

**THE END OF “EXISTING INDIAN FAMILY”  
JURISPRUDENCE: *HOLYFIELD* AT 20, *IN THE MATTER OF  
A.J.S.*, AND THE LAST GASPS OF A DYING DOCTRINE**

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In this case Baby Boy L. is only 5/16ths Kiowa Indian, has never been removed from an Indian family and so long as the mother is alive to object, would probably never become a part of the Perciado or any other Indian family. While it is true that [the Indian Child Welfare] Act could have been more clearly and precisely drawn, we are of the opinion that to apply the Act to a factual situation such as the one before us would be to violate the policy and intent of Congress rather than uphold them.

....

We conclude the trial court was correct in its determination that the ICWA, by its own terms, does not apply to these proceedings . . . .

From this point in ICWA interpretation and the development of common law, we are persuaded that abandonment of the existing Indian family doctrine is the wisest future course. Although we do not lightly overrule precedent, neither are we inextricably bound by it. *Baby Boy L.* is ready to

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1. *In re Adoption of Baby Boy L.*, 643 P.2d 168, 175–76 (Kan. 1982), *overruled by In re A.J.S.*, 204 P.3d 543 (Kan. 2009).

be retired.<sup>2</sup>

## I. INTRODUCTION

It is often said that “hard cases . . . make bad law.”<sup>3</sup> Few cases are harder than those in which a judge must decide whether to remove a child from her family, or where to place a child who has been removed from his family. Those cases become even harder when the child is American Indian.<sup>4</sup>

For years, courts in a number of states did their best to prove the aphorism true. The Indian Child Welfare Act (ICWA)<sup>5</sup> was enacted to protect the interests of Indian children, Indian parents, and Indian tribes.<sup>6</sup> However, some state courts, confronted with the types of hard cases that are abound in family law, created, then expanded, their own exception to the ICWA—an exception that ignored the ICWA’s specific language and allowed courts to set aside the Act when dealing with a child that was not part of an “existing Indian family.”

For some twenty-seven years, the “existing Indian family” doctrine has been central to ICWA jurisprudence. In nearly half of the states, either the courts have been forced to address whether the ICWA applies to an “Indian child”—a term clearly defined in the Act—who is not part of an “existing Indian family”—a term that did not exist until the Kansas Supreme Court invented it four years after the ICWA’s passage<sup>7</sup>—or legislatures have taken the question away from the courts. The U.S. Supreme Court’s only foray into ICWA jurisprudence, in *Mississippi Band of Choctaw Indians v. Holyfield*,<sup>8</sup> did not directly address the “existing Indian family” doctrine, but did provide the ammunition courts would need to shoot down the doctrine.

After a decade-and-a-half in which states adopted and rejected

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2. *In re A.J.S.*, 204 P.3d 543, 549 (Kan. 2009) (citation omitted).

3. *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting). The quotation may have originated in *United States v. Clark*, in which Justice John Marshall Harlan wrote, “it is the duty of all courts of justice to take care, for the general good of the community, that hard cases do not make bad law.” 96 U.S. 37, 49 (1877) (quoting Lord Campbell in *East India Co. v. Paul*, 7 Moo. P. C. C. 111 (1849)).

4. In this article, we generally use American Indian or Indian, rather than Native American. This preference is based in part on the use of the word “Indian” for legal purposes dating back to the Constitution itself, *see, e.g.*, U.S. CONST. art. I, § 8, cl. 3, and of the word in the Act that this article considers: the Indian Child Welfare Act, 25 U.S.C. § 1901 (2006) et seq.

5. 25 U.S.C. § 1901 et seq.

6. *See infra* Part II.A.

7. *See infra* Part II.B.

8. 490 U.S. 30 (1989).

the doctrine in roughly equal proportion, the tide began to turn. By 2009, the twentieth anniversary of the *Holyfield* decision, the “existing Indian family” doctrine had lost virtually all of its legitimacy after being abandoned by the very court that invented it.<sup>9</sup> Today, only six states employ the doctrine,<sup>10</sup> and two of those states have expressly limited its scope by refusing to apply it under certain circumstances.<sup>11</sup> Meanwhile, nineteen states<sup>12</sup> have rejected the doctrine. Four of those states—Kansas, Oklahoma, South Dakota, and Washington—previously had adopted the “existing Indian family” doctrine, only to reverse themselves either by statute<sup>13</sup> or in court.<sup>14</sup> In addition to Oklahoma and Washington, legislatures in Iowa, Minnesota, and

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9. See *infra* Part V.

10. These states include Alabama (S.A. v. E.J.P., 571 So. 2d 1187, 1189–90 (Ala. Civ. App. 1990) (where the child “has never been a member of an Indian family, has never lived in an Indian home, and has never experienced the Indian social and cultural world[. . .] to apply the ICWA to the facts of this case would be contrary to the congressional intent”), Indiana (*In re Adoption of T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988) (holding that the ICWA applies when Indian children are being removed from an Indian environment, and that where an Indian mother voluntarily gave up her child “the ICWA should not be applied to the present case in which the purpose and intent of Congress cannot be achieved thereby”), Missouri (C.E.H. v. L.M.W., 837 S.W.2d 947 (Mo. Ct. App. 1992); *In Interest of S.A.M.*, 703 S.W.2d 603 (Mo. Ct. App. 1986)), Kentucky (Rye v. Weasel, 934 S.W.2d 257 (Ky. 1996)), Louisiana (Hampton v. J.A.L., 658 So. 2d 331 (La. Ct. App. 1995)), and Tennessee (*In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880 (Tenn. Ct. App. Nov. 19, 1997)).

11. These states include Alabama (*Ex parte C.L.J.*, 946 So. 2d 880, 889 (Ala. Civ. App. 2006) (stating, “we may not extend the ‘Existing Indian Family’ exception to encompass situations in which the child’s mother is an Indian but the child is alleged to have had little to no contact with an Indian tribe”); S.H. v. Calhoun County Dep’t of Human Res., 798 So. 2d 684, 692 (Ala. Civ. App. 2001) (in refusing to grant an exception to the ICWA, holding “that in child-custody proceedings involving an ‘Indian child,’ as that term is defined in the ICWA, a state court must strictly construe and apply the provisions of the Act”), and Indiana (D.S. v. County Dep’t of Pub. Welfare of St. Joseph County (*In re D.S.*), 577 N.E.2d 572, 574 (Ind. 1991) (holding that “where the mother is a Native American Indian, the mother and child, at least presumptively for purposes of initiating ICWA inquiries, constitute an ‘Indian family’”).

12. These states include Alaska, Arizona, Colorado, Idaho, Illinois, Iowa, Kansas, Michigan, Minnesota, Montana, New Jersey, New York, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wisconsin.

13. See OKLA. STAT. ANN. tit. 10, §§ 40.1, 40.3 (West 2009), upheld by *Leatherman v. Yancey* (*In re Baby Boy L.*), 103 P.3d 1099 (Okla. 2004) (abrogating *In re S.C.*, 833 P.2d 1249 (Okla. 1992), and *In re Adoption of Baby Boy D.*, 742 P.2d 1059 (Okla. 1985)); see WASH. REV. CODE ANN. § 13.34.040(3) (West Supp. 2010) (abrogating *Crews v. Hope Servs.* (*In re Adoption of Crews*), 825 P.2d 305 (Wash. 1992)).

14. See *In re A.J.S.*, 204 P.3d 543, 549 (Kan. 2009) (overruling *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982)); *In re Adoption of Baade*, 462 N.W.2d 485 (S.D. 1990).

Wisconsin have barred state courts from adopting the doctrine.<sup>15</sup> In the remaining twelve states, the doctrine has been explicitly rejected by state high courts<sup>16</sup> or intermediate appellate courts.<sup>17</sup> Moreover, no new state has adopted the doctrine in more than a decade.<sup>18</sup>

California remains a curious case, but also remains reflective of the rest of the nation.

Among the states' appellate districts, only the Second Appellate District remains firmly committed to the "existing Indian family" doctrine,<sup>19</sup> albeit in a narrow set of circumstances,<sup>20</sup> and for reasons that have been roundly rejected by other courts.<sup>21</sup>

Meanwhile, the doctrine has been explicitly rejected in the First,<sup>22</sup> Third,<sup>23</sup> Fifth,<sup>24</sup> and Sixth<sup>25</sup> Appellate Districts.

15. IOWA CODE ANN. § 232B.5(2) (West 2006) (upheld by *In re R.E.K.F.*, 698 N.W.2d 147 (Iowa 2005)); MINN. STAT. § 260.771(2) (2008); Act 94, WIS. STAT. § 938.028(3)(a).

16. See *In re Adoption of T.N.F.*, 781 P.2d 973, 977 (Alaska 1989); *Indian Tribe v. Doe (In re Baby Boy Doe)*, 849 P.2d 925, 931 (Idaho 1993); *In re Adoption of Riffle*, 922 P.2d 510, 514 (Mont. 1996); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *L.S.W. v. K.B. (In re A.B.)*, 663 N.W.2d 625, 635–36 (N.D. 2003).

17. See *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960, 963 (Ariz. Ct. App. 2000); *In re N.B.*, 199 P.3d 16, 21 (Colo. App. 2007); *In re Adoption of S.S.*, 622 N.E.2d 832, 839 (Ill. App. Ct. 1993) [hereinafter *S.S. I*], *rev'd on other grounds*, 657 N.E.2d 935 (Ill. 1995) [hereinafter *S.S. II*]; *Dep't of Soc. Servs. v. Boyd (In re Elliott)*, 554 N.W.2d 32, 35 (Mich. Ct. App. 1996); *Jeffrey A. v. Tohono O'odham Nation (In re Baby Boy C.)*, 805 N.Y.S.2d 313, 322–23 (N.Y. App. Div. 2005); *Quinn v. Walters*, 845 P.2d 206, 209 (Or. Ct. App. 1993) [hereinafter *Quinn I*], *rev'd on other grounds*, 881 P.2d 795 (Or. 1994) [hereinafter *Quinn II*]; *D.J.C. v. P.D.C. (State in Interest of D.A.C.)*, 933 P.2d 993, 999 (Utah Ct. App. 1997).

18. The last state to adopt the "existing Indian family" doctrine was Tennessee; see *In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880 (Tenn. Ct. App. Nov. 19, 1997).

19. See *L.A. County Dep't of Children & Family Servs. v. Arturo G.* (*In re Santos Y.*), 112 Cal. Rptr. 2d 692 (Ct. App. 2001); *James R. v. Cindy R. (In re Bridget R.)*, 49 Cal. Rptr. 2d 507 (Ct. App. 1996).

20. See *Bridget R.*, 49 Cal. Rptr. 2d at 516 (limiting "existing Indian family" doctrine to situations when neither the Indian child nor either parent has any "significant social, cultural or political relationship with their tribe").

21. See *infra* Part IV.C.

22. See, e.g., *Dennis H. v. Michael S. (In re Adoption of Lindsay C.)*, 280 Cal. Rptr. 194, 201 (Ct. App. 1991) (applying the ICWA because the doctrine does not pertain to the specific facts of the case).

23. See, e.g., *S. v. S. (In re Adoption of Hannah S.)*, 48 Cal. Rptr. 3d 605, 610 (Ct. App. 2006).

24. See, e.g., *Kern County Dep't of Human Servs. v. Mishiola S. (In re Alicia S.)*, 76 Cal. Rptr. 2d 121, 129 (Ct. App. 1998) ("[T]he existing Indian family doctrine frustrates the policies underlying the ICWA. . . .").

25. See, e.g., *Santa Cruz Human Res. Agency v. Paz M. (In re Vincent M.)*, 59 Cal. Rptr. 3d 321, 323 (Ct. App. 2007).

The Fourth Appellate District appears to have its own split. The Third Division has embraced the doctrine.<sup>26</sup> However, the Second Division subsequently questioned whether it is bound by the Third Division’s holding,<sup>27</sup> and more recently went so far as to say it might reject the doctrine altogether.<sup>28</sup>

Moreover, the California Legislature passed a law expressly repudiating the doctrine.<sup>29</sup> The Second District renewed its stance that the doctrine is necessary to preserve the constitutionality of the ICWA<sup>30</sup> while the Sixth District, which previously had adopted the doctrine,<sup>31</sup> held that the statute required application of the ICWA and rejection of the doctrine.<sup>32</sup>

The California Supreme Court has refused to review these cases,<sup>33</sup> despite a specific request by Judge Bamattre-Manoukian in her concurrence in *Vincent M.* that they do so.<sup>34</sup> Similarly, the U.S. Supreme Court has refused on several occasions to review decisions on both sides of the “existing Indian family” doctrine.<sup>35</sup>

This Article will demonstrate how state court judges and state legislatures have effectively neutered the “existing Indian family” doctrine in most jurisdictions where it has been considered, relegat-

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26. See *In re Alexandria Y.*, 53 Cal. Rptr. 2d 679, 686 (Ct. App. 1996).

27. See *Orange County Soc. Servs. Agency v. Renea Y.* (*In re Suzanna L.*), 127 Cal. Rptr. 2d 860, 868 (Ct. App. 2002) (“On the facts before us, however, *we need not decide whether to accept the existing Indian family doctrine*—much less whether to accept it as a matter of legislative intent or constitutional imperative.”) (emphasis added).

28. *C.B. v. A.H.*, No. E036849, 2005 WL 2082854, \*5 (Cal. Ct. App. Aug. 30, 2005) (“[I]f we were to examine the rationale for the doctrine closely enough, we might conclude that we must reject it altogether.”).

29. CAL. WELF. & INST. CODE § 224(c) (West 2008), *previously codified at* CAL. WELF. & INST. CODE § 360.6(c).

30. *L.A. County Dep’t of Children & Family Servs. v. Arturo G.* (*In re Santos Y.*), 112 Cal. Rptr. 2d 692 (Ct. App. 2001).

31. *Crystal R. v. Superior Court of Santa Cruz County*, 69 Cal. Rptr. 2d 414, 427 (Ct. App. 1997).

32. *Santa Cruz Human Res. Agency v. Paz M.* (*In re Vincent M.*), 59 Cal. Rptr. 3d 321, 334 (Ct. App. 2007) (“An unambiguous federal statute and an unambiguous state statute require the application of the ICWA’s substantive provisions whenever the proceedings involve an Indian child. The plain language of these statutes precludes the existence of an exception where there is no existing Indian family.”).

33. See, e.g., *Vincent M.*, 59 Cal. Rptr. 3d at 334 (examining California cases after the enactment of CAL. WELF. & INST. CODE § 360.6 and the United States Supreme Court’s and California Supreme Court’s failure to address the doctrine).

34. *Id.* at 339–40.

35. See, e.g., *Hoots ex rel. A.B. v. K.B.*, 541 U.S. 972 (2004); *Fort Peck Assiniboone & Sioux Tribes v. Tubridy*, 517 U.S. 1104 (1996). See also *Leslie Scarlotte Tubridy v. Betty Jo Iron Bear* (*In re Adoption of S.S.*) (*S.S. II*), 657 N.E.2d 935, 944 (Ill. 1995) (listing cases that have not been granted *certiorari*).

ing it to little more than a troublesome footnote in a handful of states. Part II will provide the historical background for this discussion, including the passage of the ICWA, the early development of the doctrine, and *Holyfield*, the only case to date in which the U.S. Supreme Court has tackled the ICWA.<sup>36</sup> Part III will show how *Holyfield* forced courts to reconsider the “existing Indian family” jurisprudence, giving some states ammunition to reject the doctrine, and prompting other states to seek new justifications for the doctrine.<sup>37</sup> Part IV recaps the last dozen years or so, which have seen a wholesale rejection of the “existing Indian family” doctrine in every new jurisdiction to consider it.<sup>38</sup> Part V analyzes *In the Matter of A.J.S.*, in which the Kansas Supreme Court overturns *In re Adoption of Baby Boy L.* and rejects the “existing Indian family” doctrine, striking it down in the very state where it began.<sup>39</sup> Finally, in Part VI we conclude that although the “existing Indian family” doctrine is not completely dead, its rationale has been persuasively shown to be contrary to both the plain language and the intent of the ICWA.<sup>40</sup> We suggest that *A.J.S.* provides new grounds to challenge the “existing Indian family” doctrine even in the states where it still holds sway, and we predict that the tide will continue to turn against the doctrine until eventually it is completely rejected.<sup>41</sup>

## II. BACKGROUND: THE INDIAN CHILD WELFARE ACT, THE “EXISTING INDIAN FAMILY” DOCTRINE, AND *MISSISSIPPI BAND OF CHOCTAW INDIANS V. HOLYFIELD*

### A. *The Indian Child Welfare Act*

Congress enacted the ICWA in 1978 amid “rising concern in the mid-1970’s over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.”<sup>42</sup> In the years leading up to the ICWA’s enactment,

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36. *Infra* Part II.

37. *Infra* Part III.

38. *Infra* Part IV.

39. *Infra* Part V.

40. *Infra* Part VI.

41. *See infra* Part V. Of course, absent some *federal* statutory or judicial pronouncement that the “existing Indian family” doctrine violates the ICWA or is otherwise unlawful, complete rejection will need to come state-by-state.

42. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989).

roughly twenty-five to thirty-five percent of all Indian children were separated from their families and placed with non-Indian adoptive homes, foster homes, or institutions.<sup>43</sup> Congress called the disparity between Indian and non-Indian placement “shocking.”<sup>44</sup> In some states, for example, “the risk run by Indian children of being separated from their parents [was] nearly 1,600 percent greater than it [was] for non-Indian children,” an “Indian child welfare crisis . . . of massive proportions.”<sup>45</sup> Several witnesses described the detrimental effects on Indian children removed from their cultural environments.<sup>46</sup> Tribes also expressed concern that state agencies were removing Indian children based on misunderstandings of tribal culture and values.<sup>47</sup> In passing the ICWA, Congress stated that “[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today.”<sup>48</sup>

Many reasons likely contributed to this tragedy,<sup>49</sup> but the result was unmistakable: Tribal communities were being stripped of their most vital resource—their children.<sup>50</sup> Further, the practice of removing Indian children from their tribal communities was occurring in most cases “without due process of law.”<sup>51</sup> For these and other reasons, including the “abuses of the rights of Indian tribes . . . in the

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43. H.R. REP. NO. 95-1386, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7531.

44. *Id.*

45. *Id.*

46. *See, e.g., Indian Child Welfare Program, Hearings Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs*, 93rd Cong., 2d Sess., 46 (1974) (statement of Dr. Joseph Westermeyer, Department of Psychiatry, University of Minnesota).

47. *See, e.g., Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong., 2d Sess., 191–92 (1978) [hereinafter *1978 ICWA Hearings*] (statement of Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians, appearing on behalf of the National Tribal Chairmen’s Association).

48. H.R. REP. NO. 95-1386, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7531, 1978 WL 8515.

49. One possible reason might have been a fundamental misunderstanding by state officials of the importance of extended families in child-rearing within tribal communities. *Id.* at 10. Another might have been the economic incentive for child placement agencies to remove Indian children. *Id.* at 11–12. Still another might have been basic racial discrimination, or unawareness at best, and the dominant society’s unwillingness to recognize the value in direct “parent”-like relationships between an Indian child and his or her extended family or larger tribal community. In America’s non-Indian communities, the role of primary parent or guardian is typically reserved to a child’s actual in-home parents or guardians.

50. *See* 25 U.S.C. § 1901(4) (2006).

51. H.R. REP. NO. 95-1386, at 11.

process,”<sup>52</sup> Congress enacted the ICWA for the dual purpose of “protect[ing] the best interests of Indian children and [promoting] the stability and security of Indian tribes.”<sup>53</sup>

To remedy this situation, the ICWA created a statutory scheme that imposed procedural and substantive protections for three parties: the Indian child, the Indian parents, and the child’s tribe.<sup>54</sup> For example, in an involuntary child custody proceeding, a tribe is entitled to formal notice of the action, and a court may not terminate a parent’s rights without a determination that maintaining the status quo is likely to result in the child’s serious emotional or physical damage.<sup>55</sup> Prior to any such termination, the state must make “active efforts” to provide remedial services and rehabilitative programs designed to prevent the breakup of the child’s family.<sup>56</sup> Finally, in any Indian child adoption proceeding, the court generally must recognize a preference to placement with the child’s extended family, other members of the child’s tribe, or with other Indian families.<sup>57</sup> Further, when an Indian child resides on or is domiciled within an Indian reservation, the ICWA grants exclusive jurisdiction over custody proceedings involving the child to that tribe.<sup>58</sup>

Both when articulating the reasons for the ICWA, and in drafting the Act’s protective measures, Congress placed what the *Holyfield* Court called a “considerable emphasis”<sup>59</sup> on the negative effects suffered by *tribes* when children were removed.<sup>60</sup> These concerns were expressed in the findings included in the ICWA, specifically “that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.”<sup>61</sup> In order to protect this tribal interest, Congress included in the ICWA provisions

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52. *Id.* at 27.

53. 25 U.S.C. § 1902 (2006).

54. *Id.* §§ 1901–1963.

55. *Id.* §§ 1912(a), 1912(f).

56. *Id.* § 1912(d).

57. *Id.* § 1915(a).

58. *Id.* § 1911(a).

59. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34 (1989).

60. 1978 ICWA Hearings, *supra* note 47, at 193 (quoting Mississippi Band of Choctaw Indians Chief Calvin Isaac: “Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes’ ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.”).

61. 25 U.S.C. § 1901(3) (2006).

governing when a tribe retains jurisdiction over a case and laying out the necessary conditions for state jurisdiction.<sup>62</sup> Tribes were afforded the right to intervene in state court cases involving Indian children.<sup>63</sup> Finally, in what the *Holyfield* Court called one of the ICWA’s “most important substantive requirement[s],”<sup>64</sup> the ICWA required that Indian children be placed according to preferences.<sup>65</sup> This favored placement first within the family, then within the tribe, and then within another Indian family, before considering non-Indian placement—unless a court found “good cause” to the contrary.<sup>66</sup>

*B. In re Adoption of Baby Boy L. and the Early Years of the “Existing Indian Family” Doctrine*

*Adoption of Baby Boy L.* is a classic example of a hard case. Baby Boy L. was born on January 29, 1981, in Wichita, Kansas.<sup>67</sup> He was five-sixteenths Indian by blood,<sup>68</sup> the child of a non-Indian mother and a father who was five-eighths Indian by blood and was an enrolled member of the Kiowa Tribe of Oklahoma.<sup>69</sup> On the day Baby Boy L. was born, his mother executed a consent to adoption that “specifically directed and limited to the adoptive parents named in the consent.”<sup>70</sup>

There is no mystery why neither Baby Boy L.’s mother, nor the courts, wanted his father to have custody. On the day Baby Boy L. was born, his father was incarcerated at the Kansas State Penitentiary-Industrial Reformatory and had convictions for battery, battery of police officers, inciting a riot and resisting arrests.<sup>71</sup> In holding that the father was unfit to be a parent, the trial court took judicial notice of the father’s prior drug use and of the father’s admission to “numerous crimes, including armed robbery, that [he] apparently has never been charged with.”<sup>72</sup> Furthermore, the Kansas Supreme Court noted evidence that the father “was violent toward members of his own family, that he beat and abused the child’s mother, before and

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62. *Id.* §§ 1911(a)–1911(b).

63. *Id.* § 1911(c).

64. *Holyfield*, 490 U.S. at 36.

65. *Id.* at 36–37.

66. 25 U.S.C. § 1915(a) (2006).

67. *In re Adoption of Baby Boy L.*, 643 P.2d 168, 172 (Kan. 1982), *overruled by In re A.J.S.*, 204 P.3d 543 (Kan. 2009).

68. *Id.* at 173.

69. *Id.* at 172.

70. *Id.*

71. *Id.* at 179.

72. *Id.* (citing the trial court; internal quotations omitted).

during the time she was pregnant, and that he broke into her house and stole personal property from her.”<sup>73</sup> It was no wonder, then, that the Kansas Supreme Court upheld the finding that Baby Boy L.’s father was unfit.<sup>74</sup>

That, however, placed the court in a dilemma: Baby Boy L.’s father was unfit, and his mother had consented to adoption only by a particular non-Indian family:

The mother of Baby Boy L. gave a consent to the appellees to adopt her child. The consent was limited to the two named appellees and was for their benefit only. She has made it clear that if this adoption was denied for any reason, or if an attempt was made to place the child for adoption under the terms of the [Indian Child Welfare] Act, she would revoke her consent and again take custody of her child, and never consent to his placement with his father or with the father’s extended Indian family, the Kiowa Tribe, the grandparents or anyone else.<sup>75</sup>

While the mother rejected the application of the ICWA, the statute itself was clear. As the Kansas Supreme Court recognized, only two conditions are required under the Act: a “child custody proceeding” regarding an “Indian child,” as those terms are defined in the Act.<sup>76</sup> The Act’s definition of “child custody proceeding” specifically includes “‘adoptive placement’ which shall mean the permanent placement of an Indian child for adoption, *including any action resulting in a final decree of adoption.*”<sup>77</sup> The court concluded that Baby Boy L., who met the Kiowa Tribe’s enrollment requirements,<sup>78</sup> and was enrolled by the tribe, over his mother’s objections, shortly after his birth,<sup>79</sup> “must be considered an ‘Indian child’ within the definitions of the Act.”<sup>80</sup> So if there are only two prerequisites for the ICWA to apply, and those prerequisites are satisfied, how could the court avoid the ICWA’s preferences for placement with Baby Boy L.’s extended Indian family, other Kiowa Indians, or other Indian families?

The court took two avenues of attack. First, by selectively citing

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73. *Id.* at 180.

74. *Id.*

75. *Id.* at 177.

76. *Id.* at 176 (citation omitted).

77. 25 U.S.C. § 1903(1)(iv) (2006) (emphasis added).

78. *Adoption of Baby Boy L.*, 643 P.2d at 176.

79. *Id.* at 173.

80. *Id.* at 176.

from the ICWA, the court asserted that “the overriding concern of Congress and the proponents of the Act was . . . to set minimum standards for the removal of Indian children from their existing Indian environment.”<sup>81</sup> The court cited numerous sections of the Act to support its assertion that “the underlying thread that runs throughout the entire Act . . . [is] that *the Act is concerned with the removal of Indian children from an existing Indian family unit and the resultant breakup of the Indian family.*”<sup>82</sup> Those selected sections of the ICWA led the court to conclude that, “to apply the Act to a factual situation such as the one before us would be to violate the policy and intent of Congress rather than uphold them.”<sup>83</sup>

In its second, less-developed argument, the court simply concluded that trying to apply the ICWA to Baby Boy L.’s adoption would be futile because his mother would somehow prevent it.<sup>84</sup> The court noted that the mother had consented to adoption only by the appellees, and would never consent to the application of the ICWA’s placement preferences.<sup>85</sup>

Any attempt to effect the preferential placement contemplated by the Act would necessarily result in the removal of the baby from the custody of appellees and thereupon there being no consent by the mother to any such action, the child would be returned to her. We do not believe that Congress intended such ridiculous results nor do we believe that the Kiowa Tribe could in good faith recommend such a procedure.<sup>86</sup>

The 1982 *Baby Boy L.* decision quickly had a dramatic impact on the implementation of the ICWA in a number of states. Oklahoma became the second state to adopt the “existing Indian family” doctrine, in 1985.<sup>87</sup> Although the Oklahoma court neither cited nor made reference to the Kansas case, their rationales are virtually identical.<sup>88</sup> The next year, the Missouri Court of Appeals followed

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81. *Id.* at 175.

82. *Id.* (emphasis added).

83. *Id.*

84. *Id.* at 177.

85. *Id.*

86. *Id.*

87. *See In re Adoption of Baby Boy D.*, 742 P.2d 1059, 1064 (Okla. 1985).

88. *Compare id.* at 1062–64 (concluding that Congress’s concern, that the ICWA addresses, is the unwarranted breakup of Indian families by non-Indian actors, and is therefore applicable where courts are presented with Indian children being removed from an Indian environment), *with Adoption of Baby Boy L.*, 643 P.2d at 174–76 (holding that the Act is concerned with the removal of Indian children from Indian

suit,<sup>89</sup> quoting the Kansas case at length<sup>90</sup> and ultimately “agree[ing] with the rationale of *Baby Boy L.*”<sup>91</sup> The South Dakota Supreme Court adopted the “existing Indian family” doctrine in 1987,<sup>92</sup> citing both the Kansas and Missouri cases favorably.<sup>93</sup> In 1988, the Supreme Court of Indiana, in deciding *In re Adoption of T.R.M.*,<sup>94</sup> cited to the Oklahoma court.<sup>95</sup> The day after *T.R.M.*, the Supreme Court of New Jersey became the first court to reject the “existing Indian family” doctrine.<sup>96</sup> By then, five states had adopted the Kansas court’s rationale, with only one rejecting it.

Despite the Supreme Court of Kansas’s repeated citation to the ICWA, the court’s invocation of “the policy behind the adoption of the Act”<sup>97</sup> and “careful study of the legislative history,”<sup>98</sup> none of that legislative history makes its way into the court’s analysis.<sup>99</sup> The flaws in the Kansas Supreme Court’s approach—its failure to consider the interests of the tribe itself, and its willingness to allow a parent to subvert the intent of the ICWA—would be made clear seven years later, in the first and only ICWA case to reach the U.S. Supreme Court.<sup>100</sup>

### C. Mississippi Band of Choctaw Indians v. Holyfield: *The U.S. Supreme Court and the Purposes Behind the ICWA*

Twins B.B. and G.B. were born December 29, 1985, in Gulfport, Mississippi.<sup>101</sup> Both of their parents were members of the Mississippi

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families and is therefore applicable to those situations, not those in which a non-Indian mother has arranged for an adoption of her partly Indian child who has never been in an Indian environment).

89. *In Interest of S.A.M.*, 703 S.W.2d 603 (Mo. Ct. App. 1986) (holding that the ICWA did not apply because S.A.M. was not a member of an existing Indian family).

90. *Id.* at 608–09.

91. *Id.* at 609.

92. *Claymore v. Serr*, 405 N.W.2d 650, 654 (S.D. 1987).

93. *Id.* at 653. In citing to *In Interest of S.A.M.*, the South Dakota court mistakenly cites to *Miller v. Miller*, which begins on the same page that *S.A.M.* concludes. See *Miller v. Miller*, 703 S.W.2d 609 (Mo. Ct. App. 1986); *In Interest of S.A.M.*, 703 S.W.2d at 603.

94. 525 N.E.2d 298 (Ind. 1988).

95. *Id.* at 302–03.

96. See *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988).

97. *In re Adoption of Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982), *overruled by In re A.J.S.*, 204 P.3d 543 (Kan. 2009).

98. *Id.*

99. See *id.* at 171–76.

100. See discussion *infra* Part II.C.

101. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989).

Band of Choctaw Indians, and both were domiciled on the Choctaw Indian Reservation, some two hundred miles from Gulfport.<sup>102</sup> The twins were born out of wedlock,<sup>103</sup> and a trial court later noted that their mother “went to some efforts to see that they were born outside the confines of the Choctaw Indian Reservation.”<sup>104</sup> The twins’ mother and father signed forms consenting to their adoption on January 10, 1986, and January 11, 1986, respectively.<sup>105</sup> The Holyfields filed their petition for adoption on January 16, and the final adoption decree was issued on January 28.<sup>106</sup> Two months later, the Mississippi Band of Choctaw Indians moved to vacate the adoption decree, noting that the ICWA gave the tribal court exclusive jurisdiction over children domiciled on the Reservation.<sup>107</sup> The trial court rejected that argument, stating that the twins had never resided on the Reservation and that their parents had gone to great lengths to make sure that such was the case.<sup>108</sup> On appeal, the Supreme Court of Mississippi affirmed, finding that the twins had never been domiciled on the Reservation.<sup>109</sup>

The U.S. Supreme Court was not faced in *Holyfield* with the “existing Indian family” doctrine, as it evolved from *Baby Boy L*. However, the *Holyfield* court made several findings that are directly relevant to “existing Indian family” jurisprudence.

First, the Court noted the direct and detrimental consequences to Indian children of being raised in non-Indian environments: “[I]t is clear that Congress’[s] concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental impact on the children themselves of such placements outside their culture.”<sup>110</sup> The Court noted extensive testimony from mental health professionals about Indian children, raised in non-Indian environments, suffering identity crises upon learning of their heritage.<sup>111</sup> The Kansas court, in focusing only on whether an *Indian*

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102. *Id.*

103. *Id.*

104. *Id.* at 39 (citation omitted).

105. *Id.* at 37–38, 38 n.8.

106. *Id.* at 38.

107. *Id.*

108. *Id.* at 39.

109. *Id.* (“At no point in time can it be said the twins resided on or were domiciled within the territory set aside for the reservation.”) (quoting *Miss. Band of Choctaw Indians v. Holyfield (In re B.B.)*, 511 So. 2d 918, 921 (Miss. 1987)).

110. *Id.* at 49–50.

111. *Id.* at 33 n.1, 50 n.24.

family was affected,<sup>112</sup> and not on how the *Indian child* might suffer as a result of placement in a non-Indian family, ignored at least one of the central purposes of the ICWA.

Second, the *Holyfield* Court concluded that Indian tribes have their own unique and compelling interest in the placement of Indian children: “While much of the testimony again focused on the harm to Indian parents and their children who were involuntarily separated by decisions of local welfare authorities, *there was also considerable emphasis on the impact on the tribes themselves of the massive removal of their children.*”<sup>113</sup> The Tribal Chief of the Mississippi Band of Choctaw Indians had himself testified during hearings on the ICWA, stating that Indian children raised in non-Indian homes were less likely to take up and pass on the tribe’s culture and values.<sup>114</sup> Provisions in the ICWA concerning notice to the tribe and preserving tribal jurisdiction over some cases were express efforts to uphold that tribal interest: “The ICWA thus, in the words of the House Report accompanying it, ‘seeks 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.*’”<sup>115</sup> The Kansas court’s focus exclusively on the “existing Indian family,”<sup>116</sup> to the exclusion of the Kiowa Tribe’s interests, ignored this vital component of the ICWA.

Finally, the Court in *Holyfield* found that the parents’ efforts to avoid ICWA jurisdiction by giving birth and consenting to adoption far away from the Choctaw Indian Reservation could not be allowed to subvert the Act.<sup>117</sup> Allowing a parent or parents to undermine the ICWA would be “inconsistent with what Congress intended.”<sup>118</sup> “Permitting individual members of the tribe to avoid tribal exclusive jurisdiction by the simple expedient of giving birth off the reservation would, to a large extent, nullify the purpose the ICWA was intended to accomplish.”<sup>119</sup> If individual Indian parents could not subvert the ICWA, it is hard to believe that individual non-Indian parents, such as Baby Boy L.’s mother, would have any more authority to do so.

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112. See *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982), *overruled by In re A.J.S.*, 204 P.3d 543 (Kan. 2009).

113. *Holyfield*, 490 U.S. at 34 (emphasis added).

114. *Id.* at 34–35.

115. *Id.* at 37 (emphasis added) (citation omitted).

116. See *In re Adoption of Baby Boy L.*, 643 P.2d at 168.

117. *Holyfield*, 490 U.S. at 51.

118. *Id.*

119. *Id.* at 52.

### III. RETHINKING THE ICWA AFTER *HOLYFIELD*: NEW REASONS TO REJECT THE “EXISTING INDIAN FAMILY” DOCTRINE, AND NEW REASONS TO EMBRACE IT

#### A. *Holyfield*, *Legislative Intent*, and *Rejecting the “Existing Indian Family” Doctrine*

Although *Holyfield* did not directly address the “existing Indian family” doctrine, the case’s effect was felt almost immediately in the state jurisprudence surrounding the doctrine. Within the year, Alaska’s Supreme Court became the second state high court to reject the doctrine,<sup>120</sup> citing *Holyfield* as persuasive on three accounts. First, according to the *T.N.F.* court, *Holyfield* stood for the proposition that the ICWA was enacted to protect not only the interest of Indian families, but also that of Indian tribes and Indian children.<sup>121</sup> The Alaska court stated that “[r]eliance on a requirement that the Indian child be part of an Indian family for the Act to apply would undercut the interests of Indian tribes and Indian children themselves that Congress sought to protect through the notice, jurisdiction and other procedural protections set out in [the] ICWA.”<sup>122</sup>

Second, the *T.N.F.* court expressed reservations about “the creation of judicial exceptions to the plain language of [the] ICWA.”<sup>123</sup> The court was particularly critical of the Indiana Supreme Court’s decision in *In re Adoption of T.R.M.*, in which the Act was held not to apply when an Indian mother who had voluntarily given up her child for adoption to a non-Indian couple, circumventing the ICWA, sought to get the child back.<sup>124</sup> “It would seem that the adoption in *T.R.M.* was exactly the type of scenario in which Congress sought to impose federal procedural safeguards in order to protect the rights of the Indian parents and their tribe,” the Alaska court wrote.<sup>125</sup>

Finally, the *T.N.F.* court questioned the propriety of states interpreting exceptions into an Act that clearly was intended to limit states’ discretion<sup>126</sup>—an intent the Alaska court had no problem finding either in *Holyfield*<sup>127</sup> or in the statute itself.<sup>128</sup>

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120. See *In re Adoption of T.N.F.*, 781 P.2d 973, 978 (Alaska 1989).

121. *Id.* at 977.

122. *Id.*

123. *Id.*

124. *Id.*; see *J.Q. v. D.R.L. (In re Adoption of T.R.M.)*, 525 N.E.2d 298, 303 (Ind. 1988).

125. *In re Adoption of T.N.F.*, 781 P.2d at 977.

126. *Id.* at 977–78.

127. See *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 45 (1989) (“More

More dramatic was the reversal in South Dakota. Less than two years before *Holyfield*, the South Dakota Supreme Court embraced the “existing Indian family” doctrine in *Claymore v. Serr*.<sup>129</sup> Like the cases before it in Kansas,<sup>130</sup> Oklahoma,<sup>131</sup> and Missouri,<sup>132</sup> *Claymore* involved an attempt to terminate an Indian father’s parental rights to his illegitimate child.<sup>133</sup> The court recognized that the essential elements of an ICWA case—“both an Indian child and a child custody proceeding”—were present.<sup>134</sup> However, noting that the trial court had relied on the rationale put forth in *In re Adoption of Baby Boy L.*, the South Dakota court said “the requirement of an existing Indian family . . . is implied throughout the Act.”<sup>135</sup> The court then went on to state that *Claymore* had never married the child’s mother, that the child had never lived with *Claymore* or his family, and that *Claymore* had never supported the child—therefore, there was no “existing Indian family.”<sup>136</sup> Having already concluded that “the purpose of [the] Act suggests that such a finding is a necessary condition for application of the Act,” the South Dakota court held that the ICWA did not apply.<sup>137</sup>

*Holyfield* quickly upended that conclusion. A scant year after the *Holyfield* decision was announced, the South Dakota Supreme Court again faced the “existing Indian family” doctrine in *In re Adoption of Baade*.<sup>138</sup> The adoptive parents, citing *Claymore*, argued that the ICWA was inapplicable because the Indian child had never been part of an Indian family.<sup>139</sup> The court, though, citing *Holyfield*, said *Claymore* no

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specifically, its purpose was, in part, to make clear that in certain situations the state courts did *not* have jurisdiction over child custody proceedings. Indeed, the congressional findings that are a part of the statute demonstrate that Congress perceived the States and their courts as partly responsible for the problem it intended to correct.”).

128. *In re Adoption of T.N.F.*, 781 P.2d at 978 n.10 (citing 25 U.S.C. § 1901(5) (“Congress finds the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and *judicial bodies*, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”) (emphasis added)).

129. 405 N.W.2d 650 (S.D. 1987).

130. *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982), *overruled by In re A.J.S.*, 204 P.3d 543 (Kan. 2009).

131. *In re Adoption of Baby Boy D.*, 742 P.2d 1059 (Okla. 1985).

132. *In Interest of S.A.M.*, 703 S.W.2d 603 (Mo. Ct. App. 1986).

133. *Claymore*, 405 N.W.2d at 652.

134. *Id.* at 653.

135. *Id.*

136. *Id.* at 654.

137. *Id.*

138. 462 N.W.2d 485 (S.D. 1990).

139. *Id.* at 489.

longer applied:

In *Holyfield*, the Supreme Court explained the broad scope of [the] ICWA: “The numerous prerogatives accorded the tribe through the ICWA’s substantive provision . . . must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, *but also of the tribes themselves.*” Consequently, it is incorrect, when assessing [the] ICWA’s applicability to a particular case, to focus only upon the interests of an existing family. Such a practice fails to recognize the legitimate concerns of the tribe that are protected under the Act. ICWA’s application to a case is contingent only upon whether an “Indian child” is the subject of a “child custody proceeding” as those terms are defined by the Act.<sup>140</sup>

The rout was on. In 1990, California’s Third Appellate District cited *Holyfield* in *In re Crystal K.*<sup>141</sup> for the proposition that it is in an Indian child’s best interest that the relationship between child and tribe be protected,<sup>142</sup> becoming the first California court to directly address the “existing Indian family” doctrine.<sup>143</sup> The following year, Indiana’s high court began to retreat from its embrace of the doctrine,<sup>144</sup> and California’s First Appellate District, rejecting the doctrine in *Dennis H. v. Michael S. (Adoption of Lindsay C.)*,<sup>145</sup> cited *Holyfield* extensively for the ideas that states were part of the problem the ICWA was intended to fix,<sup>146</sup> that the act also protects not only the rights of families but also the rights of tribes and Indian children,<sup>147</sup> and that state law cannot be allowed to frustrate federal policy toward

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140. *Id.* at 489–90 (citations omitted) (citing *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49 (1989)).

141. 276 Cal. Rptr. 619 (Ct. App. 1990).

142. *Id.* at 665–66.

143. Two other California courts discussed the doctrine earlier, but ruled instead on other grounds. In *In re Junious M.*, the First Appellate District was critical of Kansas’s *Adoption of Baby Boy L.* decision and said that a requirement that a child identify as Indian in order to be covered by the ICWA would undermine the purposes of the Act. *See* Dep’t of Soc. Servs. of City & County of San Francisco v. Diana L. (*In re Junious M.*), 193 Cal. Rptr. 40, 46 (Ct. App. 1983). On the other hand, the Second Appellate District cited both *In re Adoption of Baby Boy L.* and *Claymore* positively before holding that the ICWA did not apply because the child was a Canadian Indian and not a member of a federally-recognized tribe. L.A. County Dep’t of Children’s Servs. v. Mary P. (*In re Wanomi P.*), 264 Cal. Rptr. 623, 630–31 (Ct. App. 1989).

144. *See* D.S. v. County Dep’t of Pub. Welfare of St. Joseph County (*In re D.S.*), 577 N.E.2d 572 (Ind. 1991) (limiting application of the doctrine).

145. 280 Cal. Rptr. 194 (Ct. App. 1991).

146. *Id.* at 198.

147. *Id.* at 199.

Indians.<sup>148</sup>

*Holyfield* has raised new questions regarding the continuing viability of *Baby Boy L.* and its progeny. As stated by one legal scholar, “After the decision in *Holyfield*, it appears that the Kansas court in *Baby Boy L.* may have given inappropriate weight to the wishes of the family. The United States Supreme Court seems unlikely to protect the *implied* right of the non-Indian mother to entirely exclude the applicability of the Act which *explicitly* protects the right of a tribe to intervene in any child custody proceeding involving an Indian child.”<sup>149</sup>

As Indian Country would soon see, the First Appellate District’s faith that *Holyfield* could slay the “existing Indian family” doctrine single-handed was misplaced. Just as *Holyfield* threw up obstacles, state courts would find new ways to circumvent the ICWA.

*B. State Court Resistance: Justifying the “Existing Indian Family” Doctrine in a Post-Holyfield World*

*1. Limitation, Distinction and Cooption: Ignoring and Selectively Quoting Holyfield to Uphold the Doctrine*

Where courts wanted to adopt the “existing Indian family” doctrine, their first strategy often was, either implicitly or explicitly, to limit *Holyfield* to the issue of domicile. In November 1990, Alabama became the first new jurisdiction to adopt the “existing Indian family” post-*Holyfield*, when the state Court of Civil Appeals decided *S.A. v. E.J.P.*<sup>150</sup> The Alabama court made only a passing reference to *Holyfield*, citing it for the proposition that the ICWA was passed because of “concern in the 1970’s over the consequences of the removal of Indian children from their Indian families and Indian tribes by abusive child welfare practices.”<sup>151</sup> By focusing exclusively on the removal of Indian children from their families and tribes, the Alabama court conveniently ignored *Holyfield*’s—and the ICWA’s—language regarding voluntary termination of parental rights, the rights of tribes and the rights of Indian children.<sup>152</sup>

Other courts took pains to distinguish *Holyfield*. The Louisiana

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148. *Id.*

149. *Id.* (citing Roger A. Tellinghuisen, Comment, *The Indian Child Welfare Act of 1978: A Practical Guide with [Limited] Commentary*, 34 S.D. L. REV. 660, 671 (1989)).

150. 571 So. 2d 1187 (Ala. Civ. App. 1990).

151. *Id.* at 1188 (citation omitted).

152. *See id.* at 1189.

Court of Appeal, in adopting the “existing Indian family” doctrine, wrote that “*Holyfield* dealt with only the issue of jurisdiction under the ICWA and therefore may be construed narrowly.”<sup>153</sup> Similarly, when California’s Sixth Appellate District initially adopted the “existing Indian family” doctrine,<sup>154</sup> it explained that:

[w]e do not believe the Supreme Court’s decision in *Holyfield* abrogates the existing Indian family [doctrine]. *Holyfield* was concerned with the interpretation of the jurisdictional provisions of section 1911 (a), and specifically with the term “domicile” as used in the Act. The court did not mention the existing Indian family doctrine and did not address the [question of] whether the Act should apply in the absence of such a family because both parents in *Holyfield* resided on the reservation and clearly had significant ties to tribal culture.<sup>155</sup>

Not content simply to say that *Holyfield* did not directly address the “existing Indian family” doctrine or to quote selectively from *Holyfield*’s passages interpreting the ICWA, some courts have gone much further. *Adoption of Crews* involved a Choctaw woman’s decision first to put her child up for adoption, and then to revoke her consent to the adoption.<sup>156</sup> The court held that neither Crews nor her family had ever constituted an Indian family, that there was no evidence that allowing Crews to revoke her consent would result in her child being placed in an Indian environment, and that applying the ICWA under such circumstances would run counter to the Act’s purposes.<sup>157</sup> Then, turning to the *Holyfield* Court’s conclusion that the parents could not act to undermine the ICWA,<sup>158</sup> the Washington court wrote:

In so holding, however, the [C]ourt made clear that the

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153. Hampton v. J.A.L., 658 So. 2d 331, 335 (La. Ct. App. 1995). The court also sought to distinguish *Holyfield* by arguing that in *Holyfield* the parents had been trying to circumvent the ICWA, while the mother in *Hampton* was simply seeking to employ the Act as a means of withdrawing her consent to the adoption of her child and the termination of her parental rights. *Id.* This argument brought a sharp rejoinder from Judge Stewart, who wrote that “J.L.’s not seeking to circumvent the ICWA or undermine the tribe’s interest should be viewed as points in her favor rather than reasons to exclude her from the Act’s coverage.” *Id.* at 340 (Stewart, J., dissenting).

154. See Crystal R. v. Superior Court, 69 Cal. Rptr. 2d 414 (Ct. App. 1997).

155. *Id.* at 426.

156. See Crews v. Hope Servs (*In re Adoption of Crews*), 825 P.2d 305, 306–07 (Wash. 1992) (en banc).

157. See *id.* at 310.

158. *Id.* at 310; see generally Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 51–53 (1989) (holding that a rule of domicile allowing Indian parents to defeat the ICWA’s jurisdictional scheme is not consistent with Congress’ intentions).

purpose of the ICWA was to avoid the “[r]emoval of Indian children from their cultural setting [because such removal] seriously impacts a long-term tribal survival and has damaging social and psychological impact on many individual Indian children.” Thus, *Holyfield* supports our conviction that [the] ICWA is not applicable when an Indian child is not being removed from an Indian cultural setting, the natural parents have no substantive ties to a specific tribe, and neither the parents nor their families have resided or plan to reside within a tribal reservation. In such a situation, whether or when a child meets the definition of “Indian child” under [the] ICWA is not controlling.<sup>159</sup>

Thus, by essentializing the ICWA as a measure aimed solely at the “removal of Indian children from their cultural setting,”<sup>160</sup> and by citing a passage from *Holyfield* that appears to lend support,<sup>161</sup> the *Crews* court asserted the U.S. Supreme Court’s endorsement of the “existing Indian family” doctrine. It was a popular assertion, repeated by the Missouri Court of Appeals, Western District,<sup>162</sup> and the dissent in *Quinn I.*<sup>163</sup> But it was not as influential in future cases as the new argument, first presented in *In re S.C.*,<sup>164</sup> that Congress had tacitly approved of the “existing Indian family” doctrine in the years since the passage of the ICWA.<sup>165</sup>

2. *Legislative Intent and Whole Cloth: Whether Congress Embraced the Doctrine by Failing to Eliminate It*

The Supreme Court of Oklahoma’s post-*Holyfield* affirmation of the “existing Indian family” doctrine came in 1992 in *In re S.C.*<sup>166</sup> The Oklahoma court cited the decade-old Kansas case, *Adoption of Baby Boy L.*, for the proposition that preserving Indian families is the “underlying thread” of the ICWA.<sup>167</sup> Then the court added a persuasive

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159. *Adoption of Crews*, 825 P.2d at 310–11 (quoting *Holyfield*, 490 U.S. at 50).

160. *Id.* at 310.

161. *See id.*

162. *See C.E.H. v. L.M.W.*, 837 S.W.2d 947, 952 (Mo. Ct. App. 1992).

163. *Quinn v. Walters (Quinn I)*, 845 P.2d 206, 213 (Or. Ct. App. 1993) (Edmonds, J., dissenting), *rev’d*, 881 P.2d 795 (Or. 1994).

164. *In re S.C.*, 833 P.2d 1249 (Okla. 1992), *overruled by* *Leatherman v. Yancey (In re Baby Boy L.)*, 103 P.3d 1099 (Okla. 2004), *and superseded by statute*, OKLA. STAT. tit. 10, § 40.1 (2009).

165. *See id.* at 1255.

166. *See id.* at 1254–55.

167. *Id.* at 1255 (citing *In re Adoption of Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982), *overruled by In re A.J.S.*, 204 P.3d 543 (Kan. 2009)).

postscript:

Our interpretation is supported by recent events in the Congress. In 1987 amendments were presented by the Senate Committee on Indian Affairs. These proposed amendments were occasioned by the courts' refusing to apply the ICWA to situations like this one. The amendments, if enacted, would have made application of the ICWA mandatory regardless of whether the child had “previously lived in Indian country, in an Indian cultural environment or with an Indian parent.” However, the amendments never came out of the Senate Committee, and at the time of this writing, have not been presented again. Congress, being aware of the [sic] this Court's decision in *In re D.M.J.*, as well as decisions from other states using similar reasoning, has refused to change the statutory language to do away with this interpretation.<sup>168</sup>

Perhaps no single paragraph in “existing Indian family” jurisprudence, save the Kansas court's initial declaration in *In re Adoption of Baby Boy L.*,<sup>169</sup> has been so immediately influential. Over the next five years, the failure of those amendments to reach the floor was cited by majorities in *Hampton*,<sup>170</sup> *In re Bridget R.*,<sup>171</sup> *Rye*,<sup>172</sup> and *In re Morgan*;<sup>173</sup> the concurring opinion in *S.S. II*;<sup>174</sup> and dissents in *In re Baby Boy Doe*<sup>175</sup>

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168. *Id.* (citation omitted).

169. See *In re Adoption of Baby Boy L.*, 643 P.2d at 175 (“A careful study of the legislative history behind the Act and the Act itself discloses that the overriding concern of Congress and the proponents of the Act was the maintenance of the family and tribal relationships existing in Indian homes and to set minimum standards for the removal of Indian children from their existing Indian environment. 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. Section 1902 of the Act makes it clear that it is the declared policy of Congress that the act is to adopt minimum federal standards ‘for the removal of Indian children from their [Indian] families.’ Numerous provisions of the Act support our conclusion that it was never the intent of Congress that the Act would apply to a factual situation such as is before the court.”) (alteration in original).

170. See *Hampton v. J.A.L.*, 658 So. 2d 331, 335 (La. Ct. App. 1995).

171. See *James R. v. Cindy R. (In re Bridget R.)*, 49 Cal. Rptr. 2d 507, 522 n.11 (Ct. App. 1996).

172. See *Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996) (citing *In re S.C.*, 833 P.2d 1249, 1255 (Okla. 1992)).

173. See *In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880, at \*14 (Tenn. Ct. App. Nov. 19, 1997).

174. See *Leslie Scarlotte Tubridy et al. v. Betty Jo Iron Bear et al. (In re Adoption of S.S.) (S.S. II)*, 657 N.E.2d 935, 945 (Ill. 1995) (Heiple, J., concurring).

175. See *Indian Tribe v. Doe (In re Baby Boy Doe)*, 849 P.2d 925, 934 (Idaho 1993)

and *S.S. I.*<sup>176</sup> Although Judge Stewart, in his dissent to *Hampton*, excoriated the logic of using a failed amendment to demonstrate intent,<sup>177</sup> most opinions rejecting the “existing Indian family” doctrine simply ignored the failed amendments.

3. *In re S.C.: Making the Case for the “Existing Indian Family” Doctrine after Holyfield*

For backers of the “existing Indian family” doctrine, the beauty of *In re S.C.* went far beyond the court’s excavation of a failed Senate amendment.<sup>178</sup> The case encapsulated everything a court needed to say to defend the doctrine in a post-*Holyfield* environment.<sup>179</sup>

First, the *S.C.* court framed *Holyfield* narrowly. By citing Justice Brennan’s declaration that “[t]he sole issue in this case is, as the Supreme Court of Mississippi recognized, whether the twins were ‘domiciled’ on the reservation,”<sup>180</sup> the Oklahoma court conveniently puts aside both the six pages of *Holyfield*, in which Justice Brennan discusses the expansive rights afforded tribes under the ICWA,<sup>181</sup> and the ensuing five pages, in which Justice Brennan explains why allowing Mississippi’s definition of “domicile” would undermine the ICWA.<sup>182</sup> The Oklahoma court returned to this argument to rebut the

(Bakes, J., dissenting).

176. See *Leslie Scarlotte Tubridy et al. v. Betty Jo Ironbear (In re Adoption of S.S.) (S.S. I)*, 622 N.E.2d 832, 844 (Ill. App. Ct. 1993) (Colwell, J., dissenting), *rev’d sub nom.* *Leslie Scarlotte Tubridy et al. v. Betty Jo Iron Bear et al. (In re Adoption of S.S.) (S.S. II)*, 657 N.E.2d 935 (Ill. 1995).

177. See *Hampton v. J.A.L.*, 658 So. 2d 331, 340–41 (La. Ct. App. 1995) (Stewart, J., dissenting).

178. See *In re S.C.*, 833 P.2d 1249, 1255 (Okla. 1992), *overruled by* *Leatherman v. Yancey (In re Baby Boy L.)*, 103 P.3d 1099 (Okla. 2004), *superseded by statute*, OKLA. STAT. tit. 10, § 40.1 (2009).

179. That should come as no surprise, as the Oklahoma court took the case specifically “to address the question” of whether the doctrine “is inconsistent with the recent Supreme Court [ruling] of *Mississippi Band of Choctaw Indians v. Holyfield*.” *In re S.C.*, 833 P.2d at 1252.

180. *Id.* at 1253 (citing *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 42 (1989)).

181. Referring to *Holyfield*, 490 U.S. at 32–37.

182. Referring to *Holyfield*, 490 U.S. at 43–47. In *Holyfield*, the Court stated that:

We start . . . with the general assumption that “in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law.” One reason for this rule of construction is that federal statutes are generally intended to have uniform nationwide application.

*Id.* at 43 (citations omitted). The Court went on:

[T]he purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term; quite the

conventional wisdom that, by emphasizing the rights of tribes, *Holyfield* undercuts a theory based entirely on the Indian children and Indian families.<sup>183</sup>

The Oklahoma court then emphatically defended the “existing Indian family” doctrine from the charge that it was “judicially created.” Without citing the ICWA, the court asserted that “the preservation of the existing Indian family was an integral purpose of the ICWA from its inception.”<sup>184</sup> The court then cited *Crews* for the proposition that *Holyfield* supports the “existing Indian family” doctrine.<sup>185</sup>

Finally, the court distinguished the “existing Indian family” doctrine from its holding, just a year earlier, that the two “[e]xpress exceptions in [the ICWA] exclude all other exceptions. Recognition of a third exception—that the act will not apply to intra-family custody disputes—would require judicial legislation rather than statutory interpretation.”<sup>186</sup> With a circularity that would make even a rhythmic gymnast’s head spin, the court asserted that “[t]he rule restricting application of the ICWA to an existing Indian family is not [a] purely judicial creation” because “it is supported amply by the language of the Act itself, and shored up by Congress’ refusal to amend the Act.”<sup>187</sup>

The final reason that *In re S.C.* was so influential in those jurisdictions that adopted the conventional rationale for the “existing Indian family” doctrine was, simply, that it came from Oklahoma, “which contains a large Indian population and consequently [is] one of the states most often presented with this vexing problem, [and] has been one of the leading states in developing this doctrine.”<sup>188</sup> In light of the Oklahoma Legislature’s response<sup>189</sup> though, the court may have

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contrary. . . . Indeed, the congressional findings that are a part of the statute demonstrate that Congress perceived the States and their courts as partly responsible for the problem it intended to correct.

*Id.* at 44–45. Finally, the Court stated that “[u]nder these circumstances it is most improbable that Congress would have intended to leave the scope of the statute’s key jurisdictional provision subject to definition by state courts as a matter of state law.”

*Id.* at 45.

183. See *In re S.C.*, 833 P.2d at 1254.

184. *Id.* at 1255.

185. See *id.* (citing *Crews v. Hope Servs. (In re Adoption of Crews)*, 825 P.2d 305, 310 (Wash. 1992)).

186. *Id.* at 1256 (citing *In re Guardianship of Q.G.M.*, 808 P.2d 684, 688 (Okla. 1991)).

187. *Id.* at 1256.

188. *Rye v. Weasel*, 934 S.W.2d 257, 261 (Ky. 1996).

189. See *infra* Part IV.A.

been too clever by half.

4. *A Judicially-Created Savings Clause: In re Bridget R. and the Constitutional Argument for the Doctrine*

For almost fifteen years after the Kansas court in *In re Adoption of Baby Boy L.* first articulated the “existing Indian family” doctrine,<sup>190</sup> judges embracing the idea employed the same rationale—that Congress had only meant for the ICWA to cover Indians who were living in an “Indian environment,” and that the doctrine, although not explicitly spelled out in the Act, was necessary for courts to properly apply the ICWA.<sup>191</sup> Then the “existing Indian family” doctrine arrived in California, and it took on a new identity: savings clause.

In *In re Bridget R.*,<sup>192</sup> a Pomo Indian father and non-Indian mother voluntarily relinquished their twin girls to a non-Indian couple less than a month after the girls’ births, then later sought to withdraw their consent to the adoption.<sup>193</sup> The trial court held that the relinquishments failed to meet the requirements of the ICWA and, therefore, were invalid.<sup>194</sup> On appeal, the adoptive parents argued that the trial court erred by refusing to apply the “existing Indian family” doctrine.<sup>195</sup> But the court rejected the doctrine’s traditional formulation, holding that *Holyfield* implicitly rejected an exception premised on whether the child had ever been part of an Indian environment.<sup>196</sup> “However, it does not follow from *Holyfield* that [the] ICWA should apply when neither the child *nor either natural parent* has ever resided or been domiciled on a reservation or maintained any significant social, cultural or political relationship with an Indian tribe.”<sup>197</sup>

Thus, the court accepted the adoptive family’s second argument: that an ICWA without an “existing Indian family” limitation would unconstitutionally violate the due process and equal protection rights of the twin girls and the Tenth Amendment reservation of powers by

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190. *In re Adoption of Baby Boy L.*, 643 P.2d 168, 176 (Kan. 1982), *overruled by In re A.J.S.*, 204 P.3d 543 (Kan. 2009).

191. *See, e.g., In Interest of S.A.M.*, 703 S.W.2d 603, 608 (Mo. Ct. App. 1986) (adopting the rationale of *In re Adoption of Baby Boy L.*).

192. *James R. v. Cindy R. (In re Bridget R.)*, 49 Cal. Rptr. 2d 507 (Ct. App. 1996).

193. *Id.* at 515–18.

194. *Id.* at 516.

195. *Id.* at 519.

196. *Id.* at 522.

197. *Id.*

the State of California.<sup>198</sup>

As we explain, recognition of the existing Indian family doctrine is necessary in a case such as this in order to preserve the ICWA’s constitutionality. We hold that under the Fifth, Tenth and Fourteenth Amendments to the United States Constitution, ICWA does not and cannot apply to invalidate a voluntary termination of parental rights respecting an Indian child who is not domiciled on a reservation, unless the child’s biological parent, or parents, are not only of American Indian descent, but also maintain a significant social, cultural or political relationship with their tribe.<sup>199</sup>

The court first argued that, absent such “social, cultural or political” ties, subjecting the girls to the procedural requirements of the ICWA would violate their due process rights.<sup>200</sup> Quoting the California Supreme Court in *In re Jasmon O.*,<sup>201</sup> the Second District held that “[c]hildren . . . have fundamental rights—including the fundamental right to be protected from neglect and to ‘have a placement that is stable [and] permanent.’”<sup>202</sup> Furthermore, the child’s right to such stable environment will outweigh the parent’s interests “where a child’s biological parents knowingly and intelligently relinquish the child to others for the express purpose of giving the child a loving and stable home.”<sup>203</sup>

Finally, because any tribe’s interest in a child is based in the ICWA, while the child’s interest in a stable environment is a “constitutionally protected interest,” the child’s interest outweighs that of the tribe.<sup>204</sup> Therefore, to the extent that the ICWA interferes with a child’s right to a stable environment, the ICWA must survive strict scrutiny.<sup>205</sup> Although the court conceded that “preserving American Indian culture is a legitimate, even compelling, governmental interest,” it held that that interest cannot be achieved—and strict scrutiny cannot be met—if neither the child nor either parent has ever had a social, cultural or political relationship with a tribe.<sup>206</sup> As a

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198. *Id.* at 518–19.

199. *Id.* at 516.

200. *Id.*

201. San Diego County Dep’t of Soc. Servs. v. Gavin O. (*In re Jasmon O.*), 878 P.2d 1297 (Cal. 1994).

202. *In re Bridget R.*, 49 Cal. Rptr. 2d at 524 (quoting *In re Jasmon O.*, 878 P.2d at 1307).

203. *Id.* at 526.

204. *Id.*

205. *Id.*

206. *Id.*

result, an ICWA without an “existing Indian family” doctrine unconstitutionally violates the due process rights of Indian children.<sup>207</sup>

The court made a similar argument regarding equal protection. The court asserted, without support, that because of the procedural requirements of the ICWA,

the number and variety of adoptive homes that are potentially available to an Indian child are more limited than those available to non-Indian children, and an Indian child who has been placed in an adoptive or potential adoptive home has a greater risk than do non-Indian children of being taken from that home and placed with strangers.<sup>208</sup>

Inserting its chosen language into the U.S. Supreme Court’s holdings in *United States v. Antelope*,<sup>209</sup> *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*,<sup>210</sup> and *Morton v. Mancari*,<sup>211</sup> the court said such disparate treatment is acceptable if either the Indian child or a parent has a significant “social, cultural or political relationship[]” with the tribe.<sup>212</sup> However, in the absence of such a relationship, the disparate treatment can only be based on race<sup>213</sup> and must withstand strict scrutiny.<sup>214</sup> Employing the same strict scrutiny analysis that was used for the due process claim, and with the same outcome, the court held that the ICWA, without an “existing Indian family” limitation, unconstitutionally violates the equal protection right of some children.<sup>215</sup>

Finally, under the Tenth Amendment and the Indian Commerce Clause,<sup>216</sup> the court found that, because family law typically is left to the states, a federal law can only supersede state law in this area if a “clear and substantial federal interest[]” is at stake.<sup>217</sup> In others words, the “ICWA should apply rather than state laws respecting family relations *only* where such application actually serves the specific purposes for which ICWA was created,” and that cannot happen successfully unless either the child or a parent has a “significant

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207. *Id.* at 527.

208. *In re Bridget R.*, 49 Cal. Rptr. 2d at 527.

209. 430 U.S. 641, 646 (1977).

210. 425 U.S. 463, 480–81 (1976).

211. 417 U.S. 535, 554 (1974).

212. *In re Bridget R.*, 49 Cal. Rptr. 2d at 527.

213. *Id.* at 527–28.

214. *Id.*

215. *Id.* at 527–29.

216. U.S. CONST. art. I, § 8, cl. 3.

217. *In re Bridget R.*, 49 Cal. Rptr. 2d. at 528 (quoting *Rose v. Rose*, 481 U.S. 619, 625 (1987)).

relationship[] with an Indian tribe or community or with Indian culture.”<sup>218</sup>

The *In re Bridget R.* rationale subsequently was adopted by California’s Fourth Appellate District, Division Three.<sup>219</sup> Two decisions out of the District’s Division Two raise some question as to what extent the doctrine is in force within the Fourth District.<sup>220</sup> However, despite enactment of a state statute<sup>221</sup> specifically intended to abrogate the *In re Bridget R.* holding,<sup>222</sup> the Second Appellate District has stood by its ruling. In *L.A. County Dep’t of Children & Family Servs. v. Arturo G. (In re Santos Y.)*,<sup>223</sup> the court held that the state legislature could not save the Act from constitutional infirmities under due process<sup>224</sup> or equal protection.<sup>225</sup> The *In re Santos Y.* court even held that the legislature could not save the Act’s Tenth Amendment problem because, even though the State of California retains its right to legislate in the area of family law, it ceded to the federal government authority to legislate over tribes.<sup>226</sup>

Combined, these new interpretive and constitutional arguments developed by the states kept the “existing Indian family” doctrine afloat for almost a decade after *Holyfield*. At the end of 1997, after the *In re Alexandria Y.* decision, three districts used the “existing Indian family” doctrine,<sup>227</sup> while two others refused.<sup>228</sup> Nationally, ten states had court rulings or statutes rejecting the “existing Indian family”

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218. *Id.* at 529.

219. *See* Orange County Soc. Servs. Agency v. Renea Y. (*In re Alexandria Y.*), 53 Cal. Rptr. 2d 679 (Ct. App. 1996). That panel refused to limit itself to situations where neither the child nor either parent had a social, cultural, or political tie to a tribe, insisting the doctrine might be viable in other circumstances. *Id.* at 686.

220. *See supra* notes 27, 28 and accompanying text.

221. CAL. WELF. & INST. CODE § 224(c) (West 2009) (previously codified at CAL. WELF. & INST. CODE § 360.6(c) (West 2007)).

222. *See* Santa Cruz Human Res. Agency v. Paz M. (*In re Vincent M.*), 59 Cal. Rptr. 3d 321, 334 (Ct. App. 2007).

223. 112 Cal. Rptr. 2d 692 (Ct. App. 2001).

224. *See id.* at 726–27.

225. *See id.* at 730.

226. *See id.* at 731. This argument borders on the absurd because it implies that no lawmaking body has the constitutional authority to regulate the placement of Indian children: the federal government is precluded by the Tenth Amendment’s reservation of power to the states, and the states are precluded by the Constitution’s reservation to Congress of plenary power over the states in Indian affairs.

227. The Second, Fourth, and Sixth Appellate Districts used the doctrine.

228. The First and Third Appellate Districts refused the doctrine. In the middle of 1998, the Sixth Appellate District rejected the doctrine in *In re Alicia S.*, splitting California at three districts on either side of the question. Kern County Dep’t of Human Servs. v. Mishiola S. (*In re Alicia S.*), 76 Cal. Rptr. 2d 121, 122 (Ct. App. 1998).

doctrine,<sup>229</sup> and eight states used the doctrine.<sup>230</sup> However, neither lawmakers nor courts would express much sympathy for the doctrine after that.

#### IV. A DECADE OF APPLYING THE ICWA: STATUTES, JURISPRUDENCE, AND THE WANING INFLUENCE OF THE “EXISTING INDIAN FAMILY” DOCTRINE

##### A. *Statutory Rejection of Exceptions to the ICWA*

Although the Oklahoma Supreme Court’s ruling in *In re S.C.* was tremendously influential outside of Oklahoma, within the state it might have had an unintended effect. Less than two years after *In re S.C.* was handed down, the Oklahoma Legislature abrogated the influential decision.<sup>231</sup> Title 10, chapter 1B, section 40.1 of the Oklahoma Code recognized the tribes’ interest in Indian children, “regardless of whether or not said children are in the physical or legal custody of an Indian parent or Indian custodian at the time state proceedings are initiated.”<sup>232</sup> Section 40.3 used the same language and specified that the rules applied to all voluntary and involuntary custody proceedings involving Indian children,<sup>233</sup> except divorce and delinquency proceedings explicitly excepted by the ICWA.<sup>234</sup> It took another decade for those statutes to reach the Oklahoma Supreme Court, but when the case arrived the court was unequivocal:

Because of recent statutory amendments to the Oklahoma Act, which in essence codified the holding in *Mississippi Band of Choctaw Indians v. Holyfield*, we determine that the “existing Indian family exception” is no longer pertinent to Indian child custody proceedings in Oklahoma . . . . To the extent that *In the Matter of S.C.*; *In the Matter of Adoption of Baby Boy D.*; and *In the Matter of Adoption of D.M.J.*, are inconsistent with our holding, they are expressly overruled.<sup>235</sup>

In the meantime, opponents of the “existing Indian family” doc-

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229. These states include Alaska, Idaho, Illinois, Michigan, Montana, New Jersey, Oklahoma (statute), Oregon, South Dakota, and Utah.

230. These states include Alabama, Indiana, Kansas, Kentucky, Louisiana, Missouri, Tennessee, and Washington.

231. See *Leatherman v. Yancey (In re Baby Boy L.)*, 103 P.3d 1099, 1101 (Okla. 2004).

232. OKLA. STAT. ANN. tit. 10, § 40.1 (West 2009).

233. *Id.* § 40.3(B) (2009).

234. See *id.* § 40.3(A) (1)–(2).

235. *In re Baby Boy L.*, 103 P.3d at 1101 (citations and footnote omitted).

trine elsewhere learned that they could do through legislation what they may have failed to do in the courts. California lawmakers incorporated language from *In re Bridget R.*<sup>236</sup> in their statute.<sup>237</sup> Although that was not enough to sway the Second Appellate District,<sup>238</sup> the statute proved dispositive to the Sixth Appellate District, reversing that court’s position on the “existing Indian family” doctrine.<sup>239</sup> The Iowa Indian Child Welfare Act<sup>240</sup> was passed in 2003 and upheld by the Iowa Supreme Court two years later.<sup>241</sup> In 2004, Washington abrogated *Crews*<sup>242</sup> by specifying in statute that “[i]f the child is an Indian child as defined under the Indian child welfare act [sic], the provisions of the act shall apply.”<sup>243</sup> Finally, in 2007, the Minnesota Legislature declared that

[a] court shall not determine the applicability of this chapter or the federal Indian Child Welfare Act to a child custody proceeding based upon whether an Indian child is part of an existing Indian family or based on the level of contact a child has with the child’s Indian tribe, reservation, society, or off-reservation community.<sup>244</sup>

In 2009, Wisconsin became the fifth state to reject the “existing Indian family” doctrine by statute.<sup>245</sup> Wisconsin’s courts had, on several occasions, refused to rule on the “existing Indian family” doctrine,<sup>246</sup> but both houses of the Wisconsin Legislature approved

236. *James R. v. Cindy R. (In re Bridget R.)*, 49 Cal. Rptr. 2d 507, 520 (Ct. App. 1996).

237. See CAL. WELF. & INST. CODE § 224(c) (West 2009) (previously codified at CAL. WELF. & INST. CODE § 360.6(c) (West 2007)) (“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 to the proceedings.”) (emphasis added).

238. See *supra* Part III.B.4.

239. See *Santa Cruz Human Res. Agency v. Paz M. (In re Vincent M.)*, 59 Cal. Rptr. 3d 321, 333–34 (Ct. App. 2007).

240. IOWA CODE § 232B.5 (2006).

241. See *In re R.E.K.F.*, 698 N.W.2d 147, 150–51 (Iowa 2005).

242. *Crews v. Hope Servs. (In re Adoption of Crews)*, 825 P.2d 305 (Wash. 1992) (en banc).

243. WASH. REV. CODE ANN. § 13.34.040(3) (West Supp. 2010) (emphasis added).

244. MINN. STAT. § 260.771, subdiv. 2 (2008) (emphasis added).

245. Act 94, WIS. STAT. § 938.028(3)(a).

246. See *Wisconsin v. Debra F. (In re Termination of Parental Rights to Branden F.)*, 695 N.W.2d 905 (Table) (Wis. Ct. App. 2005), 2005 WL 645191, \*3 n.3; *Brown County v. Marcella G. (In re Shawnda G.)*, 634 N.W.2d 140, 146 (Wis. Ct. App. 2001).

the bill unanimously.<sup>247</sup>

*B. Judicial Responses: Plain Language and Legislative Intent in Upholding the ICWA*

Just as in the initial post-*Holyfield* period, the primary argument against the “existing Indian family” doctrine relied on the plain language of the statute. Courts that adopted the doctrine continued to insist that such was the *intent* of Congress; however, Louisiana Appellate Judge Stewart wrote that, “when the wording of a statute is clear and free of ambiguity, the letter of it shall not be disregarded under the pretext of pursuing its spirit,” describing a “virtually universal rule of statutory construction [that] is found in federal law as well.”<sup>248</sup> This is especially true when a statute contains express exceptions, as the ICWA does for divorce proceedings and delinquency hearings,<sup>249</sup> for the implication is that the expressed exceptions are the only allowable exceptions.<sup>250</sup> In the ICWA, “[n]one of the applicable provisions impose any sort of threshold requirement that the proceedings involve an ‘Indian family’ or that the child have any particular contact with the tribe or with his or her tribal heritage.”<sup>251</sup> And “[n]o amount of probing into what Congress ‘intended’ can alter what Congress *said*, in plain English[.]”<sup>252</sup>

Courts also eventually developed a response to the argument, first put forth in *In re S.C.*, that by refusing to amend the ICWA Congress intended the “existing Indian family” doctrine to remain. Judge Stewart was the first to pierce the wall, pointing to the U.S. Supreme Court’s rejection of a similar argument in *Firestone Tire & Rubber Co. v. Bruch*:<sup>253</sup>

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247. Press Release, Office of the Governor Jim Doyle, Governor Doyle Signs Wisconsin’s Indian Child Welfare Act, (Dec. 8, 2009), *available at* [http://www.wisgov.state.wi.us/journal\\_media\\_detail.asp?locid=19&prid=4781](http://www.wisgov.state.wi.us/journal_media_detail.asp?locid=19&prid=4781).

248. *Hampton v. J.A.L.*, 658 So. 2d 331, 338 (La. Ct. App. 1995) (Stewart, J., dissenting).

249. 25 U.S.C. § 1903(1)(iv) (2006) (“[A]doptive placement’ . . . shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.”).

250. See *In re Guardianship of Q.G.M.*, 808 P.2d 684, 688 (Okla. 1991).

251. *Tubridy v. Ironbear (In re Adoption of S.S.) (S.S. I)*, 622 N.E.2d 832, 834 (Ill. App. Ct. 1993), *rev’d*, 657 N.E.2d 935 (Ill. 1995).

252. *Kern County Dep’t of Human Servs. v. Mishiola S. (In re Alicia S.)*, 76 Cal. Rptr. 2d 121, 128 (Ct. App. 1998) (quoting *In re N.S.*, 474 N.W.2d 96, 100 n.\* (S.D. 1991) (Sabers, J., concurring specially)) (emphasis in original).

253. See 489 U.S. 101, 114 (1989) (“We do not think that . . . legislative inaction

The bill’s demise may have had nothing to do with Congress’s view on the propriety of *de novo* review. Without more, we cannot ascribe to Congress any acquiescence in the arbitrary and capricious standard. “[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.”<sup>254</sup>

Later that same year, the Illinois Supreme Court pointed out that an earlier version of the ICWA included language that would have codified a version of the “existing Indian family” doctrine, requiring that a child have “significant contacts with an Indian tribe” before the Act applies.<sup>255</sup> By the time *Crystal R.* was decided in late 1997, even a judge adopting the “existing Indian family” doctrine felt compelled to report a laundry list of unsuccessful bills that would have amended the ICWA to either codify or abrogate the doctrine.<sup>256</sup> Congressional inaction no longer could serve as evidence of congressional intent.

*C. What’s Old is New Again: Rejecting the Bridget Rationale and Upholding the Constitutionality of the ICWA*

Although the *In re Bridget R.* decision introduced a new twist in “existing Indian family” jurisprudence, it should not have been unexpected. After all, the argument that the ICWA was unconstitutional was at least as old as the “existing Indian family” doctrine. The South Dakota Supreme Court rejected just such an argument in 1980.<sup>257</sup> Petitioner Martha Kay Guffin argued that the ICWA violated the Tenth Amendment by infringing upon the traditional state power over family law.<sup>258</sup> But the court found that, because the Indian Commerce Clause gives Congress authority to legislate Indian affairs,<sup>259</sup> there was no Tenth Amendment violation so long as the

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carries the day . . . . Though ‘instructive,’ failure to act on the proposed bill is not conclusive of Congress’[s] views . . . .”)

254. *Hampton v. J.A.L.*, 658 So. 2d 331, 340 (La. Ct. App. 1995) (Stewart, J., dissenting) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)) (alteration in original).

255. *See Tubridy v. Iron Bear (In re Adoption of S.S.) (S.S. II)*, 657 N.E.2d 935, 951–52 (Ill. 1995) (McMorrow, J., dissenting) (quoting S. 1214, 95th Cong. § 102(c) (1977)).

256. *See Crystal R. v. Superior Court*, 69 Cal. Rptr. 2d 414, 423 n.10 (Ct. App. 1997).

257. *See Guffin v. R.L. (In re Guardianship of D.L.L.)*, 291 N.W.2d 278, 280–81 (S.D. 1980).

258. *See id.* at 280.

259. U.S. CONST. art. I, § 8, cl. 3.

ICWA was not exercised arbitrarily.<sup>260</sup> Guffin further argued that Indian children were being denied equal protection that amounted to “invidious racial discrimination.”<sup>261</sup> This argument, too, the court rejected, citing the federal government’s broad authority to treat Indians differently based on their political status and not race.<sup>262</sup> Similar arguments were rejected by appellate courts in Oregon<sup>263</sup> and Illinois.<sup>264</sup>

It is not surprising then, that no court that has considered the *In re Bridget R.* constitutional argument has embraced it. As noted, California’s Fourth Appellate District, Division Three, adopted the “existing Indian family” doctrine under a similar standard in *Orange County Social Services Agency v. Renea Y. (In re Alexandria Y.)*,<sup>265</sup> but subsequent decisions from Division Two have called into question the precedential value of that holding even in the Fourth District.<sup>266</sup> The Court of Appeals of Tennessee mentioned the *In re Bridget R.* holding in a footnote before ruling on other grounds.<sup>267</sup> Every other court that has heard the argument has rejected it.<sup>268</sup> The argument against the equal protection claim has changed little in almost thirty years since the South Dakota Supreme Court first rejected it. And, as the Sixth Appellate District of California correctly pointed out, the enactment of the California statute effectively undermined the Tenth

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260. *In re Guardianship of D .L. L.*, 291 N.W.2d at 281.

261. *Id.*

262. *See id.* (citing *Fisher v. Dist. Court of Sixteenth Judicial Dist. of Mont.*, in & for *Rosebud County*, 424 U.S. 382 (1976)).

263. *See Angus v. Joseph (Application of Angus)*, 655 P.2d 208, 213 (Or. Ct. App. 1982) (finding the ICWA did not violate equal protection).

264. *In Interest of Armell*, 550 N.E.2d 1060, 1067–68 (Ill. App. Ct. 1990) (finding the ICWA did not violate due process or equal protection). In another line of cases, non-Indian parents have argued that their right to equal protection under the law is violated because, by virtue of their not being Indians, they are not entitled to the higher standard of review applied to Indians under the ICWA; these cases have been universally unsuccessful. *See, e.g., In re Marcus S.*, 638 A.2d 1158, 1159 (Me. 1994); *Dep’t of Soc. Servs. v. Firlet (In re Miller)*, 451 N.W.2d 576, 578–79 (Mich. Ct. App. 1990).

265. 53 Cal. Rptr. 2d 679 (Ct. App. 1996).

266. *See supra* notes 29–32 and accompanying text.

267. *In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880, at \*16 n.1 (Tenn. Ct. App. Nov. 19, 1997).

268. *See Santa Cruz Human Res. Agency v. Paz M. (In re Vincent M.)*, 59 Cal. Rptr. 3d 321, 334–36 (Ct. App. 2007); *S. v. S. (In re Adoption of Hannah S.)*, 48 Cal. Rptr. 3d 605, 610 (Ct. App. 2006); *In re N.B.*, 199 P.3d 16, 19–21 (Colo. App. 2007); *In re Adoption of Riffle*, 922 P.2d 510, 514 (Mont. 1996); *Jeffrey A. v. Tohono O’odham Nation (In re Baby Boy C.)*, 805 N.Y.S.2d 313, 325–26 (App. Div. 2005); *L.S.W. v. K.B. (In re A.B.)*, 663 N.W.2d 625, 634–36 (N.D. 2003); *Letherman v. Yancey (In re Baby Boy L.)*, 103 P.3d 1099, 1107 (Okla. 2004).

Amendment argument, because either Congress has the authority to legislate under the Indian Commerce Clause, or the state has the authority to regulate under its reserved powers.<sup>269</sup> Finally, both the New York Appellate Division and the California Sixth Appellate District demonstrate that the “interest” described in *In re Bridget R.*’s due process argument is not a right under the U.S. Constitution,<sup>270</sup> but exists solely in the common law of California.<sup>271</sup>

*D. 2007: A Banner Year for Upholding the ICWA*

While the past decade has seen a steady trickle of states rejecting the “existing Indian family” doctrine, and no states adopting it, 2007 was a particularly good year for the ICWA. Minnesota and Colorado became the latest states to reject the “existing Indian family” doctrine, and the balance of authorities shifted dramatically in California.

Minnesota first faced the “existing Indian family” doctrine in *In re Welfare of Children of S.W.*,<sup>272</sup> which was decided in January, 2007. The respondent argued that the court should apply the doctrine and that, without the doctrine, the ICWA would violate equal protection, due process, and the Tenth Amendment.<sup>273</sup> The trial court rejected both of these arguments.<sup>274</sup> However, the question did not reach the appellate court because the respondent failed to file a notice of review challenging the trial court’s decisions.<sup>275</sup> By mid-year, the question was moot, as the Legislature had amended state law to prohibit courts from invoking the “existing Indian family” doctrine.<sup>276</sup>

Several months later, Colorado rejected the “existing Indian family” doctrine in *In re N.B.*,<sup>277</sup> a stepparent adoption case. The child’s natural mother was a member of the Assiniboine and Sioux Tribes of the Fort Peck Reservation in Montana,<sup>278</sup> but the child spent most of

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269. *In re Vincent M.*, 59 Cal. Rptr. 3d at 336.

270. *Id.* at 334–35; *In re Baby Boy C.*, 805 N.Y.S.2d at 325.

271. *See In re Baby Boy C.*, 805 N.Y.S.2d at 325 (“[O]ther than *Bridget R.* and its progeny, we are unaware of any authority holding that a child’s ‘right’ to a stable home environment in the context of adoptive placements is one of constitutional dimensions.”) (citation omitted).

272. 727 N.W.2d 144 (Minn. Ct. App. 2007).

273. *See id.* at 152–53.

274. *Id.* at 153.

275. *Id.*

276. *See* MINN. STAT. § 260.771, subdiv. 2 (2008).

277. 199 P.3d 16, 19–21 (Colo. Ct. App. 2007), *cert. denied*, No. 07SC961, 2008 WL 757927 (Colo. Mar. 24, 2008).

278. *Id.* at 18.

his life in Colorado with his natural father and his stepmother.<sup>279</sup> When the stepmother moved to terminate the mother's parental rights and adopt the child, she argued, among other things, that the "existing Indian family" doctrine should apply because the child had never been a part of an Indian family, and that the ICWA was unconstitutional.<sup>280</sup> The court rejected each of these arguments.<sup>281</sup> First, the court invoked *Holyfield*, noting that no parent should be able to unilaterally undermine either the child's interest or the tribe's interest in the child.<sup>282</sup> Second, the court noted the lack of any such exception in the ICWA itself, despite the inclusion in the ICWA of exceptions for delinquency and dissolution proceedings.<sup>283</sup> Finally, the court warned that such an exception "would empower state courts to make an inherently subjective factual determination as to the 'Indianness' of a particular child or the parents, which courts are 'ill-equipped to make.'"<sup>284</sup>

*In re Vincent M.* brought about a dramatic shift in the balance of authorities in California. More important than simply changing precedent in the District,<sup>285</sup> *In re Vincent M.* was the first case to explicitly validate the California statute that abrogated the "existing Indian family" doctrine.<sup>286</sup> Additionally, *In re Vincent M.* was an in-depth, well-reasoned decision that provides ample ammunition for future courts looking to fend off the doctrine.

#### V. A NAIL IN THE COFFIN: *IN THE MATTER OF A.J.S. BURIES THE "EXISTING INDIAN FAMILY" DOCTRINE IN KANSAS*

In 2009, the "existing Indian family" returned to its roots, where supporters learned the hard way that "you can't go home again." Kansas courts had upheld the doctrine as recently as 2008.<sup>287</sup> But in *In*

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279. *Id.* at 17–18.

280. *Id.* at 18.

281. *Id.*

282. *Id.* at 21–22.

283. *Id.*

284. *Id.* at 22 (internal citations omitted).

285. The "existing Indian family" doctrine remains viable in just one district now, having been repudiated by four with one district split; before *In re Vincent M.*, the doctrine was viable in two districts, with three rejecting and one split.

286. See *Santa Cruz Human Res. Agency v. Paz M.* (*In re Vincent M.*), 59 Cal. Rptr. 3d 321 (Ct. App. 2007).

287. *In re M.B.*, 176 P.3d 977, 985 (Kan. Ct. App. 2008) (holding that the "existing Indian family" doctrine "precludes application of the ICWA when the Indian child's parent or parents have not maintained a significant social, cultural, or political relationship with an Indian tribe"). The Kansas Supreme Court had most recently

*re A.J.S.*, the Kansas Supreme Court was confronted again with the question of whether the ICWA should apply when a non-Indian mother voluntarily relinquishes custody of an Indian child who has never been part of an Indian family.<sup>288</sup> This time, after both carefully reviewing the reasoning in *In re Baby Boy L.* and closely examining *Holyfield* and the many state court decisions, the Kansas Supreme Court unanimously overruled *In re Baby Boy L.* and abandoned the “existing Indian family” doctrine.<sup>289</sup>

In *In re A.J.S.*, the parents were not married, and had dated for only about a month before the mother became pregnant.<sup>290</sup> The father was an enrolled member of the Cherokee Nation and the mother was non-Indian;<sup>291</sup> the parties stipulated, however, that A.J.S. would qualify as an “Indian child” under the ICWA.<sup>292</sup> “Nevertheless, the district judge ruled that ICWA was not applicable to this termination and adoption because A.J.S. had never been part of any Indian family relationship. Under these circumstances, the district judge also denied the Cherokee Nation’s motion to intervene and declined to modify the temporary custody order.”<sup>293</sup>

In its analysis of the “existing Indian family” doctrine, the court begins with *Holyfield*. Although recognizing both that *Holyfield* did not specifically address the “existing Indian family” doctrine, and that the U.S. Supreme Court has repeatedly refused to take “existing Indian family” cases, the Kansas court nonetheless finds *Holyfield* relevant for its recognition of “the central importance of the relationship between an Indian child and his or her tribe, independent of any parental relationship.”<sup>294</sup> The court quotes extensively from *Holyfield*’s discussion of Congressional intent, including both Congress’s concern over the sheer number of Indian children being removed from their homes by state agencies,<sup>295</sup> and Congress’s concern for and desire to protect the interests of tribes.<sup>296</sup> Following this lengthy

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considered the doctrine in 2006, but refused to consider the doctrine, holding that is was not applicable to the case. *See In re Adoption of B.G.J.*, 133 P.3d 1, 10 (Kan. 2006).

288. *In re A.J.S.*, 204 P.3d 543, 544 (Kan. 2009).

289. *Id.* at 549.

290. *Id.* at 544.

291. *Id.*

292. *Id.* at 545.

293. *Id.*

294. *Id.* at 547 (citing *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 50 (1989)).

295. *Id.*

296. *Id.* at 548.

quotation, the *In re A.J.S.* court concludes that “[t]he Court’s result and rationale in *Holyfield* recognized that ICWA grew in part out of concern for preservation of tribal interests in Indian children and that those interests could not necessarily be defeated by the desires of parents or concerns over placement permanency.”<sup>297</sup>

The court then briefly lists the states either rejecting and adopting the “existing Indian family” doctrine, noting that there are far more of the former than of the latter.<sup>298</sup> In doing so, the court explicitly refuses to consider congressional attempts to amend the ICWA to either affirm or reject the doctrine, noting that neither side has succeeded in persuading Congress to amend the statute.<sup>299</sup>

Finally, the court lays out its case for rejecting the “existing Indian family” doctrine and overruling *In re Baby Boy L.* First, the doctrine conflicts with the plain language of the ICWA, which does not include any consideration of the child’s cultural circumstances among the statutory exceptions.<sup>300</sup> Second, the court concludes that the “existing Indian family” doctrine is at odds with the ICWA’s goal, recognized in *Holyfield*, of protecting a tribe’s interest in Indian children.<sup>301</sup> Recognizing the long-term implications of severing the relationship between a child and his or her tribe, the court points out that the tribe loses something in that process: “As counsel for the Cherokee Nation emphasized at oral argument before us, a child removed now from the tribe cannot later be a voice for the tribe.”<sup>302</sup>

Third, the court criticizes what it calls the “secondary justification” for the holding in *In re Baby Boy L.*: that because the mother consented to adoption only by the chosen parents and would revoke her relinquishment and raise the child herself if that adoption were not upheld, in either case the child would be raised away from an Indian environment.<sup>303</sup> The *In re A.J.S.* court noted that such

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297. *Id.*

298. *Id.* at 548–49.

299. *Id.* at 549.

300. *See In re A.J.S.*, 204 P.3d 543, 549 (Kan. 2009) (asserting that the language of the ICWA makes no exception for children, such as A.J.S., who have not been raised within the Indian community).

301. *Id.* at 549–50.

302. *Id.* at 550.

303. *Id.* In *In re Baby Boy L.*, the court wrote:

The mother of Baby Boy L. gave a consent to the appellees to adopt her child. The consent was limited to the two named appellees and was for their benefit only. She has made it clear that if this adoption was denied for any reason, or if an attempt was made to place the child for adoption under the terms of the Act, she would revoke her consent and again take custody

declarations are of the mother’s intent only, and that the father’s and the tribe’s interests are expressly protected by the ICWA.<sup>304</sup> In fact, the court concludes, the “existing Indian family” doctrine allows for the breakup of a family without allowing that an “Indian family” might eventually be created.<sup>305</sup>

Lastly, the court notes the “widespread and well-reasoned criticism” of the “existing Indian family” doctrine among both scholars and courts.<sup>306</sup> After quoting extensively from *In re Baby Boy C.*,<sup>307</sup> the court finally concludes:

Given all of the foregoing, we hereby overrule *Baby Boy L.*, and abandon its existing Indian family doctrine. Indian heritage and the treatment of it has a unique history in United States law. A.J.S. has both Indian and non-Indian heritage, and courts are right to resist essentializing any ethnic or racial group. However, ICWA’s overall design, including its “good cause” threshold in 25 U.S.C. § 1915, ensures that all interests—those of both natural parents, the tribe, the child, and the prospective adoptive parents—are appropriately considered and safeguarded. ICWA applies to this state court child custody proceeding involving A.J.S., and the Cherokee Nation must be permitted to intervene.<sup>308</sup>

The court carefully considers all of the arguments for the “existing Indian family” doctrine<sup>309</sup> and thoughtfully rejects them.<sup>310</sup>

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of her child, and never consent to his placement with his father or with the father’s extended Indian family, the Kiowa Tribe, the grandparents or anyone else. . . . Under either the Act or Kansas law, any proceedings which the Kiowa Tribe might have undertaken if allowed to intervene would have been useless. Any attempt to effect the preferential placement contemplated by the Act would necessarily result in the removal of the baby from the custody of appellees and thereupon there being no consent by the mother to any such action, the child would be returned to her. We do not believe that the Congress intended such ridiculous results nor do we believe that the Kiowa Tribe could in good faith recommend such a procedure.

*In re Adoption of Baby Boy L.*, 643 P.2d 168, 177 (Kan. 1982), *overruled by In re A.J.S.*, 204 P.3d 543 (Kan. 2009).

304. *In re A.J.S.*, 204 P.3d at 550.

305. *See id.*

306. *See id.* at 550–51 (listing numerous court cases and publications that suggest the “existing Indian family” doctrine conflicts with the purpose of the ICWA).

307. 805 N.Y.S.2d 313 (App. Div. 2005).

308. *In re A.J.S.*, 204 P.3d at 551.

309. The court did not express an opinion on the argument and began with *James R. v. Cindy R.* (*In re Bridget R.*), 49 Cal. Rptr. 2d 507 (Ct. App. 1996), that the “existing Indian family” doctrine is necessary to save the ICWA from constitutional infirmities under the due process and equal protection clauses. *See In re A.J.S.*, 204 P.3d at 549. However, as noted, no court outside of California has adopted this

Short of a U.S. Supreme Court decision or congressional action expressly barring the “existing Indian family” doctrine, the Kansas Supreme Court’s explicit abrogation of its holding in *Baby Boy L.* might be the most dramatic thing that could have happened in “existing Indian family” jurisprudence. Kansas is where the “existing Indian family” doctrine began, so it goes without saying that the state’s reversal is a monumental event. Moreover, each of the six states where the “existing Indian family” doctrine remains valid relied extensively on the *In re Baby Boy L.* rationale that the doctrine effects Congress’s intent—a rationale that *In re A.J.S.* concludes was both flawed to begin with and was repudiated by the U.S. Supreme Court’s findings in *Holyfield*.<sup>311</sup> In each of those states, attorneys seeking to defend the rights of Indian children, Indian families and Indian tribes now have new and persuasive ammunition with which to seek reconsideration of the “existing Indian family” doctrine.

## VI. CONCLUSION

The “existing Indian family” doctrine is not dead yet. The doctrine remains good law in six states.<sup>312</sup> Even more importantly, nearly half of the states have not yet addressed the “existing Indian family” doctrine either in statute or in common law.<sup>313</sup> Courts in those states may still have to consider whether the ICWA applies to children who

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argument. *See supra* Part IV.C.

310. *In re A.J.S.*, 204 P.3d at 551.

311. *See* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 65 (1989).

312. *See supra* note 10. Tennessee recently affirmed its commitment to the “existing Indian family” doctrine in *In re K.L.D.R.*, No. M2008-00897-COA-R3-PT, 2009 WL 1138130 (Tenn. Ct. App. Apr. 27, 2009).

313. These states are Arkansas, Connecticut, Delaware, Florida, Georgia, Hawaii, Maine, Maryland, Massachusetts, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Virginia, West Virginia, and Wyoming. At least one jurist has erroneously stated that Nebraska adopted the “existing Indian family” doctrine. *See* Tubridy v. Iron Bear (*In re* Adoption of S.S.) (S.S. II), 657 N.E.2d 935 (Ill. 1995) (Heiple, J., concurring) (including Nebraska v. D.W. (*In re* Interest of C.W.), 479 N.W.2d 105 (Neb. 1992), in a list of “existing Indian family” cases that the U.S. Supreme Court had denied cert). However, *In re C.W.* concerned not the “existing Indian family” doctrine, but the ICWA’s “good cause” language. *In re C.W.*, 479 N.W.2d at 118. Additionally, the Wyoming Supreme Court has been asked to rule on the “existing Indian family” doctrine, but refused because the doctrine would not have applied in the case before the Court. *See* Wisconsin v. Debra F. (*In re* Termination of Parental Rights to Branden F.), 695 N.W.2d 905 (Table) (Wis. Ct. App. 2005), 2005 WL 645191; Brown County v. Marcella G. (*In re* Shawnda G.), 634 N.W.2d 140, 146 (Wis. Ct. App. 2001); Northern Arapaho Tribe v. Wyo. Dep’t of Family Servs. (*In re* SNK), 108 P.3d 836, 838 (Wyo. 2005).

qualify as “Indian children” under the ICWA but who fail to be part of an “Indian family” or who have little or no connection (yet) to their tribes.

However, given the number of courts that have rejected the “existing Indian family” doctrine—especially the recent, thorough, and thoughtful decisions in *In re Baby Boy C.*, *In re Vincent M.*, *In re N.B.*, and *In re A.J.S.*—the number of states that have codified the doctrine’s rejection, and the substantive repudiation of the rationales used to support it, the doctrine’s demise appears imminent.