The Indian Child Welfare Act in the California Courts: An Abrogation of the Supremacy, Due Process and Equal Protections Clauses of the United States Constitution

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Introduction and Purpose of Article

When court-appointed counsel represents a parent or child with a claim to tribal membership which s/he wishes to advance in a child dependency matter, an increasing number of state courts have adopted the "existing Indian family" doctrine as a means of defeating the jurisdiction, notice and/or placement requirements of the Indian Child Welfare Act.[1] The "existing Indian family" doctrine basically enables a state court to refuse to apply the ICWA, even though the prerequisites for triggering the ICWA have been satisfied, if the child is not currently part of an existing Indian family. When the doctrine is found to apply in any given case, the state court can ignore the requirements of the ICWA in conducting the dependency proceeding.

Ironically, the application of the "existing Indian family" doctrine in a state court continues the very condition Congress sought to rectify by requiring the states, in a uniform way, to "recognize the essential tribal relations of the Indian people and the cultural and social standards prevailing in Indian communities and families."[2] Because the "existing Indian family" doctrine thwarts this purpose, when a party to a dependency proceeding advocates invocation of the "existing Indian family" doctrine, or where a trial court has relied on the doctrine in rendering its decision, a full frontal assault on the doctrine as a statutory construction of the Indian Child Welfare Act should be waged. It is the purpose of this article to assist trial and appellate counsel in waging this attack by (1) presenting the historical and cultural context of the ICWA's enactment, (2) reviewing the evolution of the "existing Indian family" doctrine, (3) identifying the ethnocentric and cultural bias reflected in the "existing Indian family" doctrine, (4) demonstrating how the "existing Indian family" doctrine defeats the purpose of the ICWA, and finally, (5) suggesting the legal grounds upon which counsel might rely to defeat the use of the "existing Indian family" doctrine.

The Historical and Cultural Context of the ICWA

Congress's authority to regulate commerce with Indian tribes is found in clause 3, section 8, article I of the United States Constitution.[3] From this provision, Congress has derived its plenary power over Indian affairs. The powers of Indian tribes are, in general, however,"inherent powers of a limited sovereign" which have never been extinguished.[4] Before the Europeans came, the tribes were sovereign political communities.[5] Indian tribes are no longer possessed of the full attributes of sovereignty. Some aspects of sovereignty were given up by treaty, and others were taken by statute by Congress in the exercise of its plenary powers. However, Indian tribes are still viewed as separate sovereigns because they have not given up their full

sovereignty. "Indian tribes are unique aggre
gations possessing attributes of sovereignty over both their members and their territory."[6] Their sovereignty is of a unique and limited character, and exists only at the sufferance of Congress. It is subject to complete defeasance, but until Congress acts, the tribes retain their existing sovereign powers. "In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or by statute, or by implication as a necessary result of their dependent status."[7] This permits a condition of "dual sovereignty" to operate in Indian affairs.

In the area of family affairs, Congress has acted affirmatively to preserve that sovereignty, and to protect it from state encroachment. In 1978, Congress observed that an "alarmingly high percentage of Indian families" were being broken up by the often unwarranted removal of Indian children by nontribal public and private agencies. Congress also observed that an "alarmingly high percentage" of these children" were being placed in non-Indian foster and adoptive homes and institutions. Finally, Congress believed that the States had failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.[8] Simply put, state welfare case workers and juvenile court judges were extremely ethnocentric in their approach to dealing with Indian minors in their courts.

As a result, Congress passed the Indian Child Welfare Act of 1978 (ICWA). The Congressional declaration of policy claimed the protection of the "best interests of Indian children" and the "protection of the stability and security of Indian tribes and families" as its purpose. Congress would further these policies by establishing minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which reflect the unique values of Indian culture, and by providing assistance to Indian tribes in the operation of child and family service programs.[9] At issue in this article is the substantive requirement imposed on state courts which, absent "good cause," mandates that adoptive placements be made preferentially with (1) members of the child's extended family, (2) other members of the same tribe, or (3) other Indian families.[10] The United States Supreme Court has construed the ICWA as seeking "to protect 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."[11] The ICWA was to do so by establishing a federal policy that, where possible, an Indian child should remain in the Indian community.[12] It was also to achieve this goal 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."[13] But the "existing Indian family" doctrine is a legal construct grounded in white, middle-class standards, which has thwarted the very purpose and intent of the ICWA.

Who Is An Indian Under the ICWA? [14]

The ICWA defines an "Indian" as 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.[15] It 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) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.[16] An "Indian child's tribe" means "(a) the

Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts."[17] An "Indian tribe" is defined as "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."[18]

Under the plain meaning of the ICWA, determining who is an Indian is not difficult.

The State's Implementation of the ICWA

Rule 1439(a)(1) of the California Rules of Court defines an Indian child by incorporating the following language from the federal statute: an unmarried person under the age of 18 who is either a member of an Indian tribe or is the biological child of a member of an Indian tribe and is eligible for membership in an Indian tribe.

The rule basically leaves the definition of who is an Indian to the tribes themselves. The rule also does not define a point at which membership in the tribe must have been achieved. Inferentially, it would then appear that as long as tribal membership is achieved before the dependency proceeding is concluded, or before the adoption is final, the ICWA would apply.[19]

It is clear that some states courts are unhappy with the jurisdictional preference for the tribal courts in the placement of Indian children. As a result, some state courts have taken it upon themselves to refine or "improve" on the definition of Indians in the federal statute. But when the state courts involve themselves in making their own determinations of who is an Indian, a lack of uniformity in the application of the ICWA results. This lack of uniformity, caused by state "refinements" of the definition of who is an Indian, is very similar to what the United States Supreme Court criticized in *Mississippi Band of Choctaw Indians* v. *Holyfield*, where the United States Supreme Court rejected a state court's attempt to use the state definition of domicile, rather than the federal definition. Using the state's varying definitions, the high Court held, would have defeated the purpose of the ICWA.[20]

In imposing their own "refined" definition, some state courts appear to be confused over whether " Indian" refers to a racial group, a genetic identification, a political affiliation, and/or a cultural identity. Out of this confusion has evolved the kind of misunderstandings that the ICWA was designed to prevent. The "existing Indian family" doctrine is one such misunderstanding.

The "Anglo" bias of the legal system in defining Indians places too much focus on biology to the exclusion of other equally important considerations. It fails to recognize that Indian notions of family vary widely, but all embrace the term as a fluid concept.[21]

Legally speaking, an Indian tribe is a nation, which is a geo-political entity that enjoys limited sovereignty. Anthropologically speaking, an Indian tribe is an association of persons who claim

common descent from a common ancestor in form of a real person or a patron deity.[22] And some courts see being Indian as a racial distinction.[23] Given these fragmented ways of viewing Indian people, it is not surprising that state courts are confused and that their confusion has yielded a high level of inconsistency in the law.

The most accurate way to describe Indians seems to be as an indigenous people who have a geo-political, social and/or cultural affiliation which may be traced through descendancy.[24] But tracing membership through descendancy does not make being an Indian a "racial" distinction. Moreover, no one element of this definition can be singled out for treatment as the litmus test of "Indian-ness." Yet that is what state courts who have adopted the "existing Indian family" doctrine have tried to do.

Indians are the indigenous peoples of the Americas.[25] Indigenous peoples are the living descendants of preinvasion inhabitants of lands now dominated by others. They are peoples, nations, or communities that are culturally distinct. They find themselves engulfed by settler societies born of the forces of empire and conquest. They are indigenous because their ancestral roots are imbedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity. They are peoples to the extent they comprise distinct communities with a continuity of existence and identity that links them to the communities, tribes, or nations of their ancestral past.[26]

Most tribes of North American Indians present in the United States are also political entities -- they are each a nation. They are also culturally distinct. They have different languages, and embrace different customs, traditions and values. They claim common ancestry from a deity or a real person. And while they are not a racial group, they may have genetic commonalties.[27]

Tribal membership, from a state court's point of view, should be viewed as a form of citizenship. Who is a citizen is defined by the country to whom the citizenship attaches. An American court, for example, does not decide whether one recognized as a citizen of France by the French government should be entitled to French citizenship. France does that. And that is France's unique prerogative. And it is the law of France that controls. The American court does not decide whether the citizen is really "French" by asking whether the individual speaks French, eats French food, or adopts other aspects of French culture. An American court would not do so because it is not relevant to the concept of "citizenship."

Similarly, who is an Indian should be determined by the tribe. Congress shared this view and so provided in the ICWA. Once the tribe has certified a child as a member, or eligible for membership, the ICWA applies, and the state courts have no reason to judge the "Indian-ness" of the tribal member.[28] The fact that some state courts do not do so may reveal those courts' ethnocentrism and their paternalistic view that Indian children are better off "assimilated."

If the state courts would shed this ethnocentric and paternalistic rule, determining who is an Indian, within the meaning of the ICWA, would be relatively easy to do. Indian tribes have and

maintain rolls, based on membership or descent, for a variety of reasons, among which is the distribution of assets and judgment funds. Where there is a distribution of funds over which the federal government has supervision and control, or pursuant to express legislation, or at the request of a tribe, such rolls are maintained by the Bureau of Indian Affairs within the Department of the Interior. The tribe has complete authority to determine all questions relating to its own membership and may prepare and maintain its rolls. (*Baciarelli v. Morton* (9th Cir. 1973) 481 F.2d 610 and Roff v. Burney (1897) 168 U.S. 218, and *Cherokee Intermarriage Cases* (1906) 203 U.S. 76.)

The "Existing Indian Family" Doctrine

Some California courts, as well as courts in other jurisdictions, have diluted the scope of the ICWA by limiting its application to children of "existing Indian families." This doctrine nullifies the ICWA in those cases where the child, while a tribal member or eligible for tribal membership, has not enjoyed Indian "culture" with his or her birth family. This may be because the family has not maintained tribal ties. Or it may be, as in *Holyfield*, that the parents were trying to avoid the tribe's involvement with their child.

The first ICWA case in which the "existing Indian family" doctrine was adopted by a state supreme court was in 1982 in *In re Matter of Adoption of Baby Boy L.*[29] There, the Kansas Supreme Court refused to apply the ICWA where a non-Indian mother gave birth to an "illegitimate" child who had an Indian father. The mother gave up the child for adoption by non-Indian parents over the objection of the father and his tribe. The Kansas Supreme Court held that the intent of the Act was to prevent the "removal of Indian children from an existing Indian family unit and the resultant breakup of the Indian family." The implication, of course, is that illegitimate Indian infants who are born to non-Indian mothers who voluntarily relinquish them will have had no exposure to Indian culture before they were placed for adoption, so the tribe has experienced no loss. This conclusion necessarily presumes that the Indian father would not have exposed the child to Indian culture if the child had not been placed for adoption. It also seems that the child's illegitimacy suggested to the Kansas Supreme Court that the child would have no opportunity for exposure to Indian culture simply because the mother objected. Based on these two assumptions, the "existing Indian family" doctrine was constructed and used to defeat the application of the ICWA in Kansas.

These assumptions seem to reflect contemporary adherence to outdated common law notions about the lack of involvement of birth fathers of "illegitimate" babies.[30]

The following year, the First District Court of Appeal in California, in *In re Junious M.* (1983) 144 Cal.App.3d 786, took a trial court to task for refusing to invoke the ICWA jurisdiction because the trial court had found the child was not an Indian. The First District held that the trial court erred, because the question of whether the minor was an Indian child was one for the tribe

to determine.[31] In dicta, the court wrote:

> We noted that the trial court predicated its decision not to apply the Act in part on its determination that the minor had developed no identification as an Indian. The language of the Act contains no such exception to its applicability, and we do not deem it appropriate to create one judicially. [32]

The court also found that such an exception would undermine the purpose of the ICWA. It did so without reference to the Kansas case.

The issue was then not addressed until 1990 when another California appellate court considered the application of the "existing Indian family doctrine."[33] In *In re Crystal K.*,[34] the Third District Court of Appeal reversed a parental rights termination by a trial court that refused to apply the ICWA. The *Crystal K.* trial court had refused to apply the ICWA because the parental rights termination sought there was a private matter between the child's parents. It was analogous to divorce proceedings between the parents of an Indian child, the trial court reasoned, and because divorce proceedings are excluded from the ICWA, this proceeding should be too. However, the appellate court held the ICWA applicable to a non-Indian mother's petition to terminate the parental rights of her child's Indian father. The court further decided that "limiting the Act's applicability solely to situations were nonfamily entities physically remove Indian children from actual Indian dwellings deprecates the very links -- parental, tribal and cultural -- the Act is designed to preserve."[35] In dicta, the court explicitly disapproved *In re Wanomi P.*[36] to the extent that the decision embraced the Kansas Supreme Court's pronouncement in *Baby Boy L.*: that the ICWA primarily concerns the maintenance of the family and tribal relationships existing in Indian homes.

In 1991, the first California case which rejected the "existing Indian family" doctrine as a prerequisite to the ICWA application was decided. In *In re Lindsay C.*,[37] the trial court had held the ICWA inapplicable based on *Baby Boy L*. The First District Court of Appeal reversed, finding that the ICWA applied, and that the case did not fall under either of the two specific exclusions for divorce or delinquency. Even though the child to whom the Indian father's rights had been terminated had never been in the care of the father, and had no connection with Indian culture, the court held that the ICWA applied.

The appellate court questioned the viability of *Baby Boy L*. in light of the United States Supreme Court's opinion in *Choctaw Indian Band v. Holyfield.*[38] Based on *Holyfield,* and other authority,[39] the First District concluded that the United States Supreme Court seemed unlikely to protect the implied right of a non-Indian mother to entirely exclude the application of the ICWA, which explicitly protects the right of a tribe to intervene in any child custody proceeding involving an Indian child.[40] The appellate court reversed the termination of the father's parental rights and the trial court was directed to give notice to the tribe of its right to intervene

in the adoption proceeding.

Poor Anthropology: The Constitutional Analysis of In re Bridget R.(1996) 41 Cal.App.4th 1483

In 1996, the Second District Court of Appeal held that the trial court had erred in applying the ICWA in *In re Bridget R.*[41] The appellate court held that the trial court had erred in applying the ICWA without first determining that the biological parents had a significant social, cultural or political relationship with the tribal community, and that on remand, the burden of proof on this issue would have to be carried by the biological parents and the tribe. This finding was required, according to the Second District, because unless the ICWA was construed as requiring a significant social, cultural or political relationship with the tribe before invoking it, the ICWA itself would be unconstitutional.

In Defining the Interests

This opinion is an important one, in that the fundamental premise upon which the opinion is based is faulty and creates a false dichotomy. The opinion characterizes the ICWA as pitting the interest of the individual child against the collective interest of the tribe. However, this dichotomy is a false one. The standard under the ICWA is not the "best interest of the child." The standard is the "best interest of the Indian child."[42] And Congress has already identified that interest as being furthered where the tribe has notice and an opportunity to intervene. Congress has also identified that interest as being furthered by placements of Indian children in Indian families.

In Identifying Preemption

The state courts that invoke the "existing Indian family" doctrine as part of their statutory construction of the ICWA are violating the supremacy clause. Congress has already "pre-empted" the state courts on those "best interest" issues.[43] The United States Supreme Court in *Holyfield* found that using the states' definitions of domicile would defeat the purpose of the ICWA. Analogizing to *Holyfield*, and relying on the same Congressional intent identified in *Holyfield*, the use of the "existing Indian family" doctrine stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

In Balancing the Interests

The use of the "existing Indian family" doctrine permits a state court to substitute its own perceived "best interest of the child" standard in place of the Congressionally declared "best interest of the Indian child" standard. This standard invariably exalts Anglo middle-class values over the values espoused by any indigenous culture. That is exactly the practice Congress sought to prevent in its passage of the ICWA.[44]

In addressing the issue of the constitutionality of the ICWA, the Second District found that the record raised substantial doubt as to whether the Indian father, who resided several hundred miles from the tribal reservation, ever participated in tribal life or maintained any significant social, cultural or political relationship with the tribe.

Weighing this "minimized" "Indian-ness" interest against the individual "best interest" of the child (which, because of the minimal nature of Bridget's Indian cultural experience, quickly defaulted to an Anglo-defined "best interest"), was the only constitutional way the ICWA could be interpreted, according to the Second District. Without the "existing Indian family" doctrine, the Second District concluded, that the ICWA: (a) impermissibly intrudes upon a power ordinarily reserved to the states; (b) improperly interferes with Indian children's fundamental due process rights respecting family relationships; and (c) on the sole basis of race, deprives them of equal opportunities to be adopted that are available to non-Indian children and exposes them to having an existing non-Indian family torn apart through an after-the-fact assertion of tribal and Indian-parent rights under the ICWA. The court further found that all this occurs in the absence of even a rational relationship to a permissible state purpose, much less a necessary connection with a compelling state purpose.

Before reaching the constitutional analysis, the Second District noted that other courts had also declined to apply the ICWA where the child was not being removed from an existing Indian family. These courts refused to apply the ICWA because the policies of preserving Indian culture and promoting the stability of Indian tribes and families was not furthered where the child was not being removed from an existing Indian family. Of course, this interpretation of the purpose of the ICWA is also inaccurate when viewed against the events which led to the ICWA's passage.

The ICWA was not drafted or passed merely to prevent the few remaining Indian children from being taken. It was also drafted and passed to permit politically and culturally disenfranchised Indians to reconnect with their tribes by giving placement preferences to the tribes. It takes little historical review to find substantial support for this view.

In the 1950's Indian children were routinely removed from their families and sent to boarding schools where they were punished for doing anything "Indian." This occurred during a period of coercive assimilation. That generation of "punished Indian children" grew up without their tribes and culture.[45]

When this generation of Indians had children, they had nothing Indian to share. To use the "success" of the state agencies and social workers of the 1950's in "assimilating" Indians as a means by which to deny the application of ICWA to the next generation of Indian children would reward the misguided social workers of the 1950's with yet another generation of "assimilated" Indian children. Yet it was the actions of these misguided social workers that lead to the passage of the ICWA. It was not passed to merely stop them. It was also passed to reconnect people they had attempted to disconnect.[46]

The Second District did not address preemption or supremacy clause issues. Instead, it identified the constitutional limitations on the scope of the ICWA as those of due process, equal protection, the Indian Commerce Clause and the Tenth Amendment.

Due Process

The Second District first observed that where there is no existing Indian family, the interests of the tribe and the biological family may be in direct conflict with the children's strong needs. The Second District defined those needs, which it also found to be constitutionally protected, as remaining through the developing years in one stable and loving home. The court then cited United States Supreme Court cases which recognize that the parent- child connection merits constitutional protection in appropriate cases because it is "woven through the fabric of our society."[47]

Of course, it is the use of the term "our society" that reveals the fallacy of the court's position. Under the ICWA, the subject is Indian society, not the "our society" the court referred to. The Second District's definition of the constitutionally protected right of a child to remain throughout his or her developing years in one stable and loving home, also suffers from a similar ethnocentric bias. For Indian children, the concept of a home and stability is different. And the placement of an Indian child in an Anglo home may be "inherently unstable" because of the identity crisis that Indian children suffer when they grow up in white culture and function as white, but are viewed by white culture as "non-white."[48] Those children then lack the background to fit into Indian culture, and become children without a culture.

While the court found the child's rights to a stable and loving home to be constitutionally protected, the court also found the parents' rights to have been subordinated because they had relinquished their parental rights. The court then found that the tribe had no constitutional rights, but only a statutory right under the ICWA. Of course, this ignores the line of United States Supreme Court cases that recognize that once a statutory right has been created, it must be applied in a constitutional manner.[49] The statutory rights of the tribe under the ICWA should be recognized as subject to constitutional protection under the due process clause.

The Second District's analysis also fails to recognize that indigenous peoples' definitions of family are different. And if constitutional protections of family are to be extended in a constitutional manner, the much more fluid concept of family which typifies indigenous cultures is the one the court should use. Viewed that way, then the tribe, as part of the Indian child's family, does have constitutional protection, independent of the ICWA statutory language. Moreover, the United States Supreme Court in *Holyfield* recognized this when it described the interest of the tribe in the Indian child, and the interest of the biological parents of the Indian child, as in parity.[50]

Another way of exposing the flaws in the *Bridget R.* opinion is to identify the "smuggled

facts"[51] on which the opinion relies. The court stated:

> It is almost too obvious to require articulation that "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." [52]

The court is correct in that biological parents have the right to choose whether they will raise their children as Indians. But if they relinquish that right by relinquishing their rights as parents, and it is in the Indian child's best interest to be raised in an Indian home, why should the parent's rejection of the culture control? Why should the parent not be found to have relinquished that right as well?

Moreover, the assumption that an "assimilated home" will never provide any opportunity for experiencing Indian culture is sheer speculation without any support in the evidence, and is based on a number of secondary assumptions. First, what constitutes full assimilation? Is assimilation ever complete? Does assimilation foreclose reconnection with a family member who has maintained tribal ties? Does that forever foreclose the discovery of one's "roots?"

The parents' decision to reject Indian culture by choosing to have their children raised by white families may not reflect a static value. The assimilation of indigenous peoples, and their reactions to assimilation, are not cast in concrete, but change through time. The cultural "melting pot" of the 1960's has now become the celebration of cultural diversity in the 1990's.

Findings of unconstitutionality, based on these "smuggled facts" which may be false, and which in any event are not based on evidence, does not yield a finding that the ICWA violates due process unless the "existing Indian family" interpretation is adopted. It renders the Second District's interpretation utilizing the "existing Indian family" doctrine an unconstitutional violation of the due process clause.

Equal Protection

The Second District in Bridget R. also postulated that the ICWA requires Indian children who cannot be cared for by their parents to be treated differently from non-Indian children "in the same situation." This disparate treatment, according to the court, limits the number of potential adoptive homes available to Indian children, and is sometimes disadvantageous. However, the court concluded this treatment did not violate the equal protection clause because it is based upon social, cultural or political relationships between Indian children and their tribes. However, where such social, cultural or political relationships do not exist or are very attenuated, "the only remaining basis for applying the ICWA, rather than state law, is the child's genetic heritage -- in other words, race."[53]

This analysis suffers from several flaws. First, Indian children are not "in the same situation" as

non-Indian children. Indian children are not even similarly situated to non-Indian children. That is why the ICWA was passed in the first place. Second, any child who falls within the definition of an Indian child under the ICWA has a political relationship with a tribe, not unlike a claim to citizenship. Under the court's own analysis, then, it does not violate the equal protection clause. But third, this analysis erroneously treats indigenous peoples as distinct racial groups, simply because membership in the tribe is traced through descent.

The hinging of the equal protection analysis on Indians as a "race" is tenuous at best. First, it is not clear that the term "race" has any real meaning.[54] And as the Second District used "race" in its opinion, it seems the court was really referring to "genetics." This characterization was based on the fact that tribal membership is traced through biological descent from an historical member of the tribe. It was on this form of membership determination that the Second District concluded that the characterization was one of race. Of course, the intestacy laws of California trace heirs through descent. Doing so does not make it a "race-based" determination, however.

Indians, as well as other "racial groups," have been stereotyped throughout American culture by individuals who the courts have charitably described as "poor anthropologists."[55] In point of fact, there are thousands of different tribes in the Americas, many of whom would be unrecognizable to a "poor anthropologist" as an Indian.

At the time of European contact in 1542, California's indigenous people were organized into approximately 105 separate tribal groups, speaking 90 languages, consisting of more than 100 different dialects. California was home to the tallest (Mojave) and the shortest (Yuki) Indians in North America.[56] Whether a "poor anthropologist" could even identify an Indian by "racial characteristics" must be questioned. The point is, the court appears to have characterized as "race," for purposes of equal protection analysis, what is really genetic descent.

Second, whatever meaning "race" may have at one point in time, may have a different meaning at another. The concept is a dynamic one that seems to change with time.[57] That means that legislation which was not "race-based" at one time may subsequently be viewed as "race-based" because society's sense of what a race is has changed.

The issue of whether Indians constitute a race need not, however, be central to an evaluation of the Second District's equal protection analysis of the ICWA without the use of the "existing Indian family" doctrine. A distinction based on race or other attribute, such as indigence or national origin, also triggers heightened scrutiny, and the ICWA easily survives such scrutiny. The governmental interest in stopping the cultural genocide that decimated the Indian population during the age of assimilation is a compelling one. This interest led to the passage of the ICWA, and it is this interest that will enable the ICWA to survive equal protection scrutiny, even where a child or his or her parents has no cultural tie to an Indian tribe. This is because the best-interest-of-the-Indian-child standard is different from California's best-interest-of-the-child standard.

Characterizing the application of the ICWA to children who have no cultural ties to an Indian

tribe as one based on race seems tautological. On the one hand, the court seems to view "Indian-ness" as a geo-political-cultural distinction. On the other hand, the court seems to view indigenous people, stripped of their geo-political-cultural affiliations, as a racial group. The defect in this analysis is two-fold. First, an Indian who is stripped of his legal status as a member of a tribe, or one eligible to be a member of a tribe, is not covered by the ICWA. The analysis, to be accurately stated, must address the person who is not culturally affiliated, but has the political affiliation, regardless of the extent to which the person has chosen to exercise it. In other words, the situation the Second District identified as rendering the ICWA unconstitutional, simply cannot occur under ICWA's definition of who is an Indian. But even assuming that it could occur, and an Indian who is stripped of his or her geo-political-cultural affiliations would still be covered by ICWA, is this a distinction based on an identifying feature that triggers heightened scrutiny, such as indigence, race or national origin? If not, the equal protection analysis rests on a rational basis test -- a very easy standard to satisfy.

The Indian Commerce Clause and the Tenth Amendment

The Second District concluded that principles of tribal self-government seek an accommodation between the interests of the tribes and the federal government on the one hand, and those of the states on the other, citing *Washington v. Confederated Tribes of the Colville Indian Reservation.*[58] However, positing that maxim in a vacuum is misleading. That standard applies where Congress has not preempted the field.

In *Confederated Tribes*, the State of Washington was attempting to prevent three Indian tribes from selling cigarettes on their reservations because they were charging their own cigarette tax, but they were not charging Washington States sales and cigarette taxes. The Court found there was no overriding federal interest that would be frustrated by tribal taxation of cigarette sales, and that even if the state's interests were implicated by the tribal taxes, tribal sovereignty is dependent on, and subordinate to, only the federal government, not the states.[59] The state therefore could not interfere in any way with the tribes' charging of the tribal tax. The Court also concluded, however, that Indian tribes are not authorized by Congress to market an exemption from state taxation to persons who would normally do their business elsewhere. The court explicitly found that no federal statutes pre-empted the state sales and cigarette taxes.[60] The Court also acknowledged that the tribes themselves could probably pre-empt state taxation through the exercise of properly delegated federal power.[61]

The Indian Commerce Clause does not automatically bar all state taxation of matter significantly touching the political and economic interest of the Tribes. The Clause has a more limited role to pay in preventing undue discrimination against, or burdens on, Indian commerce. Analogizing to the commerce clause restriction set forth in *United States v. Lopez*,[62] the Second District concluded that Congress has exceeds its authority when, acting under its enumerated powers, it 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. Finding the family matters are traditionally reserved to the states, and that no adequate nexus exists respecting application of the ICWA to children whose families do not maintain significant relationships with an Indian tribe or community or with Indian culture, the Second District held that an ICWA that does not incorporate the "existing Indian family" doctrine impermissibly intrudes upon a power reserved to the states.[63]

The *Bridget R.* court's analysis of the Indian Commerce Clause ignores one important fact: Congress has legislated to preempt state law in family matters involving Indian children. The Second District has ignored the same fact that demonstrates that the "existing Indian family" doctrine violates the Supremacy Clause.

Other Districts Speak Out

In *In re Larissa G.*,[64] the Fourth District did not entertain the issue of the "existing Indian family" doctrine, but nonetheless bolstered the due process analysis of *Bridget R.*

Larissa G. involved the parental veto power reserved to the parents in the ICWA. In section 1911, subdivision (b), the ICWA provides for the transfer of jurisdiction to the tribal court where an Indian child not domiciled on a reservation is involved. The state court is required to order that transfer, absent objection by either parent. The court interpreted this as evidence of a legislative history dedicated to the maintenance of the family in existing Indian homes. Citing *Baby Boy L.*, the court stated:

It was not to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother.

The court adopted the "competing interests" analysis, pitting the parent's interest in raising a child as s/he sees fit against the tribe's interest in fostering its community by preserving Indian families. The court found that when the child is domiciled off the reservation, relationships shift under the ICWA and the parent's interests may be primary because the tribe's interest is not as great. However, as the United States Supreme Court held in *Holyfield*, the interests of the parents and the tribe are equal.[65]

In *In re Alexandria Y.*[66] the Fourth District again applied the "existing Indian family" doctrine to uphold the juvenile court's refusal to apply the ICWA where the mother was a member of the Seminole Nation, but was raised by non-Indians and where there was no evidence to suggest the mother had ever been exposed to her Indian heritage. Because she had no "social, cultural or political" relationship with Indian life, there was no existing Indian family to preserve. The court agreed with *Bridget R.* except to the extent that both parents must lack a significant relationship with Indian life. The determination of whether there is an existing Indian family is dependent on the unique facts of each situation. The court here also stated in dicta that even if one of the child's parents does maintain a connection to Indian life that a trial court deems significant, the ICWA exception may still apply.

The *Alexandria Y.* court also took the position that *Holyfield* did not impliedly reject any form of the "existing Indian family" doctrine.

The following year, the Sixth District joined the Fourth and the Second Districts in adopting the "existing Indian family" doctrine in *Crystal R. v. Superior Court*.[67] In *Crystal R.*, the Sixth District directed the trial court to conduct a hearing in which the father and his tribe had the burden of proving, by a preponderance of the evidence, that the father maintained significant ties with the tribe, and that if the burden was not carried, the ICWA would not apply.

The *Crystal R.* court held that the ICWA recognizes that the tribe's interest in child custody proceedings diminishes as the family's connections to the tribe become more attenuated. The court inferred this from the fact that the ICWA jurisdiction is exclusive if the child lives on the reservation, concurrent if the parents or child no longer reside on the reservation, and allow only

intervention by the tribe in the state court proceedings if jurisdiction is not transferred. As the tribe's interest weakens, the state's interest in protecting the best interests of the child assume more importance. And the "best interest of the child" is the "good cause" to which the ICWA refers, according to the *Crystal R.* court.

However, it was more than the "existing Indian family" issue that prompted the *Crystal R.* court's analysis. The Indian father was not born in Alaska, where his tribe was located, had never been there, and had not indicated any intention of returning there. Moreover, the father was not an enrolled member when Crystal was born. His interest in his Indian heritage was a "recent phenomenon, sparked, as it would appear, by commencement of the dependency and the notice provided by the Agency. Prior to that the father was seemingly not part of any "Indian community" and in all likelihood never would have been in the stance of these proceedings."[68]

It would appear that the court was offended here by "token attestations of cultural identity." The court concluded that:

> We do not believe Congress could have intended that the special protections provided by the ICWA be invoked as a legal ploy in a custody proceeding by a parent who has otherwise abdicated parental rights and has no demonstrable ties to Indian culture. We find no compelling reason why such a parent should be entitled to rights and protections greater than any other resident of the state. [69]

By engrafting the "existing Indian family" doctrine onto the ICWA, the state courts are able to judge, by the values of the dominant society, whether the parent's cultural background meets its view of what "Indian culture" should be. In doing so, the state courts are put right back into the position from which congress had them removed.[70]

Less than one year ago, the Fifth District rejected the "existing Indian family" doctrine in *In re Alicia S.*[71] Relying on *Holyfield*, the Fifth District pointed out that the protection of the tribal interest in the child is distinct from, but on a parity with, the interest of the parents. The court also noted that the children have a corresponding interest in maintaining a relationship with the tribe, even if their parents do not.[72]

The Fifth District decided that where the dependent child's interests in permanence and stability outweigh the competing interests of the parents and the tribe, the court could depart from the statutory preferences under the good cause exception. And in *Bridget R.*, *Alexandria Y.*, and *Crystal R.*, the Fifth District found that those trial courts could have reached the same results under the good cause exception, without reliance on the "existing Indian family" doctrine. However, the burdens of proof would have been imposed differently.

It would appear that the "good cause" exception in the ICWA is the true provision which ensures the constitutionality of the ICWA. But one critical difference between "good cause" and the "existing Indian family" doctrine is that under former, the presumption favors the application of

ICWA, and the burden of proof lies with the party seeking to exempt itself from the ICWA. But under the "existing Indian family" exception, the Indian has the burden of establishing his or her "Indian-ness" to the satisfaction of the dominant culture.

Federal Jurisdictional Possibilities

The final remaining issue is whether there is any way to obtain federal review of a decision in which the "existing Indian family" doctrine has been applied.

A petition for writ of certiorari appears to be the only available means for obtaining review in a case where the "existing Indian family" doctrine has been applied in a state court in a dependency or adoption matter. Such limited opportunity for review suggests that this issue will continue to evade review unless the United States Supreme Court decides it wants to resolve this issue. If it does choose to resolve this issue, the Court will have to decide whether it wants to do so in a private adoption case, or in a dependency case.

In a 1997 law review article, B.J. Jones, Judge of the Turtle Mountain Tribal Court of Appeals and Director of the Northern Plains Tribal Judicial Institute of the University of North Dakota School of Law, has characterized the independent actions of states in creating the "existing Indian family" doctrine as making a farce of the ICWA goal of uniformity. He is also critical of the way federal courts have avoided involvement in the ICWA issues. This "diffidence" on the part of the federal courts has created an "anomaly in federalism." The ICWA has created federal civil rights, but it has left them to be enforced in state courts who applications vary widely. As a result, these federal civil rights have been rendered largely unenforceable in any federal forum other than the United States Supreme Court.[73] However, as Judge Jones notes, the ICWA does vest the federal courts with the authority to overrule erroneous state court decisions.[74] It would appear that the effort to obtain federal review of the "existing Indian family" doctrine will continue, and that these efforts should be monitored.[75]

Conclusion

The emergence of the "existing Indian family" doctrine reflects a lack of understanding of the ICWA, its purpose, the value of Indian culture, and the importance of descent, geo-political, and cultural considerations in defining Indian identity. The very purpose of the ICWA was to redress the incipient cultural genocide that was occurring prior to the ICWA's enactment, which resulted in children being cut off from their tribal roots. Then after the ICWA's enactment, state courts constructed the legal fiction of the "existing Indian family" doctrine. This doctrine used the product of pre-ICWA social work, which was the disconnection of one generation of Indian children from their tribal roots, to prevent a reconnection, and to extend that disconnection to yet a second generation of Indian children. The application of this doctrine virtually insures that where one generation of tribal members was successfully disconnected from their tribes, pre-ICWA, that disconnection can be used as a justification for continuing it into the second generation, rather than rectifying the wrong done to previous generation, and bringing the second generation of Indian children back into tribal life. The continued use of this doctrine, coupled with a cultural value that exalts assimilation over the preservation of diversity, could well signal the imminent extinction of indigenous Americans and their culture.

Notes:

1 The Indian Child Welfare Act, 25 U.S.C. § 1901 et seq., will hereinafter be referred to as the "ICWA."

2 25 U.S.C. §1901.

3 "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

4 F. Cohen, Handbook of Federal Indian Law 122 (1945), as cited in *United States v. Wheeler* (1978) 435 U.S. 313, 322.

5 *McClanahan v. Arizona State Tax Commission* (1973) 411 U.S. 164.

6 *United States v. Mazurie* (1975) 419 U.S. 544, 557.

7 *United States v. Wheeler, supra,* 435 U.S. 313, 323, citing *Oliphant v. Suquamish Indian Tribe* (1978) 435 U.S. 191.

8 25 U.S.C. § 1901.

9 25 U.S.C. § 1902.

10 25 U.S.C. § 1905(a).

11 *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 36, citing HR Re. No. 95-1386, p. 23. This is the only case the United States Supreme Court has heard under the ICWA. In *Holyfield*, the Court stated that the most important substantive requirement imposed by state courts by the ICWA is § 1915(a), which, absent "good cause" to the contrary, mandates that adoptive placements be made preferentially with (1) members of the child's extended family, (2) other members of the same tribe, or (3) other Indian families.

12 *Ibid*.

13 *Id.* at p. 24.

14 The word "Indian" is a misnomer. When Christopher Columbus arrived in North America in 1492, he mistakenly believed he had reached "the Indies" (Asia), and he called the people he encountered "Indians." The term is still widely employed to describe indigenous peoples of the Western Hemisphere, and anthropolitically speaking, "indigenous peoples" is a more accurate way to identify American Indians. However, because the law has wholly appropriated the term "Indian" to describe the vast variety of indigenous peoples in the United States, this article will

use the term "Indian."

15 25 U.S.C. § 1903, subd. (3).

16 25 U.S.C. § 1903, subd. (4).

17 25 U.S.C. §1903, subd. (5).

18 25 U.S.C. § 1903, subd. (8).

19 However, it is also clear that many state courts are offended by Indians who enroll in their tribes only after a dependency action is undertaken, or where they wish to set aside an adoption. This is seen by the courts as manipulative, particularly where the court does not recognize any aspect of "Indian-ness" in the individual. See *In re Bridget R.* (1996) 41 Cal.App.4th 1483, 1512, cited in *In re Crystal R.* (1997) 59 Cal.App.4th 703, 721.

20 Moreover, the Court pointed out that Congress perceived the States and their courts as partly responsible for the problem the ICWA was intended to correct. *(Mississippi Band of Choctaw Indians v. Holyfield, supra,* 490 U.S. at 44-45.)

21 See Christine Metteer, *Pigs in Heaven: A Parable of Native American Adoption Under the Indian Child Welfare Act*, 28 Ariz. St. L.J. 589, 618 (1996). Here, it is noted that the Indian concept of family is "a notion as fluid as river."

22 If common descendancy is claimed from a patron deity, the inappropriateness of treating Indians as a "race" becomes even clearer.

23 See *In re Bridget R.* (1996) 41 Cal.App.4th 1483, 1508.

24 Many Indian tribes also embrace a form of adoption. For example, the Seminole Indians of Florida adopted runaway African-American slaves into their tribe in the eighteenth and nineteenth centuries. (*See* K. Porter, The Black Seminoles: History of a Freedom-Seeking People (1996).

25 There are indigenous people outside the Americas. For example, the Sami of Sweden, Norway, and Finland are a nomadic people who live in the Scandinavia regions of the arctic circle.

26 See James Anaya, Indigenous Peoples in International Law 3 (1996).
27 Under the older tripartite notion of race, Indians are Mongoloid. Under this same notion, African-Americans are Negroid and Europeans are Caucasoid. Negroes, people of African descent, are at greatest risk of having Sickle Cell Anemia -- a blood disorder inherited through a gene from each parent. (Sickle Cell Information Center, Emory University, September 14, 1997.)

This genetic disease primarily affects one racial group.

Jews, in contrast, are not a racial group. A Jew can be defined as a person whose religion is Judaism. A Jew can also be defined as one who is descended, or is regarded as descended, from the ancient Hebrews. But Jews, like Negroes, are also more vulnerable to certain medical conditions. For example, the Tay Sachs gene occurred among the antecedents of modern Ashkenazi Jewry after the second Diaspora (70 A.D.) and before the major migrations to regions of Poland and Russia (1100 A.D. and later.) (*See* G. Petersen, *The Tay-Sachs Disease Gene in North American Jewish Populations: Geographic Variations and Origins*, Am J. Hum. Genet. 35:1258-1269 (1983).).

"Tribes" or "clans" can then be comprised of a distinct racial group, or a group which, through time, develops shared genetic traits. But since anthropologists now believe that every human alive today carries DNA from a common ancestor "Eve," the notion of race and genetics, when looking at the evolution of the human species, is a problematic construct at best, and probably a defective one which will yield the kind of analysis that has led to the "existing Indian family" doctrine. Because of this, anthropologists tend to study culture and the rules and institutions of the culture to define it. Of course, if that were done here, it would totally remove the state courts from defining "Indian-ness," a role which some state dependency courts are not willing to permit without a fight.

28 What would it mean to a state juvenile court to say that an individual had "cultural ties" to the Indian community? How would this be judged? Must an individual speak an ancient tribal language? Wear traditional tribal clothing? Attend functions on the reservation? Vote in tribal elections? Or would connections to modern Indian culture be sufficient? And how would modern Indian culture be defined?

29 (1982) 231 Kan. 199, 643 P.2d 168, 175.

30 At common law, the unwed mother of a child had the right to custody of the child to the exclusion of the biological father. (*Ex Parte Knee* (1804) 127 Eng.Rep. 416; *Rex v. Soper* (1793) 101 Eng.Rep. 156; Annot., Right of mother to custody of illegitimate child (1927) 51 A.L.R. 1507, 1512; accord, Cal.Civ. Code, former § 200, repealed by Stats. 1975, ch. 1244, § 4, p. 3195; *Guardianship of Smith* (1954) 42 Cal.2d 91, 93.)

The modern trend is to abandon cruel and outmoded terms like "illegitimate" in referring to children. In fact, the Uniform Parentage Act (the Act) was part of a package of legislation introduced in 1975 as Senate Bill No. 347. The purpose of the legislation was to eliminate the legal distinction between legitimate and illegitimate children. The Act followed in the wake of United States Supreme Court decisions mandating equal treatment of legitimate and illegitimate children. (See, e.g., *Levy v. Louisiana* (1968) 391 U.S. 68.)

A press release issued on October 2, 1975, described Senate Bill No. 347 this way: "The bill, as

amended, would revise or repeal various laws which now provide for labeling children as legitimate or illegitimate and defining their legal rights and those of their parents accordingly. In place of these cruel and outmoded provisions, SB 347 would enact the Uniform Parentage Act which bases parent and child rights on the existence of a parent and child relationship rather than on the marital status of the parents." (*Johnson v. Calvert* (1993) 5 Cal.4th 84, 88-89.)

31 In reaching this conclusion, the court relied on the Guidelines for State Courts, promulgated by the Bureau of Indian Affairs of the Department of the Interior on November 16, 1979, at p. 67586:

> the determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe is conclusive. . . .

32 *In re Junious M., supra,* 144 Cal.App.3d at 796, citing *A.B.M. v. M.H.* (Alaska 1982) 651 P.2d 1170, 1173.

33 The Second District in *In re Wanomi P.* (1989) 216 Cal.App.3d 156, 168, did, in dicta, cite with approval the *Baby Boy L.* court's interpretation of the ICWA as primarily concerning the maintenance of the family and tribal relationship existing in Indians homes, and the establishment of minimum standards for the removal of Indian children from their existing Indian environment. However, that case involved a Canadian tribe in Nova Scotia, and the court determined the ICWA did not apply because a foreign tribe was involved which had not registered with the Bureau of Indian Affairs.

34 (1990) 226 Cal.App.3d 655.

35 *Id.* at 666.

36 (1989) 216 Cal.App.3d 156.

37 (1991) 229 Cal.App.3d 404.

38 (1989) 490 U.S. 30.
39 Tellinghuisen, *The Indian Child Welfare Act of 1978: A Practical Guide with [Limited] Commentary* (1989) 34 S.D.L.Rev. 660, 671.

40 *In re Lindsay C., supra,* 229 Cal.App.3d at 412.

41 (1996) 41 Cal.App.4th 1483.

42 The United States Supreme Court's opinion in *Holyfield* supports this view by analogy. In

Holyfield, the states were attempting to use state law, rather than federal law, to determine the "domicile"of the Indian child. The United States Supreme Court found that to be error, because Congress clearly intended that a uniform federal rule apply. To interpret the ICWA in any other way would perpetuate the problem the states were responsible for creating. 490 U.S. at 45.

43 Whether a federal statute should be construed to preempt a state statute is basically a question of Congressional intent. Did Congress, in enacting the federal statute, intend to exercise its constitutionally delegated authority to set aside the laws of the states? If so, the Supremacy Clause requires courts to follow federal, not state, law. (*Barnett Bank of Marion County, N.A. v. Nelson* (1996) 517 U.S. 25.) Congress can pre-empt state law by so stating in express terms (E.g., *Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 525.) Congressional intent to pre-empt state law in a particular area can also be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. (*Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218.) In a third category, federal law may pre-empt state law to the extent it actually conflicts with federal law, thereby making compliance with both laws impossible. *(Florida Lime & Avocado Growers, Inc. v. Paul* (1963) 373 U.S. 132, 142-143.) An intent to preempt state law can also be found where the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Hines v. Davidowitz* (1941) 312 U.S. 52, 67.)

44 *Mississippi Band of Choctaw Indians v. Holyfield, supra,* 490 U.S. at 37.

45 See L. Graham, *"The Past Never Vanishes": A Contextual Critique of the Existing Indian Family Doctrine*, 23 Am. Indian L. Rev. 1, 21.

46 *Id.* at 23.

47 *Lehr v. Robertson* (1983) 463 U.S. 248, 256.

48 See *Mississippi Band of Choctaw Indians v. Holyfield, supra,* 490 U.S. at 33, fn. 1.

49 See *Griffin v. Illinois* (1956) 351 U.S. 12; *Douglas v. California* (1963) 372 U.S. 359; and *Evitts v. Lucey* (1985) 469 U.S. 382.
50 *Mississippi Band of Choctaw Indians v. Holyfield, supra,* 490 U.S. at 52.

51 C. Sevilla, *Pirating Facts into the Record: Combating the Fact Smuggler,* CCAP Seminar Materials (November 6, 1998).

52 *In re Bridget R., supra,* 41 Cal.App.4th at 1507.

53 *Id.* at 1508.

54 The entire concept of race is illusive. In *Saint Francis College v. Al-Khazraji* (1987) 481 U.S.

604, the United States Supreme Court acknowledged a substantial lack of uniformity in the "modern" definition of race. (See 481 U.S. at pp. 610-611, and fn. 4.)

Justice White, writing for a unanimous court, noted that the tripartite division of humanity into three races (Negroid, Mongoloid and Caucasoid) had been criticized as arbitrary by anthropologists and biologists, and that some scientists had concluded that "... racial classifications are for the most part sociopolitical, rather than biological, in nature." (*Saint Francis College, supra*, 481 U.S. at p. 610, fn. 4.)

55 *Manzanares v. Safeway Stores, Inc.* (10th Cir. 1979) 593 F.2d 968, 971.

56 M. Moratto, California Archeology 3 (1984).

57 In *Sandhu v. Lockheed Missiles & Space Co.* (1994) 26 Cal.App.4th 846, 857, the court observed that:

Current dictionary and encyclopedic definitions reflect the same lack of unanimity. Webster's Ninth New Collegiate Dictionary (1990) defines race to include, inter alia, "a family, tribe, people, or nation belonging to the same stock," and "a class or kind of people unified by community of interests, habits or characteristics"; the Encyclopaedia Britannica divides people into six to ten "geographical races" [footnote omitted]. (The New Encyclopaedia Britannica Micropaedia Ready Reference (1993) p. 876); the World Book divides them into nine geographical races including "Indian" (16 World Book (1991) p. 55); and the Encyclopaedia Americana identifies six major races, including "Races of the Indian Subcontinent" (23 Encyclopaedia Americana (1987), pp. 116-118). The "modern definition" of race thus appears as equivocal now as it did to the Supreme Court in 1987.

A review of census data also reflects how the pragmatic definition of race has evolved historically. Until 1810, the Bureau of the Census only recorded the White population. From 1810 to 1850, it recorded White and "negro." From 1860-1970 it recorded White, Negro and "other races," including Indian (Native American), Japanese and Chinese. (Historical Statistics of the U.S., Colonial Times to 1970, pt. 1, U.S. Dept. of Commerce, Bur. of the Census (1970) Table 91-104, p. 14.) By 1950, the census had broken down the "nonwhite population" into 9 racial categories, including "Asian Indians" (Statistical Abstract of the U.S. (1960) p. 28, chart 25, fn. 1), whereas "[persons of Mexican birth or ancestry who are not definitely [Native American] Indian or of other nonwhite stock" were included in the White population. (*Id*. at p. 2.) The 1980 census identified 15 racial groups, including "Asian Indian." (Statistical Abstract of the U.S. (1990) p. 4.) The Bureau of the Census notes that its use of "race" "does not denote any clear cut scientific definition of biological stock...." (*Ibid*.; Statistical Abstract of the U.S., supra, at p. 2.)

58 (1980) 447 U.S. 134, 156-157

59 *Id.* at 154.

60 *Id.* at 155.

61 *Id.* at 156.

62 (1995) 514 U.S. --, 131 L.Ed.2d 626, 638-643.

63 *In re Bridget R., supra,* 41 Cal.App.4th at 1511.

64 (1996) 43 Cal.App.4th 505.

65 *Mississippi Band of Choctaw Indians v. Holyfield, supra,* 490 U.S. at 52.

66 (1996) 45 Cal.App.4th 1483.

67 (1997) 59 Cal.App.4th 703.

68 *Id.* at 721.

69 59 Cal.App..4th at 721.

70 *Quinn v. Walters* (1993) 117 Or.App.579, 584, fn. 2, and *State, In interest of D.A.C.* (Utah App. 1997) 933 P.2d 993, 999.

71 (1998) 65 Cal.App.4th 79.

72 Id. at 85, citing *Mississippi Band of Choctaw Indians v. Holyfield, supra,* 490 U.S. at 52.

73 B. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts,* 73 N.D.L. Rev. 395 (1997).

74 25 U.S.C. § 1914.

75 Although it might not provide equitable relief in the case prompting its initiation, a 42 U.S.C. § 1983 action for deprivation of civil rights under color of state law may be actionable in federal court, although substantial immunity issues would be present. But if such a suit were successful, it could indirectly signal the death knell of the "existing Indian family" doctrine in California.