) Id. § 1901(5).
\(\)\(^27\) Id. § 1902.
\(\)\(^28\) It is the author’s preference to use the term American Indian. However, the statute refers only to Indian, but it is understood to mean American Indian.
2. Who is an Indian Child?

The ICWA only applies to Indian children. The act is very specific as to what is required to be an Indian child. The ICWA defines an "Indian child" as "any unmarried person who is under age eighteen and 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.”

3. What is an Indian Tribe?

Because an Indian child must be a member of an Indian tribe, or eligible for membership, the ICWA also defines this term. An "Indian tribe" is “any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43.”

B. When Does the Act Apply?

The ICWA applies to all child custody proceedings that involve an Indian child. A “child custody proceeding” is defined to include foster care placements, terminations of parental rights, pre-adoptive placements, and adoptive placements. The ICWA specifically excludes juvenile delinquency proceedings and child custody proceedings occurring during a divorce proceeding. To trigger the Act, two things are required: first, a child custody proceeding as defined by the ICWA, and second, an Indian child as defined by the ICWA must be the subject of the child custody proceeding. Once the ICWA is triggered, then the issue becomes who has jurisdiction over the child.

30. Id. § 1903(4).
31. Id. § 1903(8).
32. Id. § 1903(1).
33. Id.
34. Id.
C. Who Has Jurisdiction?

An Indian tribe will have exclusive jurisdiction over any child custody proceeding:

involving an [American] Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by an existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.35

Tribal courts have concurrent jurisdiction over child custody matters regarding American Indian children who are not domiciled on the reservation.36

In any state court child custody proceeding involving an Indian child not domiciled or residing within the reservation of the Indian child’s tribe, the state 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, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe . . . . In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.37

Despite a clear grant of jurisdiction or the right to intervene, “many state courts have created [an exception] to the application of ICWA and have interpreted the statute in such a manner as to render many of its provisions superfluous.”38 That exception is the “existing Indian family” exception.

35. Id. § 1911(a).
36. Parnell, supra note 2, at 414.
37. 25 U.S.C. § 1911(b)–(c).
A. Introduction

The “existing Indian family” exception, the most brazen flouting of the ICWA, is viewed by many as the latest attempt to force American Indians into modern society. By applying the “existing Indian family” exception, state courts unilaterally decide who is a real American Indian child despite a clear definition of “Indian child” in the ICWA. By applying the “existing Indian family” exception the states are using a back-door approach to do exactly what the ICWA was intended to prevent: imposition of white middle class standards to child custody cases involving American Indian children.

B. Definition

State courts have resisted the participation of tribes in American Indian child custody proceedings and the application of the ICWA by using the “existing Indian family” exception. The “existing Indian family” exception is an entirely judge-made doctrine that bars application of the ICWA when either the child or the child’s parents have not maintained a significant social,

41. Jones, supra note 3, at 397.
cultural, or political relationship with his tribe. This reluctance to apply the ICWA has been extended by some courts to the point where the Act only applies in cases where an American Indian family has maintained significant political and cultural ties with their tribe. In these jurisdictions, in order for the Act to apply, the exception requires that the child be removed from an “existing Indian family unit” or “Indian home or culture.” State courts use the exception to retain jurisdiction, to place American Indian children in contravention of the placement preferences or to refuse to allow American Indian parents to revoke consent to voluntary foster care or adoption placements.

However, what qualifies as an “Indian family” has differed from court to court. In situations where the American Indian child never lived in an American Indian family and had no association with American Indian culture, the ICWA may not be applied even though the biological parent had such associations.

IV. APPLICATION OF THE “EXISTING INDIAN FAMILY” EXCEPTION—CALIFORNIA AS A MODEL

California has nineteen cases in which it applied the “existing Indian family” exception. It was first applied in California by Court of Appeal, Second District, Division 1 in In re Wanomi P. in 1989. In each case, the effect of applying the “existing Indian family” exception was to deny a tribe jurisdiction or the right to intervene. However, no case involving the “existing Indian family” exception has reached the California Supreme Court.

44. Atwood, supra note 5, at 625.
45. Jones, supra note 3, at 402.
49. Other jurisdictions which have applied the “existing Indian family” exception to avoid application of the ICWA are: Kansas, Indiana, Kentucky, Louisiana, Missouri, Montana, Oklahoma, Washington, and Alabama. See cases cited supra note 43.
A. Who Has Applied It?

The California courts which applied the "existing Indian family" exception have done so for two general reasons. First, some courts believe that applying the exception protects the constitutionality of the ICWA. Second, other courts believe that the exception is necessary to preserve the intended purpose of the ICWA.

1. Constitutional Arguments

Some courts in California have forgotten the lessons learned in first-year Constitutional Law. They argue that the ICWA is a race-based statute, despite the fact that its application is dependent upon tribal membership or eligibility for membership. As a race-based statute, these courts apply equal protection tests to the ICWA. They find that, to the extent that disparate treatment is based upon social, cultural, or political relationships between American Indian children and their tribes, it does not violate the equal protection requirements of the Fifth and Fourteenth Amendments. However, when such social, cultural, or political relationships do not exist or are very attenuated, they find the only remaining basis for applying the ICWA is the child's race.

One court explained that recognition of the "existing Indian family" doctrine was necessary in order to preserve the ICWA's constitutionality. It held that under the Fifth, Tenth, and Fourteenth Amendments, the ICWA does not and cannot apply to invalidate a voluntary termination of parental rights respecting an American Indian child who is not domiciled on a reservation, unless the child's biological parent, or parents, are not only of

54. In re Bridget R., 49 Cal. Rptr. 2d at 527.
55. Id. at 516.
American Indian descent, but also maintain a significant social, cultural, or political relationship with their tribe.\(^{56}\)

2. ICWA Purpose

Another reason cited by the California courts for applying the "existing Indian family" exception is that they believe the purpose of the ICWA is to maintain American Indian culture. If there is no culture to maintain, then there is no need to apply the ICWA.\(^{57}\)

One court noted, "It is almost too obvious to require articulation that 'the unique values of Indian culture' will not be preserved in the homes of parents who have become fully assimilated into non-Indian culture."\(^{58}\) The determination of who is fully assimilated into non-Indian culture is then left to the court itself.\(^{59}\)

Some courts have refused to apply the ICWA unless an American Indian child is being removed from an "existing Indian family," which means a family with a significant connection to the Indian community.\(^{60}\) The courts misinterpret the purpose of the ICWA by limiting it to protect American Indian children from improper removal from their "existing Indian family" units\(^ {61}\) and to promote the stability and security of American Indian tribes.\(^ {62}\)

B. Who Refused to Apply It?

Several courts in California have refused to apply the "existing Indian family" exception. Some refused to do so because they

56. Id.
59. In re Bridget R., 49 Cal. Rptr. 2d at 526.
60. Id.
believe it is an unwarranted judicial gloss on the ICWA. Others declined to rely on a judicially created exception to the ICWA that appears nowhere in the Act itself. These courts recognize that there is no threshold requirement in the Act that the child must have been born into or be living with an existing Indian family, or must have some particular type of relationship with the tribe or her Indian heritage.

These courts rely on the express language of the ICWA and know that "[n]o amount of probing into what Congress 'intended' can alter what Congress said, in plain English, . . . ". They argue that the "existing Indian family" exception frustrates the policies underlying the ICWA and allows the dominant society to judge whether the parents' cultural background meets its view of what "Indian culture" should be. Doing so puts the state courts right back into the position they were in before Congress enacted the ICWA.

V. WHY IS IT FLAWED?

The "existing Indian family" exception is in effect swallowing the rule. It creates a test of application by which many who qualify under ICWA will not qualify with application of this exception. It places a focus on families, instead of any potential relationship between the American Indian child and the tribe.

66. Id. at 90.
71. Parnell, supra note 2, at 419.
A. Ignoring Tribal Interests

Just as a state has an interest in its citizens and residents, tribes have an interest in their members and potential members. Because states removed American Indian children from their reservations, these children did not learn the culture, religion, and language of their tribes. Inevitably, if there are no children to pass on the culture, religion, and language, then a tribe will be extinguished.

Children are the only real means for the transmission of tribal heritage. If American Indian children are denied exposure to the ways of their tribes, it seriously undercuts the tribes’ ability to continue as self-governing communities.

So when an American Indian child is removed from the surrounding most likely to connect that child with his cultural heritage, that removal inadvertently continues the gradual genocide of American Indians. The ICWA recognized not only that the child needs the tribe, but also that the tribe needs its children.

The tribal interest that needs protection is survival. The right to determine one’s members and survive as a tribe lies at the heart of tribal sovereignty and self-determination. Tribes have an interest in maintaining sovereignty and strengthening tribal relations. Congress knew that an American Indian tribe could not exist without members and further understood that the future of the tribe lies with its children. The federal government’s delayed aspiration to prevent tribal extinction resulted in Congress

73. Id.
75. Id. at 34, 109 S. Ct. at 1600-01.
77. Metteer, supra note 39, at 613.
79. Atwood, supra note 5, at 633.
80. Quinn, 881 P.2d at 802 (Fadeley, J., dissenting).
81. Id.
identifying tribal survival as a fundamental purpose of the ICWA.\footnote{Atwood, supra note 5, at 654.}

Tribal sovereignty includes the right to provide for the care and upbringing of its youngest members.\footnote{Wisconsin Potowatomies of Hannahville Indian Community v. Houston, 393 F.Supp. 719, 730 (W.D. Mich. 1973).} This right includes the recognition of the American Indian concept of family, which is an extended family model. Under this model, members of an American Indian child's extended family, such as aunts, uncles, cousins, or grandparents have child-rearing responsibilities.\footnote{Christine M. Metteer, A Law Unto Itself: The Indian Child Welfare Act as Inapplicable as Inappropriate to the Transracial/Race-Matching Adoption Controversy, 38 Brandeis L.J. 47, 49 (1999–2000).} If a parent is unable to care for an American Indian child, it is common in the American Indian community for a relative or friend to step into the role of parent.\footnote{Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 35, 109 S. Ct. 1597, 1601 (1989).}

The spiritual bonds between an American Indian child and his family and tribe are acknowledged in American Indian cultural beliefs, but not understood by those outside the culture.\footnote{Jennifer Nutt Carleton, The Indian Child Welfare Act: A Study in the Codification of the Ethnic Best Interests in the Child, 81 Marq. L. Rev. 21, 38 (1997).} American Indian parents recognize that the child is not theirs alone but that the child is part of something larger—the tribe.\footnote{Robert Coles, M.D. IV, Children of Crisis, Eskimos, Chicanos, Indians 520 (1st ed. 1978); Quinn v. Walters, 881 P.2d 795, 804 (Or. 1994) (Fadeley, J., dissenting).} Because states were unfamiliar with this aspect of American Indian culture and this country has a long-standing history of depriving American Indian tribes of their youngest members, Congress enacted the ICWA.\footnote{Erik W. Aamot-Snapp, Note, When Judicial Flexibility Becomes Abuse of Discretion: Eliminating the “Good Cause” Exception in Indian Child Welfare Act Adoptive Placements, 79 Minn. L. Rev. 1167, 1171 (1995).}

The ICWA constitutes a proclamation by Congress to preserve American Indian tribes through standards which keep American Indian children within their families and communities whenever
Congress intended to provide tribes with more self-autonomy in child custody proceedings through the ICWA. They recognized that there is no greater threat to "essential tribal relations" and no greater infringement on tribal self-government than interference with tribal control over the custody of their children. For these reasons, Congress established a federal policy that, when possible, an American Indian child should remain in the American Indian community.

The "existing Indian family" exception ignores Congress' goal of tribal self-determination. It does so by taking the determination of who is an "Indian child" out of the hands of the tribes, and placing it in the hands of state courts. These are the same state courts whose lack of familiarity with tribal customs led to the enactment of the ICWA. Despite the fact that a tribe can recognize a person as a member, thereby making them American Indian within the definitions of the ICWA, under the exception, a state court ultimately determines if the member acts American Indian enough to appease their perception of what an American Indian should do or be.

The application of the "existing Indian family" exception also denies the child the ability to be exposed to her cultural heritage. Congress recognized the importance of the bond between an American Indian child and the tribe when it enacted the ICWA, because application of the ICWA is not limited to children who were current tribe members, but also those eligible for membership. By recognizing the relationship between an American Indian child and the tribe, the ICWA presents the tribe with an opportunity to correct the past. However, the exception denies the tribes the right to establish or renew ties with children.

90. Cross, supra note 70, at 880 n.198.
92. Id. at 7546.
94. Parnell, supra note 2, at 432.
95. Id. at 432-33.
96. Id. at 432.
born to tribal members who are now assimilated into non-American Indian culture because of past removals. It also fails to answer why a child who has not been exposed to his American Indian culture should not now be provided the opportunity for exposure. Keeping American Indian children involved with their tribe would guarantee the child’s cultural identity and maintenance of American Indian tribes.

B. Ignoring the Plain Language

Congress unambiguously defined the key terms of the ICWA: “Indian child” and “child custody proceeding.” The “existing Indian family” exception, however, ignores the plain language of the ICWA, especially the definition of “Indian child.”

1. What is the Plain Language?

Congress defined an “Indian child” as a member of a tribe or as the biological child of a member and eligible for membership. That definition creates a checklist to determine if a child will meet the definition of an “Indian child.” The child is a member of a tribe: check, the child is an Indian child. Or the child is the biological child of a member and the child is eligible to be a member of the tribe: check, check, the child is an Indian child. With this unambiguous definition Congress identified the relationship that a parent and child must have with the tribe for the ICWA to apply: membership.
The "existing Indian family" exception adds requirements to this definition of "Indian child." It is insufficient under the exception to be a member of a tribe. Depending upon which court is applying the exception, the additional requirements range from living in an "Indian home," to living in an "Indian family," to either the child or the parent being Indian enough in the eyes of the court. To be Indian enough, the child or the parent must convince the court that he has a significant relationship with Indian tribal culture. All of these requirements are beyond the reach of the definition of "Indian child," because "[n]o amount of probing into what Congress 'intended' can alter what Congress said, in plain English, at 25 U.S.C. §1903(4)."

2. Statutory Interpretation and Construction

In order for a court to apply the "existing Indian family" exception it must ignore the clear provisions of the ICWA and rely on what the court believes Congress meant to say. In the only U.S. Supreme Court case involving the ICWA, the Court held that it was improbable that Congress would have left the ICWA's key jurisdictional provision—domicile—subject to definition by state courts as a matter of state law. The Court recognized that Congress did not intend to leave this key term to be defined by the very state courts whose past misunderstanding and prejudice against American Indian traditions was one of the reasons that the ICWA was enacted. Accordingly, it seems implausible that Congress intended for these same state courts to determine when an American Indian parent or child was sufficiently connected to American Indian culture to trigger application of the ICWA. Another explanation for the Court's decision is the rule of

103. Parnell, supra note 2, at 413.
105. Id. at 1511.
109. Cross, supra note 70, at 873.
110. Id.
construction that federal statutes are generally intended to have uniform nationwide application.111

The principle "expressio unius est exclusio alterius" means that the expression of one thing excludes others.112 The ICWA provides for two exceptions to its application: divorce proceedings and juvenile delinquency proceedings. So under this general rule of statutory construction, these express exceptions serve to exclude any other exceptions, including the "existing Indian family" exception.113 As a general principle, when Congress explicitly enumerates certain exceptions, additional exceptions are not to be implied.114 The "existing Indian family" exception is an impermissibly implied exception.

C. Perpetuating a Stereotype of American Indians

1. What is the Stereotype?

The trouble with the "existing Indian family" exception is that it asks what it means to be an "Indian child" and an Indian family, but uses white "civilized society's" definitions to answer these questions.115 When applying the "existing Indian family" exception, these courts rely on their preconceived notions of what an American Indian is or should be. In one example, a court expected the American Indian family to "adopt [American Indian] culture as a day to day way of life."116 This expectation demonstrates the court's unawareness of American Indian cultures. There is no one American Indian culture to which a person can

113. Parnell, supra note 2, at 408–09, n.160.
115. Metteer, supra note 39, at 611.
subscribe. There are more than 569 federally recognized tribes and thus more than 569 different American Indian cultures.

2. What is Wrong with the Stereotype?

Prior to the ICWA, social workers and state officials found that many Indian parents were socially irresponsible and possessed inadequate child-rearing capabilities because they used extended family members to assist in caring for the child. However, it was common in many American Indian families to rely upon a network of family members as responsible caregivers. The conclusions of the social workers and state officials were received with disbelief by American Indian tribes whose cultural perceptions of child-rearing often are fundamentally different from non-Indian standards.

Congress found the states so deficient in concrete knowledge of traditional American Indian customs and traditions that it enacted the ICWA. Nowhere in the ICWA are there limits regarding where the “Indian child” must live or what type of cultural activities the “Indian child” must practice. Courts which apply the “existing Indian family” exception have the judicial gumption to assume responsibility for ferreting out the “real” from the “counterfeit” American Indians, considering Congress placed this determination with the tribes themselves. These courts identify fake American Indians as those who have become fully assimilated into non-American Indian culture.

These courts do so by finding that “token attestations of cultural identity” are inadequate to establish the judicially required, significant cultural traditions and affiliations. These courts

119. Id.
120. Id.
122. Parnell, supra note 2, at 427.
123. Jones, supra note 3, at 415.
125. Id. at 1512.
require significant cultural traditions and affiliations, because they believe that the ICWA is intended only to preserve American Indian culture, not foster it. Therefore, by the “existing Indian family” exception courts have, in effect, created a litmus test for “Indian-ness.”

Their “Indian-ness” litmus test includes such things as ties to the tribe, Indian cultural setting, and length of time living in an Indian home. One court has gone so far as to require that the child live in an “actual Indian dwelling.” Another court has been gracious enough to provide a laundry list so that the real Indians can be identified. To be “Indian” for this court, either the child or the parent must: privately identify themselves as Indians and privately observe tribal customs; participate in tribal community affairs, vote in tribal elections, or otherwise take an interest in tribal politics; contribute to tribal or Indian charities, subscribe to tribal newsletters or other periodicals of special interest to Indians; participate in Indian religious, social, cultural, or political events which are held in their own locality; or maintain social contacts with other members of the tribe.

This litmus test of “Indian-ness” ignores the clear definitions in the ICWA. To be an Indian, all that is required is tribal membership, not a showing that you comply with some non-American Indian judges’ concept of what an American Indian is or should be. In making these determinations, these state court judges are making the very value judgments Congress did not feel it was able to make. These state courts are, once again, demonstrating that they lack the capacity and understanding to have determination power over American Indians.

126. Id.
127. Davis, supra note 46, at 489.
128. Metteer, supra note 39, at 612.
130. Westphal, supra note 42, at 139.
D. It is Not Needed to Prevent the ICWA from Being Unconstitutional

An in-depth analysis of the constitutional issues is beyond the scope of this article. However, a mere glance at the constitutional issues reveals that the ICWA is constitutional. First, American Indian tribes are not subject to the U.S. Constitution. American Indian tribes are sovereigns with their own constitutions, whereas the U.S. Constitution specifically limits federal and state power. The courts using the "existing Indian family" exception to keep the ICWA from being unconstitutional argue that it violates the due process and equal protection guarantees of the Fifth and Fourteenth Amendments. The Supreme Court, however, determined that a tribe’s interests are superior to those of the individual tribe member because protection of the tribe’s interest is intended to benefit the class in which he is a member. This would make an analysis focused on individual rights contrary to the provisions of the ICWA.

1. Congressional Power over American Indians

a. In General

Article I, Section 8, Clause 3 of the U.S. Constitution (the Indian Commerce clause) reserves to Congress the power to regulate commerce with Indian tribes. This clause grants Congress plenary power over American Indians, thus allowing Congress to legislate regarding American Indians as long as that

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133. Metteer, supra note 97, at 668.
135. Metteer, supra note 84, at 57.
136. Carleton, supra note 86, at 37.
137. U.S. Const. art. I, § 8, cl. 3.
legislation is not arbitrary. The Supreme Court, in interpreting treaties and legislation dealing with American Indians, articulated that such legislation must be considered in light of "the broad policies that underlie them" and traditional notions of tribal sovereignty. In *Morton v. Mancari*, the Court stated, "[A]s long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians, such legislative judgment will not be disturbed."

**b. The ICWA**

During discussion of the ICWA, Congress was aware of these constitutional issues. The Department of Justice report of February 9 and May 23, 1978 raised questions regarding the constitutionality of certain provisions of the legislation. Therefore, when Congress enacted the ICWA, it cited the Indian Commerce clause and "other constitutional authority" as the bases for its authority to pass such legislation. Congress found that it has a responsibility to protect and preserve American Indian tribes and their resources. Congress further established "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."

**2. The ICWA does not Violate the Fifth Amendment**

The Fifth Amendment requires due process when the federal government attempts to deprive a person of life, liberty, or...
Since the ICWA is not dealing with a fundamental right, the test should be whether the legislation is rationally related to a legitimate government interest. The courts which apply the "existing Indian family" exception subject the legislation to the higher standard of strict scrutiny. However, applying the strict scrutiny test for legislation regarding American Indians and American Indian tribes is contrary to the reasonably related standard enunciated by the Supreme Court in Morton. When interpreting legislation related to American Indians, the Court determined the proper test is whether the legislation was rationally related to the fulfillment of Congress’ unique obligation to American Indians. If rational, then the Court would not overrule Congress’ judgment.

3. The ICWA does not Violate the Fourteenth Amendment

The Fourteenth Amendment requires that states not deprive a person of life, liberty, or property without due process or equal protections under the law. Under the "existing Indian family" exception courts argue that the ICWA uses a racial classification and, as such, it requires strict scrutiny. However, the Court has stated that when legislation is directed toward American Indians, it is not a racial classification if it is limited to members of federally recognized tribes. The Court determined that such classification is a political one.

Since the ICWA contains no blood quantum requirement to determine whether a particular person is an American Indian, it is

145. U.S. Const. amend. V.
149. Parnell, supra note 2, at 430.
150. ld. at 430–31.
151. U.S. Const. amend. XIV.
154. ld.
not a racial classification. Each of the 562 federally recognized tribes determines its own eligibility criteria, which ranges from a minimum blood quantum requirement to a no minimum blood quantum requirement. Since the ICWA is based upon a political classification, the determination of whether it violates equal protection is dependent on the tribe's historical political relationship with the federal government, instead of the child's "social, cultural or political" relationship with the tribe. Tribe members have the ability to renounce tribal affiliation, which distinguishes "American Indian" from any racial classifications, since no other race member can voluntarily relinquish her racial status. Furthermore, the United States Supreme Court has, without fail, upheld all federal legislation regarding American Indians as not violating equal protection requirements. The ICWA is constitutional without applying the invented "existing Indian family" exception.

E. The ICWA Lacks Uniformity

The perception of what constitutes an "Indian family" has differed from court to court. The application of the "existing Indian family" exception is thus unpredictable and results in inconsistent outcomes. One never knows when a court will apply it or ignore it. The "existing Indian family" exception may be applied in situations where the American Indian child

156. Id.
157. Metteer, supra note 97, at 682.
158. Metteer, supra note 84, at 56.
159. Id. at 55.
161. Cross, supra note 70, at 891.
162. In California alone, the application of the "existing Indian family" exception to avoid application of the ICWA is unpredictable and inconsistent. The following have applied the exceptions: In re Bridget R., 49 Cal. Rptr. 2d 507 (Cal. Ct. App. 1996); Guardianship of Zachary H., 86 Cal. Rptr. 2d 7 (Cal. Ct. App. 1999); In Re Alexandria Y., 53 Cal. Rptr. 2d 679 (Cal. Ct. App. 1996); Crystal R. v. Superior Court, 69 Cal. Rptr. 2d 414 (Cal. Ct. App. 1997); In re Wanomi, 264 Cal. Rptr. 623 (Cal. Ct. App. 1990). For cases that have refused to apply the exception, see cases cited supra note 64. Also, compare supra section IV(1) with IV(2).
never lived in an American Indian family and had no association with American Indian culture, even though his biological parent had such associations.\textsuperscript{163}

The Supreme Court recognized that with the passage of the ICWA, Congress intended nationwide uniformity.\textsuperscript{164} In \textit{Mississippi Band of Choctaw Indians v. Holyfield}, the Court determined that a uniform definition of domicile was necessary to achieve the purpose of the ICWA.\textsuperscript{165} Similarly, a uniform definition of American Indian child is also necessary to accomplish the ICWA's purpose. Unfortunately, the United States Supreme Court has denied certiorari in eight cases involving the "existing Indian family" doctrine, including one from Division Three of the Fourth District of the California Court of Appeal.\textsuperscript{166}

VI. CALIFORNIA'S RESPONSE AS A MODEL FOR CONGRESS

A. Senate Bill 678

California State Senator Denise Moreno Ducheny introduced Senate Bill 678 (SB 678) in February 2005. This bill represents an important means to protect the interests of American Indian children, families, and tribes by comprehensively amending state law to ensure compliance by state courts and county agencies with the ICWA.\textsuperscript{167} The Senate Bill mandates that the ICWA applies regardless whether the American Indian child was in the physical custody of an American Indian parent at the commencement of a custody proceeding, parental rights have been terminated, or the child has lived on an American Indian reservation.\textsuperscript{168} It further mandates that a tribe's determination of the child's membership status is conclusive. In the absence of a tribal determination, the

\begin{itemize}
\item \textsuperscript{163} Walters, \textit{supra} note 48, at 639.
\item \textsuperscript{165} \textit{Id}.
\item \textsuperscript{166} In re Bridget R., 41 Cal. App. 4th 1483 (1996); In re Santos Y., 92 Cal. App. 4th 1274, 1305 (2001).
\item \textsuperscript{167} California Indian Legal Services, \textit{Summary of SB 678}, http://www.calindian.org/tribal alert03.01.05.attach2.doc (last visited March 26, 2006).
\item \textsuperscript{168} \textit{Id}.
\end{itemize}
Bureau of Indian Affairs' determination that a child is an Indian child is conclusive.\textsuperscript{169}

The Senate Bill also adds to the California Probate Code the same provision which was added to the California Family Code\textsuperscript{170} and the Welfare and Institutions Code\textsuperscript{171} by Assembly Bill 65 in 1999. This provision affirms California's interest in protecting

\begin{itemize}
\item 169. Id.
\begin{enumerate}
\item The Legislature finds and declares the following:
\begin{enumerate}
\item There is no resource that is more vital to the continued existence and integrity of recognized Indian tribes than their children, and the State of California has an interest in protecting Indian children who are members of, or are eligible for membership in, an Indian tribe.
\item It is in the interest of an Indian child that the child's membership in the child's Indian tribe and connection to the tribal community be encouraged and protected.
\end{enumerate}
\end{enumerate}
(b) In all Indian child custody proceedings, as defined in the federal Indian Child Welfare Act (25 U.S.C. § 1901 et seq.), the court shall consider all of the findings contained in subdivision (a), strive to promote the stability and security of Indian tribes and families, comply with the federal Indian Child Welfare Act, and seek to protect the best interest of the child.
\item A determination by an Indian tribe that an unmarried person, who is under the age of 18 years, is either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and a biological child of a member of an Indian tribe shall constitute a significant political affiliation with the tribe and shall require the application of the federal Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) to the proceedings.
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\end{itemize}
American Indian children and the American Indian child’s interest in having tribal membership and a connection to the tribal community.\textsuperscript{172}

The California State Senate Judiciary Committee conducted a hearing and voted on SB 678.\textsuperscript{173} SB 678 then went to the Senate Appropriations Committee for a hearing on August 25, 2005.\textsuperscript{174} On that date, the Senate Appropriations Committee voted to place SB 678 on its suspense file.\textsuperscript{175} This caused SB 678 to become a two-year bill that still needs to work its way through the California Assembly.\textsuperscript{176} The Senate passed SB 678 on January 30, 2006.\textsuperscript{177}

\textbf{B. Congressional Amendment to the ICWA}

California Senate Bill 678 will only prevent the use of the “existing Indian family” exception in California. In order to achieve national uniformity, Congress must amend the ICWA so that it specifically excludes the use of the “existing Indian family” exception.

Currently, “Indian child” means any unmarried person who is under age eighteen and 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.\textsuperscript{178} Congress could add a third subsection to 25 U.S.C. §1903(4) which reads: an “Indian child” who meets the definition determined under (a) and (b) is an “Indian child” for purposes of the ICWA regardless of the existence of an Indian family. Because state courts are acting beyond the scope of the ICWA, Congress needs to respond with an amendment to the ICWA.

\begin{itemize}
  \item \textsuperscript{172} California Indian Legal Services, \textit{Summary of SB 678}, http://www.calindian.org/tribal alert03.01.05.attach2.doc (last visited March 26, 2006).
  \item \textsuperscript{173} California Indian Legal Services, \textit{Tribal Alert: Senate Judiciary Hearing Committee on SB 678 (RE ICWA) Rescheduled for August 23, 2005}, http://www.calindian.org/tribalalert07.06.05.htm (last visited March 26, 2006).
  \item \textsuperscript{174} \textit{Id.}
  \item \textsuperscript{175} \textit{Id.}
  \item \textsuperscript{176} \textit{Id.}
  \item \textsuperscript{177} California Indian Legal Services, SB 678 Passes Senate, http://www.calindian.org/news_01.31.06.htm (last visited March 26, 2006).
  \item \textsuperscript{178} 25 U.S.C. § 1903(4) (2005).
\end{itemize}
CONCLUSION

Once again, Congress must strip state courts of its usurped authority over the determination of American Indian children. The "existing Indian family" exception ignores tribal interests in maintaining connections with its only means of survival: its children. The exception violates not only the plain language of the ICWA, but also the spirit by perpetuating a stereotype of American Indians. Although state courts use constitutional issues as a guise for implementing the "existing Indian family" exception, the exception itself violates the Constitution with state courts exerting authority over American Indians reserved to Congress. Finally, the lack of uniformity caused by the use of the exception obligates Congress to act. Amending the ICWA is a simple, but effective remedy to the state courts' offensive use of the "existing Indian family" exception.