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Chipping Away at the Indian

Child Welfare Act: Doe v.

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Interpretation of ICWA and

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CHIPPING AWAY AT THE INDIAN CHILD WELFARE ACT: DOE V. MANN AND THE COURT'S "1984" INTERPRETATION OF ICWA AND PL 280

By Jake J. Allen¹

"The past was erased, the erasure was forgotten, the lie became truth."²

INTRODUCTION

In *Doe v. Mann*, the Ninth Circuit (Mann Court) held that the Indian Child Welfare Act (ICWA) did not provide exclusive jurisdiction to a tribe in California due to the tribe failing to "present to the Secretary [of the Interior] for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction."³ The holding was based on the Mann Court's reasoning that Public Law 280's⁴ (PL 280) civil regulatory jurisdiction, when combined with the provisions of ICWA, divested the tribe of exclusive jurisdiction over involuntary child custody proceedings, and under ICWA's § 1918(a),⁵ there was a requirement for the tribe to submit a plan to the Secretary of the Interior (Secretary) to regain exclusive jurisdiction over child custody

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² George Orwell, *Nineteen Eighty-Four*, (1984), 78, Published by Secker and Warburg (1949).

³ *Doe v. Mann*, 415 F.3d 1038, 1061 (9th Cir. 2005) (quoting 25 U.S.C. § 1918(a) of ICWA).

⁴ "An Act [t]o confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes." 83 Cong. Ch. 505, August 15, 1953, 67 Stat. 588.

⁵ 25 U.S.C. § 1911(a) provides: "An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceedings involving an Indian child who resides or is domiciled within the reservation of such tribe, *except where such jurisdiction is otherwise vested in the State by existing Federal Law.*" (emphasis added).

cases involving Indian children residing on the reservation.⁶ The Mann Court failed to address the issue of which entity had the presumption of jurisdiction in the case of concurrent tribal/state jurisdiction.

In deciding that federal courts had jurisdiction to hear cases, which have been fully adjudicated in state courts,⁷ the Mann Court cited the Indian canon of construction from *Montana v. Blackfeet*,⁸ where “federal courts will liberally construe a federal statute in favor of Indians, with ambiguous provisions interpreted for their benefit.”⁹ In resolving the ambiguity of whether ICWA provided jurisdiction for federal courts, the Mann Court concluded that § 1914 of ICWA provided federal courts with “authority to invalidate a state court ... termination of parental rights if it is violation of §§ 1911, 1912, or 1913.”¹⁰ However, when confronted with an ambiguity in interpreting the scope of PL 280’s interplay with ICWA, the Indian canons of construction were ignored by the Mann Court. It noted that while § 1911(a) poses little difficulty in interpretation on its face, the “*wrinkle* comes in interpreting Public Law 280, which is embedded within § 1911.”¹¹ (emphasis added). The Court’s resolution of this ambiguity was to hold that there was no ambiguity and resulted in the violation of multiple bedrock principles of Indian law including: (1) constructing statutes to liberally benefit Indians;¹² (2) venturing into Indian

⁶ *Id.*

⁷ Cases that have been fully adjudicated in state court and not subject to the Rooker-Feldman doctrine which bars federal courts from exercising subject-matter jurisdiction after a party loses in state court and exercising a *de facto* appellate review of state judgments. The Tenth Circuit takes a different view and will not relitigate a dispute such as this. See *Comanche Indian Tribe of Okla. V. Hovis*, 53 F.3d 298 (10th Cir. 1995) (after a state court had determined it had jurisdiction, the federal Appeals court would not relitigate).

⁸ *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

⁹ *Doe v. Mann*, 415 F.3d at 1047.

¹⁰ *Id.*

¹¹ *Id.* at 1048.

¹² See *Montana v. Blackfeet Tribe of Indians*, *supra*; also see *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (“The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.”).

sovereignty that has always been the exclusive providence of Congress;¹³ and (3) recognizing that any limitation of tribal sovereignty has to be express and not implied.¹⁴ Additionally, by ignoring PL 280's limited scope of state civil regulatory jurisdiction over tribes that had been established by the Supreme Court and the Ninth Circuit's own precedent, the Mann Court veered into a precarious position unsupported and contrary to its applicable primary authority.

District Court Judge Patel, in *Doe v. Mann*, articulated that “[s]urprisingly, in the twenty-five year history since ICWA was enacted, no court has ruled on th[e] issue” of the requirement for PL 280 tribes to petition the Secretary to reassume exclusive jurisdiction over reservation domiciled Indian child custody cases.¹⁵ Judge McKeown, for the Ninth Circuit in *Doe v. Mann*, noted that this “case presents an issue of first impression for federal courts.”¹⁶ California’s Department of Social Services had not asserted in federal court at any time in the 25-year existence of ICWA, that due to a tribe’s PL 280 civil jurisdictional limitations, the tribe was not entitled to *referral* jurisdiction¹⁷ of a reservation-domiciled Indian child. The State of California had conducted their affairs, concerning Indian child custody cases, for twenty-five years to give tribes referral jurisdiction and the Supreme Court has stated, “[w]hen a party

¹³ *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978) (“The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance.”).

¹⁴ *California v. Cabazon*, 480 U.S. 202, 207 (1987) (The Supreme Court held that state laws may only be applied to tribal lands “if Congress has expressly so provided.”).

¹⁵ *Doe v. Mann*, 285 F.Supp.2d 1229 (N.D. Cal. 2003).

¹⁶ *Doe v. Mann*, 415 F.3d at 1039.

¹⁷ While both the tribe and the state may have concurrent jurisdiction over involuntary child custody proceedings, the presumption is for the tribe to have jurisdiction over the action and the state is obliged to refer the case to tribal forums absent specified circumstances. The Supreme Court in *Holyfield* stated, “[s]ection 1911(b), [of ICWA] on the other hand, creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989). For jurisdiction by a tribe for a child *not* domiciled on the reservation to exceed the jurisdiction of a child domiciled on a reservation, would be an absurd result.

belatedly asserts a right ... longstanding observances and settled expectations are prime considerations.”¹⁸ The longstanding observances of case law and the settled expectations of the tribes in California were not prime considerations for the Mann Court.

What these judges failed to note was decades of settled law¹⁹ which established that in PL 280 states, jurisdiction is concurrent but presumptively tribal jurisdiction.²⁰ In addition, the Supreme Court narrowly interpreted the of the scope of civil regulatory powers of PL 280 states in *Bryan v. Itasca*, when it pronounced that PL 280 was “primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and private citizens.”²¹ The Ninth Circuit’s analysis seemed to rewrite the Supreme Court’s narrow interpretation of the scope of PL 280’s civil jurisdiction. In the present case, there was neither a “lack of adequate Indian forum,” nor a “legal dispute between reservation Indians, [or] between Indians and private citizens.” The Mann case was a dispute between a reservation Indian and the state government, not between individuals. “The past was erased” by the Mann Court and we can only hope that the erasure will not be forgotten, and that the lie does not become truth.²²

There is hope that the past has not been forgotten. *In re M.A.*, decided in 2006 (subsequent to *Doe v. Mann*), a California appellate court held that while the tribal court had not followed the statutory procedure for the “reassumption” of exclusive jurisdiction,

¹⁸ *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 200 (2005).

¹⁹ The past also embodies the judicial doctrine of *stare decisis*.

²⁰ *See Native Village of Venetie I.R.A. Council v. State of Alaska*, 944 F.2d 548, 561 (9th Cir. 1991) (“Exclusive jurisdiction, of course, is clearly broader than concurrent jurisdiction. Likewise, referral jurisdiction is broader in scope than concurrent jurisdiction, in that referral jurisdiction is concurrent *but presumptively tribal* jurisdiction.”).

²¹ *Bryan v. Itasca*, 426 U.S. 373, 383 (1976) (PL 280 did not give the states general regulatory powers over tribes and their members.).

²² *See* generally, George Orwell, *supra*.

the tribe could still petition for transfer of a non-reservation Indian child because the referral jurisdiction was presumptively tribal jurisdiction under *Bryan v. Itasca*.²³

FACTS AND PROCEDURE

Mary Doe was a member of a federally recognized tribe, the Elem Indian Colony in Lake County, California,²⁴ at the time of this action. In 1999, Mary's minor daughter Jane was living in her great aunt's home on the reservation.²⁵ The daughter told Mary that her minor cousin had sexually assaulted her, resulting in the mother calling the Department of Social Services and agency removal of Jane from her great aunt's home.²⁶ Child dependency proceedings were initiated in Superior Court, under California Code §§ 300(b) and (d), that resulted in placing Jane in a foster home pending the outcome.²⁷ The Elem Tribal Council intervened in a timely manner, after it passed a resolution declaring Jane should be placed with Mary Doe's married brother.²⁸ The superior court disregarded the Tribal Council's resolution, terminated Mary Doe's parental rights, and allowed Jane's foster parents, Indians but non- members of the Elem Tribe, to adopt her.²⁹

One and one-half years later, Mary Doe initiated a complaint in federal court for declaratory and injunctive relief, claiming that the superior court did not have jurisdiction

²³ *In re M.A.*, 137 Cal. App.4th 567, 569 (3 Dist. 2006)

²⁴ *Doe v. Mann*, 415 F.3d at 1040.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

under ICWA.³⁰ The district court held that because the Elem Indian Colony had not applied to the Secretary for reassumption of jurisdiction, the tribe did not have exclusive jurisdiction over child custody proceedings under § 1911(a) of ICWA and the superior court had concurrent jurisdiction to decide the case.³¹ On appeal, the Ninth Circuit affirmed.³²

After the Mann Court decided that there was federal jurisdiction under ICWA to hear these types of cases via the Indian canon of construction, it decided that involuntary child custody proceedings fell within the purview of PL 280's civil jurisdiction, and thus the tribe did not have exclusive jurisdiction.³³ In reaching this conclusion, the Mann Court first decided that California's child dependency statute was neither criminal nor prohibitory in nature.³⁴ Then, to reach the conclusion that PL 280's civil jurisdiction controlled, the Mann Court had to address *Bryan v. Itasca* and *California v. Cabazon*, both cases defining PL 280's scope of jurisdiction as limited to disputes between private parties.³⁵ The Mann Court stated that it was "confident that resting [its] analysis simply on the Supreme Court's references to private disputes would create a tortured result," and concluded: "The simple fact that the state steps in as a party does not transform what is an adjudicatory proceeding involving private parties into a regulatory proceeding."³⁶

BACKGROUND

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 1038.

³³ *Id.* at 1049.

³⁴ *Id.* at 1058.

³⁵ *Id.*

³⁶ *Id.* at 1059.

A. Principles of Indian Law

1. Tribal Sovereignty

The origins of United States tribal sovereignty law can be traced to the Marshall Trilogy.³⁷ In 1831, Justice Marshall, in the case *Cherokee Nation v. Georgia*, used the phrase “domestic dependent nations,” when referring to the sovereign status of Indian tribes.³⁸ After meticulous documentation, Felix Cohen concluded, “[w]hat is not expressly limited [by Congress] remains within the domain of tribal sovereignty.”³⁹ Tribal sovereignty, absent waiver by treaty, has been traditionally only limited by Congress.⁴⁰ Despite the recognition of this authority of Congress, the Supreme Court has placed limitations on tribal authority consistent with what it termed implicit divestiture, which has been defined as “that part of sovereignty which the Indian implicitly lost by virtue of their dependent status.”⁴¹ However, these judicial divestments of Indian sovereignty have been limited to relations between tribes and non-members⁴² and not

³⁷ Mathew L. M. Fletcher, *The Iron Cold of the Marshall Trilogy*, North Dakota Law Review, Vol. 82, No. 4, 2006. The Marshall Trilogy consists of three cases decided by the Supreme Court of the United States in the early years, authored by Chief Justice Marshall, which lay the foundation for Indian law. The cases were *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823) (holding that the “Doctrine of Discovery” prevented Indians from having the rights of alienation of Indian lands and only the federal government could buy or take the lands), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) (a case which determined that Indian tribes were not foreign states, but akin to “domestic dependant nations,” with a relationship to the federal government as a “ward to his guardian”), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (holding that the Cherokee nation was a nation with a distinct, independent community, occupying its own territory, and the laws of the state of Georgia could have no force on the Cherokee reservation).

³⁸ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 2 (1831).

³⁹ Felix S. Cohen, *Handbook of Federal Indian Law*, 122-23 (1941).

⁴⁰ See *Wheeler*, 435 U.S. at 322-23 (“The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance.”), also see the Indian Commerce Clause of the U.S. Constitution, U.S.C.A. Const. Art. 1, § 8, cl. 3.

⁴¹ See *Wheeler*, 435 U.S. at 326 (“The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.”).

⁴² *Id.*

those matters of internal tribal relations.⁴³ The Supreme Court has made it clear that in statutory construction, the absence of an express Congressional mandate prohibits any limitation of tribal sovereignty.⁴⁴

2. The Indian Canon of Construction

Due to the special trust relationship between the federal government and Indian tribes, the usual canons of construction do not apply when a court is interpreting statutes affecting Indians.⁴⁵ The Supreme Court has stated that “[t]he standard principles of statutory construction do not have their usual force in cases involving Indian law. As we said earlier this Term, ‘[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.’”⁴⁶ *Bryan*, a case

⁴³ *GMAC v. Chischilly*, 96 N.M. 113, 114, 628 P.2d 683, 684 (1981) (“There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the rights of the Indians to govern themselves. It is immaterial that the respondent is not an Indian.” citing *Donnelly v. United States*, 228 U.S. 243, 269-72, 33 S.Ct. 449, 458-59, 57 L.Ed. 820 (1913)).

⁴⁴ See *California v. Cabazon*, *supra*; also see *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 170-171, 93 S.Ct. 1257, 1261 (1973) (“State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.”); *Rice v. Rehner*, 463 U.S. 713, 719-720, 103 S.Ct. 3291, 3296 (1983) (“When we determine that tradition has recognized a sovereign immunity in favor of the Indians in some respect, then we usually are reluctant to infer that Congress has authorized the assertion of state authority in that respect ‘except where Congress has expressly provided that State laws shall apply.’” (quoting *McClanahan*, *supra*, 411 U.S., at 171, 93 S.Ct., at 1261 (quoting U.S. Dept. of the Interior, Federal Indian Law 845 (1958))); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (Repeal by implication of an established tradition of immunity or self-governance is disfavored.).

⁴⁵ *Montana v. Blackfeet Tribe of Indians*, 471 U.S. at 766 (“[H]eld that State of Montana could not tax Indian tribe's royalty interests under oil and gas leases issued to non-Indian lessees pursuant to Indian Mineral Leasing Act.”).

⁴⁶ *Id.* (quoting *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985)).

that directly addressed the civil jurisdictional applicability of PL 280, affirmed these principles.⁴⁷

B. The Applicable Statutes

1. Public Law 280

Public Law 280 was passed in 1953, twenty-five years prior to ICWA.⁴⁸ This legislation affected six “mandatory” states including California.⁴⁹ The criminal jurisdiction over Indian tribes was expansive and the Supreme Court has recognized that the central focus of the statute was to grant state criminal jurisdiction over offenses committed by or against Indians on reservations.⁵⁰

On the other hand, the civil jurisdiction was limited with a “virtual absence of expression of congressional policy or intent respecting s[ection] 4's⁵¹ grant of civil jurisdiction to the States.”⁵² The Supreme Court has addressed PL 280’s scope of civil

⁴⁷ *Bryan*, 426 U.S. at 392 (“statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.” *quoting Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89, 39 S.Ct. 40, 42, 63 L.Ed. 138 (1918)).

⁴⁸ *Mann*, 415 F.3d at 1050.

⁴⁹ *Id.* (the other five mandatory states are Alaska, Minnesota, Nebraska, Oregon, and Wisconsin).

⁵⁰ *Bryan*, 426 U.S. at 380 (state criminal jurisdiction is embodied in § 2 of the Act, 18 U.S.C. § 1162 which states in part “State jurisdiction over offenses committed by or against Indians in the Indian country. Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.”).

⁵¹ Pub.L. 83-280, § 4, 28 U.S.C. § 1360(a) states in part: “State civil jurisdiction in actions to which Indians are parties (a) ... [T]he States ... shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country ... to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State....”

⁵² *Bryan*, 426 U.S. at 380.

jurisdiction granted to the states and concluded that in light of the language of PL 280 and its legislative history it was “virtually compel[ed] ... [to the] conclusion that the primary intent of s[ection] 4 was to grant jurisdiction over *private civil litigation involving reservation Indians in state court.*”⁵³ (emphasis added). The *Cabazon* Court,⁵⁴ and the Ninth Circuit in *Confederated Tribes of Colville Reservation*, reiterated this conclusion.⁵⁵

2. The Indian Child Welfare Act

ICWA was passed by Congress in 1978 in response to “[t]he wholesale separation of Indian children from their families,” and Congress described the situation as “perhaps the most tragic and destructive aspect of American Indian life” at that time, noting that the disparity between placement rates for Indians and non-Indians was “shocking.”⁵⁶ The House legislative history recognized that “cultural biases frequently affect[ed] decision making” when placement decisions were made for Indian children.⁵⁷ Congressional reports had shed light on the ignorance and hostility of state social workers and judges toward tribal culture and its benefits.⁵⁸ The Supreme Court subsequently declared, regarding ICWA, “Congress was concerned with the rights of Indian families and Indian

⁵³ *Id.* at 385 (“the consistent and exclusive use of the terms “civil causes of action,” “aris(ing) on,” “civil laws . . . of general application to private persons or private property,” and “adjudicat(ion),” in both the Act, [PL 280], and its legislative history virtually compels our conclusion that the primary intent of s 4 was to grant jurisdiction over private civil litigation involving reservation Indians in state court.”).

⁵⁴ *Cabazon*, 480 U.S. at 208 (Public Law 280 granted to states civil jurisdiction only over private disputes.).

⁵⁵ *Confederated Tribes of Colville Reservation v. State of Wash.*, 938 F.2d 146, 147 (9th Cir. 1991) (“it was not the Congress’ intention to extend to the States the ‘full panoply of civil regulatory powers,’ [quoting *Bryan*,] 426 U.S. at 388, 96 S.Ct. at 2110, but essentially to afford Indians a forum to settle private disputes among themselves.”).

⁵⁶ H.R. Rep. 95-1386, 9, 1978 U.S.C.C.A.N. 7530, 7530.

⁵⁷ *Id.* at 10.

⁵⁸ *Id.* at 8-12.

Communities vis-à-vis state authorities. More specifically, its purpose was, in part, to make clear that in certain situations the state courts did not have jurisdiction over child custody proceedings.”⁵⁹ When taken as a whole, in light of the legislative history and explicit terms, the main purpose of the statute was to curtail state authority.⁶⁰

ICWA provides for a dual system of state and tribal jurisdiction in Indian child custody cases, with § 1911(a) providing for exclusive jurisdiction over children who are domiciled on the reservation and concurrent but presumptively tribal jurisdiction in the case of children domiciled outside the reservation.⁶¹ However, there are certain enumerated exceptions to transfer jurisdiction for non-reservation domiciled children.⁶² ICWA provides that “[a]n Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceedings involving an Indian child who resides or is domiciled within the reservation of such tribe, *except where such jurisdiction is otherwise vested in the State by existing Federal Law.*”⁶³ (emphasis added). The exact nature of the particular exceptions embedded in this statute are subject to debate, but generally it has been thought to possibly include PL 280 and other statutes conferring civil jurisdiction on individual states over particular reservations.⁶⁴ However, because these “statutes often contain exceptions and limitations, their grants of civil jurisdiction to states do not encompass certain kinds of proceedings, such as regulatory matters. Insofar as child

⁵⁹ *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 44-45 (1989).

⁶⁰ Felix S. Cohen, *Handbook of Federal Indian Law*, 829 (2005).

⁶¹ *In re Alicia S.*, 65 Cal.App.4th 79, 82, 76 Cal.Rptr.2d 121, 123 (Cal. App. 5 Dist. 1998).

⁶² 25 U.S.C. § 1911(b): “Transfer of proceedings; declination by tribal court. In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child’s tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child’s tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.”

⁶³ 25 U.S.C. § 1911(a).

⁶⁴ Cohen, at 830.

welfare proceedings may fit within these exceptions, a tribe may retain exclusive jurisdiction notwithstanding the statute.”⁶⁵

The Attorney General of Wisconsin (a mandatory PL 280 state), found that involuntary proceedings to terminate parental rights based on neglect or abuse were regulatory in nature and fell outside the boundary of PL 280’s State civil jurisdiction.⁶⁶

Minnesota, another mandatory PL 280 state, has enacted a statute recognizing exclusive tribal court jurisdiction over all child placement proceedings involving Indian children domiciled on reservations in the state.⁶⁷

The only mention of PL 280 in ICWA is in § 1918(a): “Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of [PL 280] ..., or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings,” by petitioning the Secretary.⁶⁸ The force and meaning of this section, again, depends upon the scope of civil jurisdiction conferred to the states by PL 280, which is ambiguous.⁶⁹ In *Venetie I.R.A. Council v. Alaska*, a Ninth Circuit case deciding state jurisdiction (Alaska) under PL 280 as it pertained to ICWA, the state argued that § 1918(a) completely divested all tribal jurisdiction under ICWA, because Congress would have not provided in ICWA the provision to “reassume” jurisdiction otherwise.⁷⁰ The Ninth Circuit held that the provision to “reassume” jurisdiction applied to reassuming exclusive jurisdiction and that absent the successful petitioning process, the tribe had concurrent jurisdiction under ICWA.⁷¹

⁶⁵ *Id.*

⁶⁶ 70 Op. Wisc. Att’y Gen. 237, 3 (1981).

⁶⁷ Minn. Stat. § 260.77(1).

⁶⁸ 25 U.S.C. § 1918(a).

⁶⁹ *Mann*, 415 F.3d at 1048.

⁷⁰ *Venetie*, 944 F.2d at 559-62.

⁷¹ *Id.*

C. State Defenses to Tribal Jurisdiction in Opposition to ICWA

The enforcement and implementation of ICWA has been met in some cases with hostility and resistance from state courts.⁷² ICWA provides an exception for referral jurisdiction of a non-reservation domiciled Indian child for “good cause.”⁷³ Although the statute does not define “good cause,” the BIA Guidelines outline some non-binding circumstances including: (1) the petition is inexcusably filed when the proceeding is already at an advanced stage; (2) the Indian child is older than twelve and objects; (3) presenting the necessary evidence in tribal court would produce a hardship for the parties or witnesses; or (4) a child over five whose parents are not available, and has little or no contact with the tribe or its members.⁷⁴ Some court systems, including California,⁷⁵ have used the “good cause” exception to apply a “best interests of the child” doctrine,⁷⁶ while others have declined because the use of this “standard when determining whether good cause exists defeats the very purpose for which the ICWA was enacted, for it allows Anglo cultural biases into the picture.”⁷⁷ It has been noted that “[c]onspicuously absent from the list of justifications for deviating from the placement preferences [by the BIA] is a determination that adherence to the preferences would not be within the child’s best

⁷² See Atwood, *supra*, 51 Emory L.J. at 587 (“By some accounts the Act, [ICWA], has been the victim of entrenched state court hostility ever since its enactment more than two decades ago.”).

⁷³ 25 U.S.C. § 1911(b).

⁷⁴ Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67, 584, C.3.(a).

⁷⁵ See e.g., *In re Robert T.*, 246 Cal. Rptr. 168, 173-174 (Ct. App. 1988).

⁷⁶ This doctrine is used when the state court thinks that the tribal court will not make decisions approved by the state court.

⁷⁷ *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 170 (Tex Ct. App. 1995).

interest- presumably because the BIA did not wish to invite state courts to engage in a highly discretionary and potentially biased analysis.”⁷⁸

The “existing Indian family” doctrine⁷⁹ has also been used to determine placement of an Indian child, however California courts have been divided over this doctrine in the past.⁸⁰ More recently, it has been prohibited by state statute.⁸¹ California, like Oklahoma, has enacted legislation to prohibit the use of this doctrine.⁸² The courts that adhere to this doctrine reason that Congress never intended that ICWA to apply in other situations where its application would do nothing to further its underlying purpose of preserving Indian culture, in that there is no existing family to save.⁸³

One appellate court in California held that ICWA violated the Constitutional rights of a child who was one-quarter Indian by bloodline, and did not allow the transfer of the child to his mother’s tribe.⁸⁴ Another California court held that ICWA did not preempt California’s *de facto* parent doctrine as applied to Indian children.⁸⁵

ANALYSIS

Doe v. Mann was a case of an Indian child residing on a reservation who had been

⁷⁸ See Atwood, *supra*, 51 Emory L.J. at 643-44.

⁷⁹ Meaning “generally a family with a significant connection to the Indian community” *In re Alicia S.*, 65 Cal.App.4th at 82.

⁸⁰ *Id.*

⁸¹ *Id.* at 87.

⁸² Cal. Welf. & Inst. Code § 360.6(c)(2) (1998); Okal. Stat. tit.10 § 40.3(B).

⁸³ See *Id.* at 82.

⁸⁴ *In re Santos Y.*, 92 Cal. App.4th 1274, 1274, 112 Cal Rptr.2d 692, 692 (2 Dist. 2001).

⁸⁵ *In re Brandon M.*, 54 Cal.App.4th at 1387- 88 (“The *de facto* parenthood doctrine simply recognizes that persons who have provided a child with daily parental concern, affection, and care over substantial time may develop legitimate interests and perspectives, and may also present a custodial alternative, which should not be ignored in a juvenile dependency proceeding.”).

sexually molested while living in her great aunt's home.⁸⁶ The State of California removed the child and placed her in foster care.⁸⁷ The tribe intervened as a right, presumably to "protect the best interests of [their] Indian child[] [member] and to promote the stability and security of [their] tribe,"⁸⁸ the stated purpose of ICWA by the legislative history. The state court denied the tribal council recommendation to place the child in her married uncle's home.⁸⁹ This is the type of hostility to ICWA discussed by Barbara Ann Atwood.⁹⁰

After a year and one-half, the mother challenged the decision, alleging lack of jurisdiction by California's Superior Court, because § 1911(a) granted exclusive jurisdiction to tribes.⁹¹ This pleading, in light of persuasive precedent, the 1981 Wisconsin Attorney General's opinion (PL 280 did not apply to a tribe's exclusive jurisdiction under ICWA),⁹² would seem to be somewhat reasonable.⁹³ Nonetheless the pleading was risky due the holding in *Venetie* (the provision to "reassume" jurisdiction applied to reassuming exclusive jurisdiction and that absent the successful petitioning process, the tribe had concurrent jurisdiction under ICWA in a PL 280 state).⁹⁴

The District Court could have decided that the threshold question in this case was the current welfare of the child and a doctrine such as the *de facto* parent applied.⁹⁵

⁸⁶ *Doe v. Mann*, 415 F.3d at 1040.

⁸⁷ *Id.*

⁸⁸ H.R. REP. 95-1386, 8, 1978 U.S.C.C.A.N. 7530.

⁸⁹ *Doe v. Mann*, 415 F.3d at 1040.

⁹⁰ See Atwood, *supra*, 51 Emory L.J. at 587 ("Most of the scholarship on the ICWA attacks state court resistance as unreasonably hostile to the statutory goals at best and anti-Indian at worst.").

⁹¹ *Doe v. Mann*, 415 F.3d at 1040.

⁹² See the above discussion of the 1981 Wisconsin Attorney General's opinion, 70 Op. Wisc. Att'y Gen. 237, 3 (1981).

⁹³ A better argument might have been to assert that the tribe had presumptive transfer jurisdiction as discussed *infra*.

⁹⁴ *Venetie*, 944 F.2d at 548.

⁹⁵ *In re Brandon M.*, 54 Cal.App.4th at 1387- 88 ("The *de facto* parenthood doctrine simply recognizes that persons who have provided a child with daily parental concern, affection, and care over substantial time

Because of the length of time the child had spent with the adoptive parents, if the Court used the *de facto* parent doctrine, it would make the issue of exclusive jurisdiction moot, and it could have used the precedent of *Venetie* to justify concurrent jurisdiction of the state court.⁹⁶

Instead, the Mann Court held that because of concurrent jurisdiction, the Superior Court of California was justified in ignoring the intervention by the tribe.⁹⁷ Under this precedent, no tribe in a PL 280 state could assert any rights in an involuntary child custody case of a child who was domiciled on a reservation, absent approval of exclusive jurisdiction from the Secretary.⁹⁸ Of the hundreds of tribes in California, only one had gained approval for exclusive jurisdiction under the provisions of ICWA at the time of the Mann decision.⁹⁹ This holding is incompatible with the stated objectives of ICWA by Congress.¹⁰⁰ The legislative history of ICWA noted that in California there were nearly three times as many Indian children as non-Indian children placed in foster care and comparatively many more children that were Indian placed in adoptive homes.¹⁰¹ It would be more than a stretch to conclude this decision, which has the practical effect of providing exclusive jurisdiction to the state over reservation-domiciled children, was compatible with the intent of Congress. The Mann Court interpreted ICWA, when combined with PL 280, as taking jurisdiction, and thus sovereignty, away from tribes.

may develop legitimate interests and perspectives, and may also present a custodial alternative, which should not be ignored in a juvenile dependency proceeding.”).

⁹⁶ *Venetie*, 944 F.2d at 548. This would be a sort of reverse *Venetie*, where the tribe had to recognize the state court concurrent jurisdiction, but it would not be “clean.” What the state court did in ignoring the intervention of the tribe can not be cleanly justified from a legal perspective, but this method is more justifiable than the way the Mann Court did it.

⁹⁷ See *Doe v. Mann*, F.Supp.2d at 1242.

⁹⁸ 25 U.S.C. § 1918(a).

⁹⁹ Respondent’ Brief, 2006 WL 236758 (U.S.) The Washoe Tribe was listed in the Federal Register. 61 Fed. Reg. 1779 (Jan. 23, 1996). Subsequently the Washoe Tribe’s *exclusive* jurisdiction has been recognized by a federal court in *Hall v. Washoe Tribe of California*, WL 2006 2943167 (E.D. Cal. 2006).

¹⁰⁰ H.R. Rep. 95-1386, 9, 1978 U.S.C.C.A.N. 7530, 7530. See discussion *supra*.

¹⁰¹ S. REP. No. 95-597 at 46-47 (November 4, 1997).

The main purpose of ICWA was to curtail the state's authority¹⁰² in Indian child custody proceedings because the child custody situation was "shocking,"¹⁰³ and California was mentioned by name in the legislative history as one of the offenders.¹⁰⁴ There is nothing in the legislative history to suggest that it was the intent of Congress, by enacting ICWA, to limit tribal sovereignty and jurisdiction for Indian child custody cases as the Mann Court concludes.

In addition to the Mann Court's decision being incompatible with the intent of ICWA, it violated the Indian canon of construction, which the court recognized as valid reasoning when granting its own jurisdiction to hear the case.¹⁰⁵ The Mann Court identified an ambiguity, the wrinkle, in the extent of PL 280's grant of jurisdiction to the State in light of ICWA's § 1911(a) and § 1918(a), and incorporating California's child dependency statute.¹⁰⁶ In deciding the extent of PL 280's civil jurisdiction, the Mann Court cited to the *American Indian Law Deskbook*, noted that "[t]he distinction between state civil laws that may supply a rule of decision and state regulatory laws that cannot be enforced by virtue of Public Law 280 is hardly clear and has caused difficulty in application."¹⁰⁷ The Mann Court then decided there was no ambiguity.¹⁰⁸

The first step in the Mann Court's analysis was that the plain language of ICWA suggested¹⁰⁹ that the child dependency law fell within the state's PL 280 jurisdiction.¹¹⁰

¹⁰² Felix S. Cohen, *supra*.

¹⁰³ H.R. Rep. 95-1386, 9, 1978 U.S.C.C.A.N. 7530, 7530.

¹⁰⁴ S. REP. No. 95-597 at 46-47 (November 4, 1997).

¹⁰⁵ *Doe v. Mann*, 415 F.3d at 1047.

¹⁰⁶ *Id.* at 1048-49.

¹⁰⁷ *American Indian Law Deskbook*, 219-20 (Hardy Myers & Clay Smith eds., 3d ed. 2004).

¹⁰⁸ *Doe v. Mann*, 415 F.3d at 1066.

¹⁰⁹ Compare the use of the characterization of the language of the law ("suggested") and the unambiguous nature that the Mann court concluded applied. The plain language "suggested" but the ruling was definitely "unambiguous."

In deciding that California's child dependency law was applicable to PL 280's jurisdiction, the Mann Court violated the Indian canon of construction (liberally construing ambiguous statutes in favor of Indians). However, after analyzing this issue for seventeen pages of the twenty-nine page decision,¹¹¹ the Mann Court concluded "[g]iven the lack of ambiguity in ICWA and explicit congressional recognition of Indian sovereignty in ICWA, including the reassumption provisions, the Indian canon of construction [did] not come into play."¹¹² The seventeen pages of discussion did not support the "lack of ambiguity." The Ninth Circuit came to the opposite conclusion, fourteen years earlier, in its decision in *Venetie*, where the state was claiming exclusive jurisdiction in spite of ICWA, stating: "[W]e conclude that Public Law 280 and the Indian Child Welfare Act are, at best, ambiguous as to whether states have exclusive or concurrent jurisdiction over child custody determinations where the tribe has not petitioned for exclusive or referral jurisdiction. Of course, ambiguities are to be resolved to the benefit of Indians."¹¹³ Under *Bryan*, *Cabazon* and *Colville*, it appears clear that PL 280 does not grant the regulatory jurisdiction to the states required for the state to enforce state statutes on reservations, leaving the issue far from "unambiguous."

The Mann Court's primary authority had already decided the scope of PL 280's state civil jurisdiction. In *Bryan*, the Supreme Court stated that the purpose of PL 280's civil component as "primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and

¹¹⁰ *Doe v. Mann*, 415 F.3d at 1058. The Mann Court cited "'civil causes of action between Indians or to which Indians are parties' and that involve 'those civil laws...that are of general application to private persons or private property.'" quoting 28 U.S.C. § 1360(a).

¹¹¹ *Id.* at 1049-1066.

¹¹² *Id.* at 1066.

¹¹³ *Venetie*, 944 F.2d at 561-62 (In this case the state was asserting exclusive jurisdiction over all child custody cases.)

other private citizens.”¹¹⁴ By this plain language, the Supreme Court narrowed the scope of PL 280 to adjudicatory, between private parties, and not regulatory civil jurisdiction.¹¹⁵ In *Cabazon*, the Supreme Court upheld the limited scope of PL 280’s civil grant to states by stating that “in *Bryan*, ... we interpreted § 4 [of PL 280] to grant States jurisdiction over private civil litigation involving reservation Indians in state court, but not to grant general civil regulatory authority.”¹¹⁶ The Mann Court reasoned that following the Supreme Court’s interpretation of the state civil jurisdiction limitations under PL 280 would “create a tortured result” and distinguished these two cases as not involving child custody cases which it reasoned “are more analogous to ‘private legal disputes.’”¹¹⁷ In other words, the Mann Court said that to follow the Supreme Court holdings, its own precedent, and the precedents of California courts for the prior twenty-five years, would create a tortured result, and that a case where the parties are the state and an individual was essentially a dispute between two private parties.¹¹⁸

The Mann Court could have relied on its own stare decisis in determining the extent of PL 280’s grant of state civil jurisdiction by relying on *Colville*, when it stated that the purpose of PL 280 was “essentially to afford Indians a forum to settle private disputes among themselves.”¹¹⁹ The Mann Court distinguished *Colville* by reasoning that the decision involved “a stand alone statute and not in connection with ICWA’s

¹¹⁴ *Bryan*, 426 U.S. at 383.

¹¹⁵ William C Camby, Jr., *American Indian Law in a Nutshell*, 241-42 (4th ed. 2004).

¹¹⁶ *Cabazon*, 480 U.S. at 208.

¹¹⁷ *Doe v. Mann*, 415 F.3d at 1059 (quoting Pub.L. 83-280, § 4, 28 U.S.C. § 1360(a)).

¹¹⁸ In the book 1984, the authorities were constantly rewriting history, changing the meanings of words and deleting words at will.

¹¹⁹ *Confederated Tribes of Colville Reservation*, 938 F.2d 147.

exception.”¹²⁰ In essence, what the Mann Court held was that tribes via ICWA have less sovereignty under PL 280 than when PL 280 was applied standing alone.

There is nothing in the legislative history, or in the plain language of the statute, that would suggest that ICWA granted *more* authority to the states and *less* sovereignty to tribes.¹²¹ However, there is abundant evidence to the contrary.¹²² This reasoning from the Mann Court produces the true “tortured result at odds with the overall structure of ICWA.”¹²³ In a conclusory manner, the Mann Court inferred that § 1918(a) of ICWA *unambiguously* stood for the proposition that PL 280 divested all exclusive jurisdiction of the tribe for *all* reservation domiciled child custody cases.¹²⁴ In essence, ICWA now defined the civil jurisdictional reach of the state under PL 280.

From the plain reading of the text, a more plausible interpretation would be that ICWA did not define the extent of PL 280’s state jurisdictional reach. Rather, *whatever* the reach of a state’s PL 280 jurisdiction that existed prior to the enactment of ICWA, which limited the tribe’s sovereignty, Congress provided a method of reassuming tribal civil authority. The Mann Court mistakenly worked backwards. It reasoned that since ICWA defined child custody cases to include voluntary¹²⁵ and involuntary child custody

¹²⁰ *Doe v. Mann*, 415 F.3d at 1066.

¹²¹ The Mann Court strongly implied that under ICWA §1918(a) the reassumption provision served as a new limitation of Indian sovereignty, rather than a method to regain what had previously been lost under PL 280. *See Id.*

¹²² *See Holyfield*, 490 U.S. at 44-45 (The purpose of ICWA “was, in part, to make clear that in certain situations the state courts did not have jurisdiction over child custody proceedings.”); also *see* H.R. Rep. 95-1386, 9, 1978 U.S.C.C.A.N. 7530, 7530.

¹²³ Language quoted from *Doe v. Mann*, 415 F.3d at 1059, where the Mann Court concluded that following the Supreme Court’s decisions in *Bryan* and *Cabazon* would create “a tortured result at odds with the overall structure of ICWA.”

¹²⁴ *See Doe v. Mann*, 415 F.3d at 1066.

¹²⁵ Except between parents in divorce, 25 U.S.C. § 1903(1)(iv).

cases, this retroactively defined the scope of PL 280's reach.¹²⁶ The proper approach would have been to define the reach of PL 280's state jurisdictional reach as a stand-alone statute, then apply the limits on tribal sovereignty to the reassumption provision of § 1918(a). For instance, if the state's PL 280 authority allowed for adjudication of custody disputes between "private parties," but not reservation-domiciled involuntary child custody proceedings because it was an infringement on tribal sovereignty as suggested by the principles espoused by *Cabazon*, the reassumption provision of ICWA would apply only to the prior proceedings and not the latter.

In the same vein, in determining the issue of the state's civil reach under PL 280 was unambiguous, the Mann Court addressed the issue of Indian sovereignty in a conclusory manner. The Mann Court reasoned that, for the issue of Indian sovereignty, the Indian canon of construction did not apply for this statute "because Congress already weighed those considerations in formulating ICWA," and "Congress was unambiguous in its effort to exempt Public Law 280 states from ICWA's exclusive jurisdiction...to include all child custody proceedings."¹²⁷ For the reasons stated above, the scope of state jurisdiction under PL 280, as determined by the Mann Court was contrary to the Court's primary authority¹²⁸ and was far from unambiguous.¹²⁹ In its analysis, the Court describes its own difficulty in interpreting "Public Law 280, which is embedded within §

¹²⁶ *Id.* at 1064 ("...Congress intended Public Law 280 states to retain jurisdiction over all child custody proceedings as defined in ICWA."); *Id.* at 1066 ("Congress was unambiguous in its effort to exempt Public Law 280 states from ICWA's exclusive jurisdiction...").

¹²⁷ *Id.* at 1066.

¹²⁸ *See Bryan*, 426 U.S. at 385 (The Supreme Court was "virtually compel[ed] ... [to the] conclusion that the primary intent of s[ection] 4 was to grant jurisdiction over private civil litigation involving reservation Indians in state court." The *Cabazon* Court, and the Ninth Circuit in *Confederated Tribes of Colville Reservation*, reiterated this conclusion.).

¹²⁹ *Doe v. Mann*, 415 F.3d at 1048 (The Mann Court noted that while § 1911(a) poses little difficulty in interpretation on its face, the "wrinkle comes in interpreting Public Law 280, which is embedded within § 1911."

1911.”¹³⁰ The Wisconsin Attorney General in 1981 and the legislature of Minnesota came to the opposite conclusion in interpreting ICWA’s exclusive jurisdiction, actions contrary to the Mann Court’s conclusion that “Congress was unambiguous in its effort to exempt Public Law 280 states from ICWA’s exclusive jurisdiction.”¹³¹ The Mann Court cast off the considerations of Indian sovereignty under the pretext of finding no ambiguity and thereby avoided the Indian canon of construction.

The holding of the Mann Court was that the tribe’s jurisdiction under ICWA for a reservation-domiciled Indian child was not exclusive.¹³² As cases prior to *Doe v. Mann* demonstrate, the issue of concurrent jurisdiction was not in doubt.¹³³ The Mann Court held that concurrent jurisdiction allowed the state court to ignore the intervention of the tribe, in effect stripping all jurisdiction of the tribe for reservation-domiciled children, except at the pleasure of state courts.¹³⁴ This was the bona fide holding in the case and turned back the clock to a pre-ICWA period. The Mann Court avoided the question of presumptive jurisdiction, which should have been the genuine issue in the case.¹³⁵

Assuming the state and the tribe had concurrent jurisdiction, is there a presumption, given the purpose and the legislative history of ICWA, for either the state or tribe to have jurisdiction, or is the system first come, first serve?¹³⁶ Another holding from a California state appellate court concerning ICWA provided an answer to this question for non-domiciled Indian children. The “right to compel transfer of off-reservation cases from state court to tribal court (‘transfer’ or ‘referral jurisdiction’) had

¹³⁰ *Id.*

¹³¹ *Id.* at 1066.

¹³² *Id.* at 1068.

¹³³ See e.g., *Venetie*, 944 F.2d at 561 (the tribe and state have concurrent jurisdiction decided in 1989).

¹³⁴ *Doe v. Mann*, 415 F.3d at 1068.

¹³⁵ See *Id.*

¹³⁶ In other words, whoever asserts jurisdiction first has established exclusive jurisdiction.

not been lost through prior legislation; rather, it was newly created by ICWA in section 1911(b).”¹³⁷ “[R]eferral jurisdiction is broader in scope than concurrent jurisdiction, in that referral jurisdiction is concurrent *but presumably* tribal jurisdiction.”¹³⁸ (original emphasis). This position was consistent with the Supreme Court’s dicta in *Holyfield* that stated, “[s]ection 1911(b), on the other hand, creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation.”¹³⁹

If ICWA provides a referral presumption for Indian children non-domiciled on the reservation, as the subsequent California appellate court¹⁴⁰ and the Supreme Court in *Holyfield*¹⁴¹ has found, but not a referral presumption for jurisdiction of children domiciled on the reservation, then this interpretation would truly be a “tortured result at odds with the overall structure of ICWA,”¹⁴² because ICWA grants exclusive jurisdiction, as opposed to concurrent for non-domiciled, to tribes for reservation-domiciled children.¹⁴³ The referral presumption of tribal jurisdiction for reservation-domiciled children would be consistent with the purpose and legislative history of ICWA.¹⁴⁴ In a concurrent jurisdictional situation such as this case arguably presents, the presumption favoring tribal jurisdiction, which is supported by case law for the entire history of the statute, is at odds with the holding in *Doe. v. Mann* and renders it wrongly

¹³⁷ *In re M.A.* 137 Cal. App.4th at 576 (In this post-Mann case, the state tried to argue that because the tribe had not petitioned for reassumption under § 1918, the tribe was not entitled to transfer of a non-reservation domiciled Indian child under ICWA. The court held that the tribe was entitled to transfer.).

¹³⁸ *Id.*

¹³⁹ *Holyfield*, 490 U.S. at 36.

¹⁴⁰ *In re M.A.* 137 Cal. App.4th at 576.

¹⁴¹ *Holyfield*, 490 U.S. at 36.

¹⁴² Language quoted from *Doe v. Mann*, 415 F.3d at 1059, where the Mann Court concluded that following *Bryan and Cabazon* would create “a tortured....”

¹⁴³ 25 U.S.C. § 1911(a), “An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation....”

¹⁴⁴ See *Holyfield*, 490 U.S. at 44-45 (The purpose of ICWA “was, in part, to make clear that in certain situations the state courts did not have jurisdiction over child custody proceedings.”); H.R. Rep. 95-1386, 9, 1978 U.S.C.C.A.N. 7530, 7530.

decided regardless of the jurisdictional limitations that may have been imposed on tribes by PL 280.

SUMMARY

The magnitude of this particular attempt to chip away at ICWA may not be known for some time. However, there is evidence that subsequent California appellate courts have narrowly interpreted *Doe v. Mann. In re M.A.*, decided in 2006, the State of California tried unsuccessfully to use the Mann Court's argument to block the transfer of a non-domiciled Indian child to the tribe by asserting that due to ICWA's § 1911(a) restriction of jurisdiction over tribes who had not petitioned the Secretary, the tribe could not assume jurisdiction.¹⁴⁵ The appellate court rejected this argument, reasoning that under § 1911(b), there was concurrent but presumptively tribal jurisdiction.¹⁴⁶ The Mann Court was right about one thing. When it ignored the past, the idea that the provisions of ICWA were meant to limit, rather than expand, the sovereignty of Indian tribes was a case of first impression.

¹⁴⁵ *In re M.A.* 137 Cal. App.4th at 572.

¹⁴⁶ *Id.* Also see *Holyfield*, 490 U.S. at 36.

