
COMMENT

ICWA AND THE UNWED FATHER: A CONSTITUTIONAL CORRECTIVE

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*The Indian Child Welfare Act provides important procedural protections for American Indian children, the parents of American Indian children, tribes, and Indian custodians in state court child custody proceedings. However, the Act excludes unwed fathers who have not “acknowledged or established” their paternity from its definition of “parent.” This effectively forecloses their ability to assert rights to their biological children under the Act. State courts have varied in their interpretations of “acknowledged or established,” with some incorporating their own laws and others adopting amorphous standards of reasonableness to determine whether an unwed father is a “parent” under the Act. The varying approaches adopted by state courts have highlighted the need for a more standardized interpretation of “acknowledged or established.” This Comment looks to the Supreme Court’s decision in *Adoptive Couple v. Baby Girl* for guidance. Though *Adoptive Couple* did not directly address the definition of “parent,” it appeared to invoke the Court’s “biology plus” jurisprudence while interpreting the Act. That case law etched the parameters of putative fathers’ paternal rights. This Comment incorporates the principles elucidated in those cases into “acknowledged or established” and posits that where enough time has passed for an unwed putative father to develop a constitutionally protectable relationship with his American Indian child, but*

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where that father has not met state law paternity requirements consistent with the Act, a state court should next consider whether the putative father, consistent with the Court's biology plus jurisprudence, has developed a parent-child relationship sufficient for due process protections to attach.

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INTRODUCTION

Fatherhood, as a legal concept and social role, has eluded concrete legal definition.¹ In the context of the Indian Child Welfare Act of 1978 (ICWA),² that nebulous term has also bedeviled the unwed putative fathers to whom it applies,³ shrouding their attempts to assert rights under ICWA in indeterminacy.

¹ See Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1784-85 (1993) ("Father[hood] is filled with contradiction: . . . central to children's experience yet increasingly transient; culturally defined by procreation but made real only through nurture; conceptually separate from mothering yet embedded in a network of interdependence; most valuable when offered as a gift, and yet often least valued when freely given.").

² 25 U.S.C. §§ 1901-1963 (2012).

³ In 2016, the most recent year for which data is available, 39.8% of all children born in the United States were born to unmarried women. U.S. DEP'T OF HEALTH & HUMAN SERVS., 67 NAT'L VITAL STAT. REP. 1, tbl.I-7 (2018).

Enacted to shield American Indian families and tribes⁴ from the unwarranted removal of their children, ICWA provides procedural protections for American Indian children, their parents, tribes, and Indian custodians in state court child custody proceedings. But § 1903(9) of the Act excludes “unwed father[s] where paternity has not been acknowledged or established” from its definition of “parent.”⁵ ICWA, however, does not define “acknowledged or established.”⁶ This has led state courts to adopt their own, often conflicting, definitions.⁷ As a result, varying standards⁸ for determining the paternity rights of unwed men with American Indian biological children have effectively undermined the uniformity which ICWA sought to impart in the child welfare proceedings of Indian children.⁹ The resulting confusion has highlighted the need for a uniform standard.¹⁰

⁴ For purposes of consistency, all references to tribes in this Comment conform to the requirement of federal recognition embedded in ICWA’s definition of tribes. *See* 25 U.S.C. § 1903(8) (2012) (“‘Indian tribe’ means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary [of the Interior] because of their status as Indians, including any Alaska Native village . . .”). There are 573 federally recognized Indian tribes in the United States. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200 (Jan. 30, 2019).

⁵ 25 U.S.C. § 1903(9) (2012).

⁶ *In re S.A.M.*, 703 S.W.2d 603, 607 (Mo. Ct. App. 1986); *see also* Michael J. Dale, *State Court Jurisdiction Under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test*, 27 GONZ. L. REV. 353, 360-61 (1991) (“How one establishes or acknowledges paternity is a difficult question to answer in its own right, even outside the context of the Act, and has produced substantial litigation and commentary.”); Kevin Heiner, Note, *Are You My Father? Adopting a Federal Standard for Acknowledging or Establishing Paternity in State Court ICWA Proceedings*, 117 COLUM. L. REV. 2151, 2153 (2017) (noting that the Bureau of Indian Affairs’ 2016 ICWA guidelines did “nothing to resolve the ambiguity” surrounding these terms).

⁷ *Compare* *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 173 (Tex. App. 1995) (adopting a state law standard for determining paternity for unwed fathers under § 1903(9)), *with* *Michael J., Jr. v. Sr.*, 7 P.3d 960, 963 (Ariz. Ct. App. 2000) (rejecting an application of state law paternity establishment requirements under ICWA).

⁸ *See* *Lehr v. Robertson*, 463 U.S. 248, 256 (1983) (“Rules governing . . . child custody are generally specified in statutory enactments that vary from State to State.”); June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1295 (2005) (“Not only are jurisdictions irreconcilably divided in their approach to parentage, decisions under settled law in a given county may not necessarily come out the same way.”).

⁹ *See* BUREAU OF INDIAN AFFAIRS, INDIAN CHILD WELFARE ACT GUIDELINES 6 (2016) (observing that the “disparate application of ICWA based on where the Indian child resides creates significant gaps in ICWA protections and is contrary to the uniform minimum Federal standards intended by Congress”).

¹⁰ *See* Joan Heifetz Hollinger, *Beyond the Best Interests of the Tribe: The Indian Child Welfare Act and the Adoption of Indian Children*, 66 U. DET. L. REV. 451, 458-59 (1989) (noting that “courts are having difficulty figuring out whether children of obvious Indian lineage are within the ICWA definition of ‘Indian children’ when their mothers are non-Indian and their fathers are Indians and tribal members, but do not meet the ICWA criteria for ‘parent’”).

This Comment proposes a constitutional solution to defining these terms. It rejects an application of § 1903(9) controlled entirely by state law. Rather, it posits that where an unmarried father fails to satisfy state law paternity establishment procedures consistent with the plain terms of the Act, a court should next look to the constitutional principles and standard established by the Supreme Court in a series of cases considering the parental rights of unwed fathers. That “biology plus” line of precedent grants unwed fathers parental rights when they have developed a substantial relationship with their children. Applying that precedent in conjunction with state law permits the Constitution to serve as a backstop where an unwed father of an Indian child may have failed to satisfy state law governing paternity but nonetheless created a constitutionally cognizable (and protectable) relationship with his child.

Part I of this Comment provides a brief overview of the treatment of American Indian children by the federal and state governments which led to ICWA’s enactment.¹¹ It also provides an overview of ICWA provisions pertinent to the determination of paternity under the Act. Next, Part II surveys state courts’ conflicting rulings construing § 1903(9) and considers the impact that the Supreme Court’s decision in *Adoptive Couple v. Baby Girl* should play in interpreting the provision moving forward. Part III describes the Court’s seminal biology plus cases and the shift they generated in paternal rights. Part IV then considers issues arising from state law incorporation after reviewing states’ methods for establishing paternity. Part V first sketches arguments in favor of employing biology plus principles, and then proceeds to describe those principles in greater detail. Finally, this Comment concludes by invoking those principles as a clarion call for their incorporation into § 1903(9) where unwed fathers do not satisfy state paternity requirements.

I. THE BIRTH OF A MILESTONE: ICWA AND THE INDIAN FAMILY

This Part traces the plight of American Indian children prior to the enactment of ICWA. It then analyzes ICWA’s provisions, considering in turn the protections they provide to Indian children, their parents, and Indian tribes and custodians in the quest to shield them from the indignities which led to the Act’s creation.

¹¹ See Lorie Graham, *Reparations and the Indian Child Welfare Act*, 25 LEGAL STUD. F. 619, 624 (2001) (“By the time ICWA was enacted into law in 1978, one-third of all Native American children were being removed from their communities and families and placed in non-Indian foster care, adoptive homes, and educational institutions.”).

A. *A History of Suffering*

Throughout modern history, Native peoples have often occupied a precarious position both within the American polity and the land which now constitutes the American union.¹² Much of that precariousness often stemmed from concerted movements, spearheaded by the federal government, towards tribal destruction and forced assimilation of tribal members.¹³ At the inception of the American union, Indian tribes were viewed as separate, sovereign nations within the territorial limits of the United States.¹⁴ Their presence, in large part, shaped the framing of the Constitution,¹⁵ punctuated the powers of the federal government over Indian affairs,¹⁶ and limited the role of states in subjecting recalcitrant tribes to their laws.¹⁷ Tribes were treated like foreign nations, with treaty-making often dictating their relationships with the United States.¹⁸

Those relationships, however, quickly eroded. Whereas Indian tribes initially commanded a fearful respect in the fledgling republic,¹⁹ that respect

¹² See *United States v. Kagama*, 118 U.S. 375, 381 (1886) (“[T]he relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character.”); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831) (“[T]he relation of the Indians to the United States [was] marked by peculiar and cardinal distinctions which exist nowhere else.”); FELIX COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 641 (1982 ed.) (“Prior to 1871, most Indians were considered to be members of separate political communities and not part of the ordinary body politic of the United States.”). Indian tribal members were not granted universal citizenship until 1925. *Citizenship Act of 1924*, ch. 233, 43 Stat. 253 (overturning *Elk v. Wilkins*, 112 U.S. 94 (1884) (rejecting a claim of American citizenship by an Indian who was born on tribal lands but later renounced his tribal affiliation)). Prior to the universal grant of citizenship, the citizenship status of individual Indians “generally depended upon the effect of particular federal statutes or treaties upon her tribe . . . because the adoption of the Fourteenth Amendment . . . was held inapplicable to Indians who had been born under tribal authority.” Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 42 n.48 (1996).

¹³ Supreme Court case law chronicled those movements with the panache of an obtuse bystander. See, e.g., *Board of Cnty. Comm’rs v. Seber*, 318 U.S. 705, 715 (1943) (“In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people . . .”).

¹⁴ *Williams v. Lee*, 358 U.S. 217, 218 (1959).

¹⁵ See generally Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999 (2014).

¹⁶ See, e.g., U.S. CONST. art. I, § 8 (granting Congress the power “[t]o regulate Commerce . . . with the Indian Tribes”).

¹⁷ See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (invalidating a state law attempting to place restrictions on access to tribal lands).

¹⁸ Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 141 (1977).

¹⁹ *Worcester*, 31 U.S. at 549 (“The early journals of congress exhibit the most anxious desire to conciliate the Indian nations.”); COLLIN CALLOWAY, *THE INDIAN WORLD OF GEORGE WASHINGTON* 12 (2018) (“[T]he power Natives wielded, the resistance they mounted, and the diplomatic influence they exerted exposed the limits of federal power, aggravated tensions

was replaced in short order by a diminished status amidst a feverish push for westward expansion and Indian subjugation.²⁰ Indian tribes were demoted from fully sovereign entities to quasi-sovereign groups divested of their right to freely convey²¹ and exclusively police their lands,²² as well as any cogent claim to foreign status.²³ Though tribal members had occupied vast expanses of the territorial United States,²⁴ tribal property was relegated to reservations²⁵ and subsequently parceled off to a disastrous effect²⁶ in the name of dissolving tribes and integrating their members within the broader confines of states.²⁷

between federal and state governments, fueled divisions between East and West, and threatened to fragment the nation Washington was building.”).

²⁰ See Indian Removal Act, ch. 148, 4 Stat. 411 (1830) (codified as amended at 25 U.S.C. § 174 (2012)) (authorizing the exchange of tribal lands within state borders for unoccupied land in formerly unorganized territories).

²¹ See *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 591 (1823) (holding that Indian inhabitants are occupants entitled to protection in the possession of their lands but incapable of transferring absolute title to others).

²² *United States v. Rogers*, 45 U.S. (4 How.) 567, 572 (1856) (“Congress may by law punish any offence committed [on tribal land], no matter whether the offender be a white man or an Indian.”).

²³ See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831) (“[A]n Indian tribe or nation within the United States is not a foreign state in the sense of the Constitution and cannot maintain an action in the courts of the United States.”).

²⁴ In the early years of the republic, Indian nations occupied at least half of the lands claimed by the states and North America’s other colonial inhabitants. See Brian Delay, *Independent Indians and the U.S.-Mexican War*, 112 AM. HIST. REV. 35, 68 (2007) (“By the early 1820s, more than a dozen generations after Columbus, indigenous polities still controlled between half and three-quarters of the continental landmass claimed by the hemisphere’s remaining colonies and newly independent states.”).

²⁵ See Bethany R. Berger, “*Power Over this Unfortunate Race*”: *Race, Politics and Indian Law in United States v. Rogers*, 45 WM. & MARY L. REV. 1957, 2017 (2004) (“This policy concentrated tribes on small reservations and appointed Indian agents to ‘civilize’ them . . .”).

²⁶ See *Hodel v. Irving*, 481 U.S. 704, 707 (1987) (“The policy of allotment of Indian lands quickly proved disastrous for the Indians.”); Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1563 (2001) (“[A]llotment replaced myriad functioning and evolving tribal property systems with a single dysfunctional and unchanging system. . . . Most significantly, it destroyed tribes’ power to adapt their property laws to meet new social, economic, political, and ecological conditions.”); Frickey, *supra* note 12, at 45 (“Under the policy of allotment, Congress deprived Indians of more than two-thirds of their land base between 1887 and 1934.”).

²⁷ See, e.g., *In re Kansas Indians*, 72 U.S. (5 Wall.) 737, 758 (1867) (describing the basis of one treaty between the federal government and a tribe as “the separation of estates and interests, [that] would so weaken the tribal organization as to effect its voluntary abandonment, and, as a natural result, the incorporation of the Indians with the great body of the people”); *United States v. Clapox*, 35 F. 575, 577 (D. Or. 1888) (portraying reservations as government run incubators of Indians “for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man”).

In the period following the Civil War, the federal government's assimilationist policies came to dominate,²⁸ marking an abrupt end to a treaty-based system through which tribes were primarily viewed by Congress as political sovereigns.²⁹ The Supreme Court often abetted these efforts through largely permissive, vacillating conceptions of the federal government's power over American Indians and the land they occupied.³⁰

A central component of that assimilationist movement was the system of boarding schools created by Congress to strip American Indian children of their cultural identities.³¹ The teachings of the schools, often anathema to tribal customs and mores,³² were meant to facilitate cultural genocide³³ and the removal of Indian children from the purview of their families and tribes.³⁴

²⁸ See DEP'T OF THE INTERIOR, OFFICE OF INDIAN AFFAIRS, FIFTY-EIGHTH ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR 4 (1889) (advising that "tribal relations should be broken up, socialism destroyed, and the family and the autonomy of the individual substituted"); Sharon O'Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship?*, 66 NOTRE DAME L. REV. 1461, 1464-65 (1991); see also Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 205-06 (1984) (explaining the diverging rationales for tribal assimilation in the late nineteenth century); Theodore Roosevelt's First Annual Message to the Senate and House of Representatives (Dec. 3, 1901), <http://www.presidency.ucsb.edu/node/206187> [<https://perma.cc/N8MS-PLQT>] (praising a recently enacted federal law as "a mighty pulverizing engine to break up the tribal mass" and advocating for "[t]he marriage laws of the Indians [to] be made the same as those of the whites").

²⁹ Act of Mar. 3, 1871, ch. 120 § 1, 16 Stat. 544, 566 ("[H]ereafter, no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract . . .").

³⁰ See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (noting that Indians "occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 25 (2002) ("From its earliest decisions, the Supreme Court established that national power over Indians derived in part from extraconstitutional, inherent powers relating to colonial discovery and the Indians' aboriginal status."). But see generally Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203 (1989) (casting doubt on the judicial presumptions which underlie federal Indian law).

³¹ See O'Brien, *supra* note 28, at 1465.

³² See Angelique Eagle Woman & G. William Rice, *American Indian Children and U.S. Policy*, 16 TRIBAL L.J. 1, 4 (2016) ("Christian and government boarding schools subjected Indian children to treatment at the polar opposite from the concept of respect and caring in Indigenous tribal society.>").

³³ Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 582, 602 (2002) ("The well-established tradition of white-run boarding schools dates back to the 1800s when Indian children were the targets of blatant cultural genocide.>").

³⁴ Lorie M. Graham, "The Past Never Vanishes": A Contextual Critique of the Existing Indian Family Doctrine, 23 AM. INDIAN L. REV. 1, 10 (1998) ("[S]tarting with the colonial missionaries, education became one of the most pernicious methods used to separate American

In addition to indoctrination, the schools endeavored to pacify Indian children and their parents amidst growing hostilities between tribes and the federal government.³⁵ The government achieved these ends through compulsion, threatening to withhold rations from Indian families whose children did not attend school³⁶—a practice sanctioned by Congress.³⁷

According to the federal government's own report, the schools were "largely ineffective" at educating Indian children.³⁸ But they did succeed in devastating tribes and Indian families through a "psychological assault on [Indian] identity" that pervaded "every aspect of boarding school life."³⁹ In addition to pillorying Indian children for their cultural heritage, the schools exposed their students to sordid living conditions⁴⁰ and violated numerous treaties through which the federal government had guaranteed tribes adequate access to schools on their reservations.⁴¹ The plight of Indian children subjected to those schools eventually reached such a fever pitch that Congress sought to ban their forced enrollment.⁴²

During that same period, by federal mandate, Indian children were relocated to white-owned farms in the East and Midwest where they were similarly conditioned to shed their cultural identities.⁴³ The Indian Reorganization Act of 1934 ostensibly sought to curb the forced assimilation which had, until that time, defined the federal government's stance toward Indian existence.⁴⁴ But that was followed by a period in which further tribal destruction ensued, and formal ties with many tribes were severed as states were granted criminal jurisdiction over tribal lands for purposes of further bringing tribal members within the ambit of the American system.⁴⁵

Indian children from the influences of family and community and assimilate them into mainstream society.").

³⁵ Daniel M. Rosenfelt, *Indian Schools and Community Control*, 25 STAN. L. REV. 489, 493 (1973).

³⁶ Berger, *supra* note 25, at 2017.

³⁷ Act of Mar. 3, 1893, ch. 209, 27 Stat. 612, 635.

³⁸ INST. FOR GOV'T RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION 8 (1928).

³⁹ Andrea A. Curcio, *Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses*, 4 HASTINGS RACE & POVERTY L.J. 45, 60 (2006).

⁴⁰ INST. FOR GOV'T RESEARCH, *supra* note 38, at II.

⁴¹ Curcio, *supra* note 39, at 57.

⁴² Act of Mar. 2, 1895 ch. 188, 28 Stat. 906 ("Hereinafter no Indian child shall be sent from any Indian reservation to a school beyond the state or territory in which said reservation is situated without the voluntary consent of the father or mother of such child.").

⁴³ Atwood, *supra* note 33, at 602.

⁴⁴ 25 U.S.C. §§ 461-79 (2012); *see also* Morton v. Mancari, 517 U.S. 535, 553 (1974) ("Congress in 1934 determined that proper fulfillment of its trust required turning over to Indians a greater control of their own destinies. The overly paternalistic approach of prior years had proved both exploitative and destructive of Indian interests.").

⁴⁵ O'Brien, *supra* note 28, at 1466-67.

With the advent of the midcentury Civil Rights Movement, federal policy toward American Indians shifted from one of forced assimilation and tribal termination to that of support for Indian self-determination.⁴⁶ In 1978, ICWA was enacted in the midst of that shift, a period in which the federal government set upon a “new orientation” towards American Indians.⁴⁷

B. ICWA as Revolution: Shifting the Tide in Favor of Tribal Unification

At the time of ICWA’s enactment, “the American Indian child-welfare crisis” had reached “massive proportions.”⁴⁸ Surveys indicated that between twenty-five and thirty-five percent of all American Indian children had been separated from their families.⁴⁹ Eighty-five percent of Indian children removed from their homes and placed into foster care were relocated to non-Indian homes.⁵⁰ Those removals were overwhelmingly a product of cultural biases and misconceptions about American Indian family structures.⁵¹ According to testimony Congress received prior to ICWA’s enactment, the “nontribal government authorities” who extracted Indian children from their families had “no basis for intelligently evaluating the cultural and social premises underlying Indian life and childbearing.”⁵²

⁴⁶ Graham, *supra* note 34, at 22-23; *see also* Richard M. Nixon, President, U.S., Special Message on Indian Affairs to the Congress of the U.S. (July 8, 1970) (“We must assure the Indian that he can assume control of his own life without being separated involuntary from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support.”).

⁴⁷ O’Brien, *supra* note 28, at 1467.

⁴⁸ Gaylene J. McCartney, *The American Indian Child-Welfare Crisis: Cultural Genocide or First Amendment Preservation*, 7 COLUM. HUM. RTS. L. REV. 529, 530 (1975).

⁴⁹ H.R. REP. NO. 95-1386, at 9 (1978).

⁵⁰ David Woodward, *The Rights of Reservation Parents and Children: Cultural Survival or the Final Termination?*, 3 AM. INDIAN L. REV. 21, 22 (1975). Prior to the Act’s passage, “many Indian families were unable to qualify as foster or adoptive families because they did not meet standards ‘based on middle-class values,’ resulting in most Indian children being placed with non-Indian families.” Allison Krause Elder, “Indian” as a Political Classification: Reading the *Tribe Back into the Indian Child Welfare Act*, 13 NW. J. L. & SOC. POL’Y 417, 418 (2018) (footnote omitted).

⁵¹ Graham, *supra* note 34, at 25.

⁵² *Hearings Before the Subcomm. on Indian Affairs & Pub. Lands of the Comm. on Interior & Insular Affairs on S. 1214, 2d Session, 95th Cong.* 190 (1978) (statement of Calvin Isaac, Tribal Chief of the Mississippi Band of the Choctaw Indians and Member of the National Tribal Chairmen’s Association). American Indian children remain overrepresented in the American foster system today. *See* NAT’L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, DISPROPORTIONALITY RATES FOR CHILDREN OF COLOR IN FOSTER CARE 5 tbl.1 (2015) (showing that American Indian children, along with their African American counterparts, are the most disproportionately represented race of children in the foster care system); *see also* Maylinn Smith, *Where Have All the Children Gone? When Will They Ever*

ICWA was Congress's response to this "growing crisis with respect to the breakup of Indian families and the placement of Indian children, at an alarming rate, with non-Indian foster or adoptive homes."⁵³ It was enacted to shield American Indian families from unwarranted invasions into familial autonomy and to provide tribes the power to make child welfare decisions for Indian children subject to removal proceedings.

Acting pursuant to its "plenary power over Indian affairs,"⁵⁴ Congress deemed it "the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families" by enacting "minimum Federal standards for the removal of Indian children from their homes," and their subsequent placement "in foster or adoptive homes which will reflect the unique value of Indian culture."⁵⁵ ICWA's provisions stem from the premise that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children,"⁵⁶ and provide procedural and substantive protections for Indian children, their parents, and tribes in state court child welfare proceedings.⁵⁷ As such, ICWA represents a delicate balancing act from a Congress unwilling to completely wrest control over Indian child

Learn?, in *FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT* AT 30, at 243, 247 (Mathew L. M. Fletcher et al. eds., 2009) ("Although helpful, evidently legislation alone cannot eliminate the overrepresentation of Indian children in state social services systems.").

⁵³ H.R. REP. NO. 95-1386, at 19 (1978). A report issued by the Senate committee considering ICWA further explained that

[t]he separation of Indian children from their natural parents, especially their placement in institutions or homes which do not meet their special needs, is socially and culturally undesirable. For the child, such separation can cause a loss of identity and self-esteem, and contributes directly to the unreasonably high rates among Indian children for dropouts, alcoholism and drug abuse, suicides, and crime. For the parents, such separation can cause a similar loss of self-esteem, aggravates the conditions which initially give rise to the family breakup, and leads to a continued cycle of poverty and despair.

S. REP. NO. 95-597, at 1-2 (1978).

⁵⁴ 25 U.S.C. § 1901(i) (2012). The Supreme Court has described that plenary power, derived from Article I, Section 8 of the Constitution, as being "exercised by Congress from the beginning." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

⁵⁵ 25 U.S.C. § 1902 (2012). This culture-specific approach was in accord with testimony received by Congress during its ICWA deliberations. *See, e.g., Hearings Before the Subcomm. on Indian Affairs & Pub. Lands of the Comm. on Interior & Insular Affairs on S. 1214, 2d Session, 95th Cong. 66* (1978) (statement of Goldie Denny, Director of Social Services, Quinault Nation, Representing National Congress of American Indians) ("General child welfare legislation, no matter how well meaning, does not address the unique legal, cultural status of Indian people. Rather, [it] tend[s] to promulgate the existing problems.").

⁵⁶ 25 U.S.C. § 1901(3) (2012).

⁵⁷ ICWA is inapplicable to tribal court proceedings. *Id.* § 1911.

custody proceedings from state tribunals,⁵⁸ but eerily cognizant of the potential for bias which the continued, unregulated use of those tribunals could portend.⁵⁹

ICWA defines child custody proceedings to include foster care placement, termination of parental rights proceedings, preadoptive placements, and adoptions.⁶⁰ For purposes of the Act, Indians are defined as members of Indian tribes and Alaska Natives belonging to Regional Corporations.⁶¹ An Indian child under the Act is an unmarried person below the age of eighteen who is “either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”⁶² ICWA defines “parent” to exclude “the unwed father where paternity has not been acknowledged or established.”⁶³

⁵⁸ See H.R. REP. NO. 95-1386, at 19 (1978) (“While the committee does not feel that it is necessary or desirable to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits, it does feel the need to establish minimum Federal standards and procedural safeguards in State Indian child custody proceedings”); Michael C. Snyder, *An Overview of the Indian Child Welfare Act*, 7 ST. THOMAS L. REV. 815, 820 (1995) (“The purpose of the ICWA was to halt unwarranted state court removal of Indian children.”). The recognition of the hostility of states toward their Indian inhabitants was by no means novel. See *United States v. Kagama*, 118 U.S. 375, 384 (1886) (“Because of the local ill feeling, the people of the States where [Indians] are found are often their deadliest enemies.”).

⁵⁹ ICWA is explicit in its condemnation of states’ roles in effectuating the rupture of Indian families. At the outset, it describes those removals as “often unwarranted” and charges states with “fail[ing] to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.” 25 U.S.C. § 1901(4)-(5) (2012).

⁶⁰ *Id.* § 1903(1). ICWA does not apply to juvenile delinquency placements or divorce proceedings where custody of an Indian child is at issue. *Id.* But only juvenile delinquency placements stemming from acts which, if committed by an adult, would be considered a crime, are intended to be exempt from ICWA’s requirements. *Id.* However, many states appear to exempt juvenile delinquency placement proceedings for Indian status offenders in contradiction of the Act’s intended scope. See generally Thalia Gonzalez, *Reclaiming the Promise of the Indian Child Welfare Act: A Study of State Incorporation and Adoption of Legal Protections for Indian Status Offenders*, 42 N.M. L. REV. 131 (2012) (arguing that state courts failing to consistently apply ICWA’s provisions regarding juvenile exemptions has resulted in an undermining of ICWA itself).

⁶¹ 25 U.S.C. § 1903(3) (2012). “In order for a child to be eligible for membership in any tribe, the legal status of the child’s mother and father, as ‘parent’ and as tribal members, has to be established.” Hollinger, *supra* note 10, at 458. But even then, ICWA is inapplicable where a child’s parent is a tribal member, but their child does not qualify for tribal membership. Snyder, *supra* note 58, at 821-22.

⁶² 25 U.S.C. § 1903(4) (2012). Accordingly, when American Indian children are tribal members or eligible for tribal membership, any state court child custody proceeding concerning them is subject to ICWA’s provisions even where the child’s American Indian heritage solely stems from their biological father and that father is not considered a “parent” under ICWA because he has not acknowledged or established paternity.

⁶³ *Id.* § 1903(9).

ICWA also provides Indian tribes exclusive jurisdiction over child custody proceedings concerning Indian children “who reside[] or [are] domiciled within” their reservation.⁶⁴ When an Indian child is not domiciled or residing within the reservation of their tribe and is subject to a state court foster care placement or a termination of parental rights proceeding, ICWA compels state courts to transfer the proceeding to the tribe in the absence of good cause⁶⁵ and parental objections.⁶⁶ It also allows for Indian custodians and tribes to intervene in state court proceedings dealing with the foster care placements and terminations of parental rights to Indian children.⁶⁷ For involuntary state court proceedings, ICWA requires state courts to “notify the parent or Indian custodian and the Indian child’s tribe” in cases “where the court knows or has reason to know that an Indian child is involved” in the proceeding.⁶⁸ Most importantly for purposes of this Comment, ICWA provides Indian parents a bevy of procedural protections intended to safeguard parent–child relationships from state interference.

Among those protections is the right to court-appointed counsel for indigent Indian custodians and parents in a “removal, placement or termination proceeding.”⁶⁹ ICWA also provides for a considerable degree

⁶⁴ *Id.* § 1911(a). In *Mississippi Band of Choctaw Indians v. Holyfield*, the Supreme Court held “that the law of domicile Congress used in the ICWA cannot be one that permits individual reservation-domiciled tribal members to defeat the tribe’s exclusive jurisdiction by the simple expedient of giving birth and placing the child for adoption off the reservation.” 490 U.S. 30, 53 (1989).

⁶⁵ The good cause exception to the transfer requirement quickly became one of ICWA’s most controversial provisions, with commentators alleging that it allowed state courts to impute their biases into Indian child welfare proceedings. *See, e.g.*, Catherine Brooks, *The Indian Child Welfare Act in Nebraska: Fifteen Years, A Foundation for the Future*, 27 CREIGHTON L. REV. 661, 687–91 (1994) (describing a Nebraska court’s use of the good cause exception as a judgment concerning the adequacy of the tribal court system making the transfer request).

⁶⁶ 25 U.S.C. § 1911(b); *see also* Laverne F. Hill, Comment, *Family Group Conferencing: An Alternative Approach to the Placement of Alaska Native Children Under the Indian Child Welfare Act*, 22 ALASKA L. REV. 89, 104 (2005) (“Even though tribes have the right to be notified of proceedings involving children of the tribe and to remove the proceedings to tribal court, the underlying philosophy that governs these proceedings is adversarial and culturally insensitive.”).

⁶⁷ 25 U.S.C. § 1911(c).

⁶⁸ *Id.* § 1912(a). Federal regulations require the notice to provide the personal identification information of the child’s “direct lineal ancestors.” 25 C.F.R. § 23.111(d)(3) (2018). However, ICWA does not provide for a tribal right to notice in voluntary proceedings, but “[m]any states themselves have enacted laws requiring notice in voluntary proceedings so as to protect the tribe’s right of intervention.” Atwood, *supra* note 33, at 614 n.110.

⁶⁹ 25 U.S.C. § 1912(b). States receiving federal child abuse prevention and treatment funding are required to provide representatives for children involved in state court abuse and neglect proceedings, but not all states guarantee representation for parents involved in parental rights termination proceedings. *See* Amy E. Halbrook, *Custody: Kids, Counsel and the Constitution*, 12 DUKE J. CONST. L. & PUB. POL’Y 179, 191 (2017) (“Counsel or a guardian ad litem is appointed on a discretionary basis in these matters, in particular in contested matters

of protection in the substantive standard by which foster care and parental rights termination proceedings are adjudged under the Act. When a state seeks to effectuate foster care placement of an Indian child, it is required to make “a determination, supported by clear and convincing evidence . . . that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”⁷⁰ For parental rights termination proceedings, the applicable standard is beyond a reasonable doubt.⁷¹ This standard is a higher burden of proof than that typically set forth for parents of children who are not Indian.⁷²

Before placing an Indian child in foster care or attempting to terminate that child’s parental rights, ICWA also requires active efforts to prevent the dissolution of Indian families.⁷³ However, the active efforts requirement is inapplicable to the attempted termination of parental rights of unwed biological fathers of Indian children who have not “acknowledged or established” their paternity pursuant to § 1903(9).⁷⁴ When a party has made such efforts to no avail, ICWA provides adoption preferences for members of the child’s extended family,⁷⁵ members of the child’s tribe, and other

where the suitability of the adoptive placement is questioned or where the child’s best interests are otherwise at issue.”).

⁷⁰ 25 U.S.C. § 1912(e).

⁷¹ *Id.* § 1912(f).

⁷² *See, e.g.,* Dep’t of Soc. Servs. v. Firllet (*In re Miller*), 451 N.W.2d 576 (Mich. Ct. App. 1990) (rejecting an equal protection challenge brought by a parent of a non-Indian child who objected to her parental rights being terminated under a lesser standard than that applied to parents of Indian children under ICWA); *see also* Santosky v. Kramer, 455 U.S. 745, 758 (1982) (holding that the standard of proof in a termination proceeding must be greater than a preponderance of the evidence standard).

⁷³ 25 U.S.C. § 1912(d). This section “applies only in cases where an Indian family’s ‘breakup’ would be precipitated by the termination of the parent’s rights.” *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 651 (2013). Additionally, “[b]efore a child can be placed in accordance with ICWA’s placement preferences, the state has to identify the child as being subject to the law.” U.S. GOV’T ACCOUNTABILITY OFF., GAO-05-290, INDIAN CHILD WELFARE ACT: EXISTING INFORMATION ON IMPLEMENTATION ISSUES COULD BE USED TO TARGET GUIDANCE AND ASSISTANCE TO STATES 16 (2005).

⁷⁴ *A.A. v. Dep’t of Family & Youth Servs.*, 982 P.2d 256, 262 (Alaska 1999).

⁷⁵ ICWA defines extended family through either tribal law and custom or as “the Indian child’s grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent,” provided that they are at least eighteen years old. 25 U.S.C. § 1903(2) (2012). As such, an unwed father who has not acknowledged or established his paternity may not be eligible for placement. *But see Adoptive Couple*, 570 U.S. at 667 (Breyer, J., concurring) (questioning if ICWA provisions, among them § 1915(a), “allow an absentee father to reenter the special statutory order of preference with support from the tribe”). Section 1916(a) permits “a biological parent” to “petition for return of custody.” 25 U.S.C. § 1916(a) (2012). However, “return of custody” implies the need for a preexisting custodial relationship, meaning that a biological father who has not acknowledged or established his paternity may also not be eligible for relief under this provision. Such a reading would be consistent with the Court’s interpretation of § 1912(f) in *Adoptive Couple*, discussed further in Part II.

Indian families.⁷⁶ For foster care and preadoptive placements, ICWA's preferences are similar, with an additional preference for Indian foster homes licensed or approved by an Indian child's tribe.⁷⁷ ICWA also allows for the placement preferences of parents to factor into placement determinations.⁷⁸ But ICWA does not permit unwed fathers who have not acknowledged or established their paternity to challenge their child's placement for violating ICWA's provisions.⁷⁹ Accordingly, an unwed father's ability to assert rights under ICWA is tethered to his ability to demonstrate that he has acknowledged or established paternity of his biological child.

II. SECTION 1903(9) AND *ADOPTIVE COUPLE*

This Part considers the definition of "parent" as defined by state courts interpreting § 1903(9). It then considers the Supreme Court's approach, or lack thereof, to the same statutory quandary, analyzing the interpretational tools utilized by the Court with a particular focus on their utility for interpreting § 1903(9) moving forward.

A. *State Court Interpretation*

Though a federal law, ICWA is primarily a creature of state court jurisprudence.⁸⁰ State courts sculpt the metes and bounds of ICWA largely free of federal court input. In ICWA's four-decade existence, the Supreme Court has decided only two cases concerning the Act despite myriad differences in state courts' interpretations. Among the most glaring and consequential are the different frameworks state

⁷⁶ 25 U.S.C. § 1915(a) (2012). "These preferences for nonmember Indians can be understood . . . as some acknowledgment that tribal government boundaries in the United States today do not necessarily reflect cultural dividing lines." Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373, 1381 (2002). But § 1915(a)'s preferences "do[] not bar a non-Indian family . . . from adopting an Indian child when no other eligible candidates have sought to adopt the child." *Adoptive Couple*, 570 U.S. at 642.

⁷⁷ 25 U.S.C. § 1915(a).

⁷⁸ *Id.* § 1915(c).

⁷⁹ *See id.* § 1914 (providing that "any *parent* or Indian custodian from whose custody such [an Indian] child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title" (emphasis added)).

⁸⁰ *See* Kathryn Fort & Adrian T. Smith, *Indian Child Welfare Act Annual Case Law Update and Commentary*, AM. INDIAN L.J., May 11, 2018, at 32, 41 ("Prior to 2015, virtually no ICWA cases were filed in federal court.").

courts have developed for determining whether an unwed father has attained “parent” status under § 1903(9).⁸¹

The varied approaches to interpreting § 1903(9) in the cases of unwed fathers is reflective of the varied circumstances in which unwed fathers invoking ICWA’s protections in child custody proceedings appear before state courts.⁸² Many of those courts have taken plain language approaches to interpreting “acknowledged or established,” permitting unwed fathers to satisfy § 1903(9)’s requirements by taking paternity tests,⁸³ claiming paternity during child custody proceedings,⁸⁴ and through acts construed to connote the assumption of paternal responsibilities.⁸⁵ But other courts have taken the opposite approach, rejecting the use of paternity tests to establish paternity⁸⁶ and concluding that a putative father’s acknowledgement of paternity to family members is insufficient to constitute acknowledgment under the Act.⁸⁷ Courts have also varied in defining the temporal dimension of their § 1903(9) analyses. Fathers have been held to qualify as parents under the Act following years of absence

⁸¹ See Christopher Deluzio, *Tribes and Race: The Court’s Missed Opportunity in Adoptive Couple v. Baby Girl*, 45 PACE L. REV. 509, 521 (2014) (“There has been silence in the academic discourse surrounding this disagreement among the states about how to define paternity under the ICWA. Regardless, this split affects a large portion of the nation’s Indian population and has muddied the waters for putative Indian fathers affected by . . . termination or adoption proceedings.”).

⁸² Despite their diverging approaches to determining whether a putative father has “acknowledged or established” his paternity, state courts appear unanimous in noting that paternity cannot be established in accord with ICWA when a biological father is unknown or has made no claim of paternity. See, e.g., *Hampton v. J.A.L.*, 658 So.2d 331, 336, 333 (La. 1995) (noting that an Indian child’s paternity “ha[d] not been conclusively established” in a case where “[t]he alleged father has had no contact with the child”); *In re N.R.*, No. 2016-77, 2016 WL 5344039, at *14 (Vt. 2016) (noting that paternity “had not been established” in a case where the biological father’s identity was unknown).

⁸³ See, e.g., *In re J.S.*, 321 P.3d 103, 109 (Mont. 2014); *Noah v. Kelly B.*, 67 P.3d 359, 367 (Okla. Civ. App. 2003).

⁸⁴ See, e.g., *In re I.M. & M.*, No. 295092, 2010 WL 2016326, at *6 n.3 (Mich. Ct. App. May 20, 2010) (“At the time of the preliminary hearing, I.M.’s father had not yet established parentage, but did so later in the proceedings.”).

⁸⁵ See, e.g., *Leatherman v. Yancey*, 103 P.3d 1099, 1108 n.24 (Okla. 2004) (“[E]vidence reflects that the father met the minimal statutory requirements by grasping his parental rights and exercising his parental duties to the extent of his ability.”).

⁸⁶ See *In re Michael J.*, No. A103198, 2004 WL 551251, at *16 (Cal. Ct. App. Mar. 22, 2004) (“The language of the ICWA suggests that something more than a blood test result is necessary for an unwed father to ‘acknowledge or establish’ his paternity.”).

⁸⁷ See *In re Adoption of Child of Indian Heritage*, 543 A.2d 925, 933-34 (N.J. 1988) (“Although petitioners contend that [the putative father’s] alleged claims of paternity to members of his family prior to the birth of the child constitute an acknowledgment of paternity under the ICWA, we disagree.”).

in their children's lives.⁸⁸ Conversely, they have also been barred from asserting rights under ICWA as a "parent" due to years of paternal absence.⁸⁹ Other courts have avoided defining "acknowledged or established" entirely.⁹⁰

When state courts have strayed from interpretations of the "plain terms"⁹¹ of § 1903(9), they have largely chosen to either impart their state's paternity establishment procedures into the Act or fashion a new standard solely applicable to ICWA. Five states—California, New Jersey, Oklahoma, Tennessee, and Arizona—incorporate state law.⁹² These courts

⁸⁸ See, e.g., *In re Morgan*, 364 N.W.2d 754, 755, 758 (Mich. Ct. App. 1985) (holding that a putative father, unwed to the child's mother at the time of the child's birth and for more than two years afterwards, had "reestablished" his relationship with his child by regularly visiting him at his foster home); *In re J.S.*, 321 P.3d at 109, 111 (holding that a putative father, who first visited his son during a state-facilitated meeting when he was eight years old, had established paternity of his child under § 1903(9)).

⁸⁹ See, e.g., *In re S.A.M.*, 703 S.W.2d 603, 607 (Mo. Ct. App. 1986) (assuming that a father who claimed paternity through acknowledgment expressed in a court motion was a "parent" under ICWA, but holding that § 1912(f) was inapplicable because the putative father "never had custody" of his child). Notably, this same interpretive approach was utilized by the Supreme Court in *Adoptive Couple*, as will be discussed in Section II.B.

⁹⁰ See, e.g., *Div. of Family Servs. v. S. R.*, No. 02-34444, 2004 Del. Fam. Ct. LEXIS 115, at *41 (noting that "acknowledge[ment]" of paternity is "a requirement for the establishment of a parent-child relationship for purposes of qualification under the Indian Child Welfare Act," but not describing what acknowledgment entails).

⁹¹ *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 560 (S.C. 2012), *rev'd*, 570 U.S. 637 (2013).

⁹² See *Jared P. v. Glade T.*, 209 P.3d 157, 161 (Ariz. Ct. App. 2009) ("[W]e look to state law to determine whether paternity has been acknowledged or established."); *In re Daniel M.*, 1 Cal. Rptr. 3d 897, 899 (Cal. Ct. App. 2003) (explaining that California's paternity establishment law "is substantively indistinguishable from" § 1903(9)); *Child of Indian Heritage*, 543 A.2d at 935 ("Congress intended to defer to state or tribal law standards for establishing paternity . . ."); *In re Baby Boy D.*, 742 P.2d 1059, 1064 (Okla. 1985) (interpreting § 1903(9) "to mean acknowledged or established through the procedures available through the tribal courts, consistent with tribal customs, or through procedures established by state law"), *cert denied*, 484 U.S. 1072 (1988), *overruled on other grounds by* *Leatherman v. Yancey*, 103 P.3d 1099, 1101 (Okla. 2004); *In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880, at *17 (Tenn. Ct. App. Nov. 19, 1997) (adopting the interpretation of the Supreme Court of Oklahoma in *In re Baby Boy D.*); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 173 (Tex. Ct. App. 1995) ("Congress intended to have the issue of acknowledgment or establishment of paternity determined by state law."). At least one commentator has described South Carolina as one of the states that "do not look to their state laws when determining whether paternity has been 'acknowledged' or 'established' under the ICWA." Deluzio, *supra* note 81, at 521. This contention is premised on the South Carolina Supreme Court's purported rejection of an interpretation of § 1903(9) dictated by state law. *Id.* at 541. However, the South Carolina Supreme Court has not definitively resolved this question. In *Adoptive Couple v. Baby Girl*, the court noted that a party's state law incorporation contention conflated paternity and paternal consent to adoption. 731 S.E.2d at 560. It did not, however, conclusively reject the conflation. Rather, it resolved the paternity issue in question by stating that the unwed putative father had satisfied the "plain terms" of § 1903(9) "by both acknowledging his paternity through the pursuit of court proceedings . . . and establishing his paternity through DNA testing." *Id.*

have held that Congress effectively ceded the terrain of paternity definition in ICWA to the states by not defining “acknowledged or established.” Of those five, three—New Jersey, Oklahoma, and Tennessee—also permit the incorporation of tribal law.⁹³ Alaska and Utah both utilize flexible standards disconnected from state law to determine whether an unwed father is a parent under ICWA.⁹⁴ The “acknowledged or established” definitions they have fashioned are amorphous standards of “reasonableness” intended to extend judicial flexibility to courts faced with sympathetic fathers seeking to invoke ICWA’s machinery.⁹⁵ Fittingly, a lack of sympathy appeared to animate the Supreme Court’s decision when faced with the same issue.

B. Section 1903(9) Following Adoptive Couple

Adoptive Couple v. Baby Girl, the Supreme Court’s sole foray into interpreting § 1903(9), provides the best support for why a federal standard is needed to govern the meaning of “acknowledged or established.” But despite granting certiorari to determine whether “parent” includes an unwed father who has not complied with state paternity law, the Court avoided answering that question.⁹⁶ Their method of doing so—seemingly adopting a framework of paternity principles established in a string of earlier family law cases—reveals the lens through which fatherhood, in the context of ICWA, should be refracted.

In *Adoptive Couple*, an unwed American Indian father (“Biological Father”) sought custody of his child (“Baby Girl”) with a non-Indian woman (“Birth Mother”) after previously renouncing claims to custody, and after she arranged for the child to be adopted. Biological Father, an

⁹³ *Child of Indian Heritage*, 543 A.2d at 935; *Baby Boy D.*, 742 P.2d at 1064; *Morgan*, 1997 WL 716880, at *17.

⁹⁴ *Bruce L. v. W.E.*, 247 P.3d 966, 979 (Alaska 2011) (“[T]o qualify as an ICWA parent an unwed father does not need to comply perfectly with state laws for establishing paternity, so long as he has made reasonable efforts to acknowledge paternity.”); *E.T. v. R.K.B. (In re B.B.)*, 417 P.3d 1, 21 (Utah 2017) (“We reject the notion that courts should rely on state law to determine whether an unmarried biological father has acknowledged or established paternity under ICWA.”).

⁹⁵ The durability of these standards in comparison to the more rigid and routine application of state law is unclear. Even where courts are ostensibly receptive to actions of paternity acknowledgment and establishment not recognized by state law, state law remains the fulcrum through which acknowledgment and establishment are conceptualized. This is most evident in Arizona, where state courts have held that the filing of state paternity actions or pursuit of legal custody “are not required,” *Michael J. v. Michael J., Sr.*, 7 P.3d 960, 963 (Ariz. Ct. App. 2000), despite the general application of “state law to determine whether paternity has been acknowledged or established.” *Jared P.*, 209 P.3d at 161.

⁹⁶ See *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 646 (2013) (“We need not—and therefore do not—decide whether Biological Father is a ‘parent.’”).

enrolled member of the Cherokee Nation, was on active duty with the United States Army and stationed in Oklahoma, roughly four hours away from Birth Mother, when she informed him one month into their engagement that she was pregnant.⁹⁷ Following the announcement, their relationship became strained due to Biological Father's insistence that they get married prior to Baby Girl's birth.⁹⁸ Approximately four months after announcing her pregnancy, Birth Mother ended their engagement, after which Biological Father made no attempts to contact her.⁹⁹ Three months before their child was born, Birth Mother asked Biological Father whether "he would rather pay child support or surrender his parental rights."¹⁰⁰ He chose the latter, but he later testified that he understood his response to indicate that he was surrendering his rights to Biological Mother, allowing her time to think and for the potential rekindling of their relationship.¹⁰¹

Birth Mother then proceeded to contact a private adoption agency and selected a non-Indian married couple ("Adoptive Couple") to adopt Baby Girl.¹⁰² The couple "provided financial assistance to Mother during the final months of her pregnancy and after Baby Girl's birth."¹⁰³ During that same period, Biological Father provided no support.¹⁰⁴ However, Biological Father was unaware that Birth Mother arranged for Baby Girl's adoption, and he "insist[ed] that, had he known this, he would have never considered relinquishing his rights."¹⁰⁵ Biological Father was similarly unaware of Baby Girl's birth.¹⁰⁶ When Birth Mother went into labor, she requested that the hospital not report her admittance.¹⁰⁷ She "signed forms relinquishing her parental rights and consenting to the adoption" the following day.¹⁰⁸ But in doing so, she identified Baby Girl as only Hispanic

⁹⁷ *Id.* at 643.

⁹⁸ *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 553 (S.C. 2012). Birth Father testified that he wanted to marry Birth Mother prior to their daughter's birth so that Baby Girl would not be born out of wedlock. *Id.* at 553 n.3.

⁹⁹ *Id.* at 553.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *See id.* ("It is undisputed that Mother and Father did not live together prior to the baby's birth and that Father did not support Mother financially for pregnancy related expenses, even though he had the ability to provide some degree of financial assistance to Mother.")

¹⁰⁵ *Id.*

¹⁰⁶ He was, however, "aware of Mother's expected due date." *Id.* at 555.

¹⁰⁷ *Id.* at 554. According to Birth Mother, this was to prevent contact with the father and had been her practice in previous births. *Id.* at 554 n.7.

¹⁰⁸ *Id.* at 554.

despite being aware of Father's Cherokee heritage.¹⁰⁹ By omitting Baby Girl's Indian heritage, Birth Mother prevented the Cherokee Nation from objecting under Oklahoma law to Baby Girl's removal from the state by Adoptive Couple.¹¹⁰

The omission of Baby Girl's Indian ancestry and its ramifications fit a pattern in the months preceding and following Baby Girl's birth. Birth Mother was initially reluctant to reveal Biological Father's tribal membership to the adoption agency.¹¹¹ Adoptive Couple were even unaware of Baby Girl's eligibility for tribal enrollment when Birth Mother relinquished her parental rights.¹¹² Upon being informed of Biological Father's Indian status, the lawyer retained by Adoptive Couple on Biological Mother's behalf sent a letter to the Cherokee Nation to confirm Biological Father's tribal enrollment.¹¹³ However, the letter misspelled Biological Father's name and misstated his birthdate, leaving the Cherokee Nation unable to verify his enrollment.¹¹⁴

Biological Father only became aware of Baby Girl's removal to South Carolina and her pending adoption four months after her birth when he was presented with adoption papers by a process server hired by Adoptive Couple days before his scheduled deployment to Iraq.¹¹⁵ The "Acceptance of Service Form" signed by Biological Father stated that he was not contesting Baby Girl's adoption.¹¹⁶ Biological Father thought that he was signing over parental rights to Biological Mother and "did not realize that he consented to Baby Girl's adoption by another family until after he signed the papers. Upon realizing that [Biological] Mother had relinquished her [parental] rights to [Adoptive Couple]," Biological Father attempted to grab the papers from the process server who warned him that

¹⁰⁹ *Id.* Birth Mother is "predominantly Hispanic," *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 643 (2013), and "testified that she believed she also had Cherokee heritage, but she was not a registered member of the Cherokee Nation." *Adoptive Couple*, 731 S.E.2d at 554 n.5. The Nation, like many other tribes, makes its citizenship determinations "based on descent from historic membership rolls." Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 511-12 (2017). Despite Birth Mother's nonmember Cherokee status, ICWA was still applicable due to Baby Girl's eligibility for membership in the Cherokee Nation. *Adoptive Couple*, 570 U.S. at 642 n.1; *see also supra* note 62 and accompanying text.

¹¹⁰ *Adoptive Couple*, 731 S.E.2d at 555 n.8. The Cherokee Nation did not become aware of Baby Girl's Indian status under ICWA until four months after her birth. *Id.* at 555.

¹¹¹ *Id.* at 554.

¹¹² *Id.* at 555.

¹¹³ *Id.* at 554.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 555.

¹¹⁶ *Id.*

he would go to jail if he damaged the documents.¹¹⁷ Biological Father then consulted a lawyer and intervened in the South Carolina adoption proceeding the next day.¹¹⁸ A court-ordered paternity test later conclusively established that Baby Girl was Biological Father's offspring.¹¹⁹ The family court then determined that ICWA applied to the adoption proceedings and, following a trial, denied Adoptive Couple's adoption petition upon a finding that ICWA's requirements had not been satisfied.¹²⁰ Custody of Baby Girl was then transferred to Biological Father approximately twenty-seven months after her birth.

The South Carolina Supreme Court affirmed. Despite acknowledging that "ICWA does not explicitly set forth a procedure for an unwed father to acknowledge or establish paternity," it concluded that Biological Father was a "parent" under the Act because he established his paternity through DNA testing and acknowledged it by pursuing custody of his daughter after becoming aware of the pending adoption proceedings.¹²¹ It further held that the consent of Biological Father in signing the "Acceptance of Service" form violated § 1913(a)'s requirement that voluntary terminations of parental rights be recorded before and certified by a judge.¹²² Under its analysis, the proposed adoption also violated ICWA's procedures for involuntary termination of parental rights. The state supreme court found that Adoptive Couple had failed to satisfy § 1912(d)'s requirement of the exhaustion of active efforts to prevent the dissolution of an Indian family.¹²³ Moreover, the court found transfer of custody to the father in accord with the Act's core purpose of "preserv[ing] American Indian culture by retaining its children within the tribe."¹²⁴

The Supreme Court reversed. The Court held, assuming for purposes of the argument that Biological Father was a "parent" under § 1903(9),¹²⁵ that §§ 1912(d) and (f) did not "bar[] the termination of his parental rights" because he never had custody over his child.¹²⁶ The Court reasoned that § 1912(f)'s reference to "the continued custody of the child by the parent"¹²⁷ "refers to custody that a parent already has (or at least

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 556.

¹²¹ *Id.* at 560.

¹²² *Id.* at 561.

¹²³ *Id.* at 562.

¹²⁴ *Id.* at 566.

¹²⁵ *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 646-47 (2013).

¹²⁶ *Id.* at 647.

¹²⁷ 25 U.S.C. § 1912(f) (2012).

had at some point in the past).”¹²⁸ Because Biological Father never had custody prior to the adoption proceedings, § 1912(f)’s requirement of a “determination” of “likely . . . serious emotional or physical damage to the child”¹²⁹ was irrelevant. The Court similarly reasoned that “when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent’s legal or physical custody . . . the ‘breakup of the Indian family’ has long since occurred and § 1912(d) is inapplicable.”¹³⁰

The *Adoptive Couple* Court’s statutory analysis was consistent with its understanding of the Act’s core purpose. In the Court’s view, the “removal of Indian children from Indian families’ was “the primary mischief” ICWA was intended to curb.¹³¹ But because no Indian family existed here, the goal of the Act was not implicated and Biological Father’s status as a “parent” could not afford him the right to the substantive protections provided in §§ 1912(d) and (f).¹³² The Court further explained that it was hesitant to apply § 1912(d)’s requirement of “remedial services and rehabilitative programs designed to prevent the breakup of the Indian family”¹³³ in this case out of a concern that “it would surely dissuade some [prospective adoptive parents] from seeking to adopt Indian children.”¹³⁴

¹²⁸ *Adoptive Couple*, 570 U.S. at 648.

¹²⁹ 25 U.S.C. § 1912(f) (2012).

¹³⁰ *Adoptive Couple*, 570 U.S. at 651-52. The Court’s reasoning here likely applies no matter the status of a parent as “Indian” under the Act. *See* 25 U.S.C. § 1903(3) (2012) (defining “Indian” as “any person who is a member of an Indian tribe or who is an Alaska Native and a member of a Regional Corporation”). Despite the Court’s use of the term “Indian parent” in its discussion of § 1912(d), a parent need not be Indian to have protected rights under the Act. Rather, for ICWA to apply in a child custody proceeding, the proceeding need only involve an Indian *child* as defined by § 1903(4). *S.S. v. Stephanie H.*, 388 P.3d 569, 574 (Ariz. Ct. App. 2017); Michelle L. Lehmann, Note, *The Indian Child Welfare Act of 1978: Does it Apply to the Adoption of an Illegitimate Child?*, 38 CATH. U. L. REV. 511, 540 (1989).

¹³¹ *Adoptive Couple*, 570 U.S. at 649.

¹³² *Id.*; *see also id.* at 651 n.7 (“Congress did not extend the heightened protections of §§ 1912(d) and (f) to all biological fathers.”).

¹³³ 25 U.S.C. § 1912(d) (2012).

¹³⁴ *Adoptive Couple*, 570 U.S. at 653. The Court cast § 1912(d)’s requirement as a “sensible” one for state-employed social workers and implicitly endorsed its fulfillment by tribes. *Id.* at 653, 653 n.9. However, the text of § 1912(d) does not make any distinctions with regards to the entities or individuals subject to its requirements. Rather, it imparts the duty of proving that unsuccessful “active efforts . . . to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family” have taken place on “[a]ny party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child.” 25 U.S.C. § 1912(d) (2012) (emphasis added).

The ruling effectively made it so that “race (as manifested by biology) is insufficient to grant a parent access to ICWA’s protections.”¹³⁵ As such, it marked “a shift in ICWA jurisprudence from a notion of parenthood as rooted in biology to one requiring physical or legal custody, or, alternatively, a social relationship beyond mere genetic relatedness.”¹³⁶ This reasoning is consonant with the Court’s holdings in a string of cases challenging state laws cabinining the rights of unwed fathers.¹³⁷ In those cases, the Court has articulated a standard requiring unwed fathers to demonstrate more than just biological ties to their children in order to claim parental rights.¹³⁸ Reading the *Adoptive Couple* decision as an extension of this doctrine provides the proper vehicle through which to situate a standard definition of “acknowledged or established” under § 1903(9).

III. BIOLOGY PLUS AND THE UNWED FATHER

Questions of parental identity are not explicitly solved by the text of the Constitution. At common law, biological fathers had no right to assert

¹³⁵ Shreya A. Fadia, Note, *Adopting “Biology Plus” in Federal Indian Law: Adoptive Couple v. Baby Girl’s Refashioning of ICWA’s Framework*, 114 COLUM. L. REV. 2007, 2043 (2014).

¹³⁶ *Id.* at 2024. Indeed, a fear that “the Act would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian,” permeates the Court’s opinion. *Adoptive Couple*, 570 U.S. at 655. The Court’s multiple references to Baby Girl’s “3/256 Cherokee” heritage, *id.* at 646, and its conclusion that “equal protection concerns,” *id.* at 656, militated against a contrary ruling have been understood “as inviting a broader constitutional challenge to the Act under a theory of racial discrimination.” Elder, *supra* note 50, at 433. *But see* Fadia, *supra* note 135, at 2018 n.84 (“The Court’s recognition of Baby Girl’s eligibility for membership and ICWA’s applicability to the case indicates that its discomfort did not determine its decision.”). Regardless, the permissibility of ICWA’s framework under the equal protection principles embedded in the Due Process Clause of the Fifth Amendment necessarily implicates the continued validity of the Court’s declaration in *Morton v. Mancari* that “legislative judgments” providing “special treatment” for Indians that can be tied rationally to the fulfillment of Congress’ unique obligations towards the Indians . . . will not be disturbed.” 417 U.S. 535, 555 (1974). This issue—which continues to be litigated and to attract the attention of commentators—is beyond the scope of this Comment.

¹³⁷ See *The Supreme Court, 2012 Term – Leading Cases*, 127 HARV. L. REV. 198, 373 (2013) (“Read as a dispute over biology versus care, the case then fits squarely in the parental rights jurisprudence preceding it, continuing the Court’s trend toward provisional prioritization of family over biology.”).

¹³⁸ See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 259-60 (1983) (noting a “clear distinction between a mere biological relationship and an actual relationship of parental responsibility”). This concept of paternity rights has carried favor with commentators who similarly believe that a biological connection alone is insufficient to fortify a claim of paternal rights. See, e.g., Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL RTS. J. 909, 917 (2006) (“Fatherhood should be defined as the conduct of nurturing children.”).

claims of legal paternity over their biological children.¹³⁹ Paternity, as a legal concept, was granted to men through marriage to their wives and an irrefutable presumption that their wives' children were biologically—and legally—their own.¹⁴⁰ Under the traditional marital presumption, an unwed male who fathers a child with a married woman was barred from legally claiming paternity of his biological child.¹⁴¹ But with the advent of new constitutional protections of privacy and autonomy, the right to parenthood for unwed fathers gained constitutional protection.¹⁴² *Stanley v. Illinois* marked the Supreme Court's first grant of constitutional protection to the parental rights of unwed fathers, a striking shift from the common law tradition.¹⁴³

In *Stanley*, the Court considered whether “a presumption that distinguishes and burdens all unwed fathers [is] constitutionally repugnant.”¹⁴⁴ Peter Stanley, Sr. lived with Joan Stanley, the mother of his children, on and off for eighteen years.¹⁴⁵ Upon her death, two of their children were placed with a court-appointed married couple.¹⁴⁶ Unmarried men were excluded from the definition of “parent” under the Illinois statute with which Stanley's children were determined to be of “dependent” status following their mother's death.¹⁴⁷ Accordingly, no determination of Stanley's fitness as a parent was made prior to the placement of his children

¹³⁹ Michael H. v. Gerald D., 491 U.S. 110, 124 (1989) (plurality opinion); Traci Dallas, Note, *Rebutting the Marital Presumption: A Developed Relationship Test*, 88 COLUM. L. REV. 369, 370 (1988).

¹⁴⁰ See Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 248-49 (2006) (explaining the rationales for the marital presumption of paternity—which Congress implicitly transmuted to ICWA through its definition of “parent”—as “provid[ing] legal certainty for purposes such as inheritance and succession,” “preserv[ing] the integrity of marriage, at least where both parties to the marriage so desired,” and “promot[ing] the welfare of the children”).

¹⁴¹ See Joan C. Sylvain, Note, Michael H. v. Gerald D.: *The Presumption of Paternity*, 39 CATH. U. L. REV. 831, 837-38 (1990) (explaining the marital presumption in the context of a California statute).

¹⁴² See David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 128 (2006) (“Before the 1970s, unmarried fathers had only the most tenuous legal rights concerning their children.”).

¹⁴³ 405 U.S. 645 (1972).

¹⁴⁴ *Id.* at 649. Four years prior to deciding *Stanley*, the Court invalidated a state law that barred children born out of wedlock from filing wrongful death actions stemming from their parents' deaths. *Levy v. Louisiana*, 391 U.S. 68, 72 (1968). Reflecting on that case in *Stanley*, the Court noted that “familial bonds” among family members whose matriarch and patriarch are not married “were often as warm, enduring, and important as those arising within a more formally organized family unit.” 405 U.S. at 651-52.

¹⁴⁵ *Stanley*, 405 U.S. at 646.

¹⁴⁶ *In re Stanley*, 45 Ill.2d 132, 133 (1970).

¹⁴⁷ *Id.* at 133-34.

with the married couple.¹⁴⁸ However, “married fathers—whether divorced, widowed, or separated—and mothers—even if unwed” were presumed fit to raise their children.¹⁴⁹

The Court invalidated the statute, holding that “[t]he private interest . . . of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection.”¹⁵⁰ The Court stated that “as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him.”¹⁵¹ In addition, the Court held that Illinois had violated the Equal Protection Clause of the Fourteenth Amendment by rejecting Stanley’s attempt to gain a hearing while also affording the opportunity to other parents at risk of losing custody of their children.¹⁵²

In *Stanley*, the Court effectively elevated the rights of unmarried fathers who “sired and raised” their children to that of their parental counterparts.¹⁵³ The progeny of *Stanley* reified the importance of due process in parental rights termination proceedings.¹⁵⁴ But the Court also proceeded to pare back any notion that it would take an expansive approach to the principles elucidated in *Stanley*. That process began six years later, when the Court unanimously denied an unwed father’s attempt to block his child’s adoption by the husband of the woman with whom he conceived the child.¹⁵⁵

Leon Webster Quilloin had never married or lived with the mother of his son, but he occasionally visited and gave his child gifts.¹⁵⁶ Still, he

¹⁴⁸ *Stanley*, 405 U.S. at 646.

¹⁴⁹ *Id.* at 647.

¹⁵⁰ *Id.* at 651.

¹⁵¹ *Id.* at 649.

¹⁵² *Id.*

¹⁵³ *Id.* at 650; Meyer, *supra* note 142, at 128 (interpreting *Stanley* as holding “that at least some unmarried fathers have constitutionally protected interests in relationships with their children”).

¹⁵⁴ See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (“When an unwed father demonstrates a full commitment to the responsibilities of parenthood by [coming] forward to participate in the rearing of his child . . . his interest in personal contact with his child acquires substantial protection under the Due Process Clause.”) (internal quotation marks and citation omitted); see also Melanie B. Jacobs, *When Daddy Doesn’t Want to be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J. L. & FEMINISM 193, 207 (2004) (noting that the Court’s “biology plus” test “recognize[s] that biological fathers who have actively asserted their parental rights must receive notice of the child’s mother’s intent to have the child adopted”). While the question of whether American Indians were entitled to due process was settled by this time following Congress’s grant of citizenship to Indians, see *supra* note 12, that question had “remained unanswered through most of the nineteenth century.” Cleveland, *supra* note 30, at 27.

¹⁵⁵ *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978).

¹⁵⁶ *Id.* at 251.

had “never exercised actual or legal custody over his child, and, according to the Court’s characterization, “never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child.”¹⁵⁷ Nearly three years after his son’s birth, his mother married Randall Walcott.¹⁵⁸ Eight years later, Walcott filed a petition for adoption.¹⁵⁹ Quilloin sought to block the adoption of his son and secure visitation rights. He did not, however, attempt to gain custody. The Georgia law at issue only required the consent of biological mothers for the adoption of children born to unwed parents, but it required the consent of both parents in all other situations.¹⁶⁰ To thwart the adoption, Quilloin sought to legitimize his child, but his petition was denied.¹⁶¹ Invoking *Stanley*, he challenged the law on due process and equal protection grounds, claiming that he deserved the same right to withhold his consent to adoption as other fathers.

The Court rejected his claims and held “that the State could permissibly give [Quilloin] less veto authority than it provides to a married father.”¹⁶² But it couched that conclusion in the belief that a married father—even one whose marriage has dissolved—“will have borne full responsibility for the rearing of his children during the period of the marriage.”¹⁶³ Quilloin, on the other hand, never “had, or sought, actual or legal custody of his child.”¹⁶⁴ Accordingly, he had not been denied due process or equal protection under the Constitution.

The Court cast the case as one in which it was merely affirming the existence of an intact family—composed of the child, his natural mother, and his stepfather—not rejecting the formation of a new family, composed of Quilloin and his son.¹⁶⁵ In deciding *Quilloin*, the Court reserved the question of whether Georgia’s statute impermissibly distinguished among unmarried

¹⁵⁷ *Id.* at 256.

¹⁵⁸ *Id.* at 247.

¹⁵⁹ *Id.* at 249.

¹⁶⁰ *Id.* at 248.

¹⁶¹ *Id.* at 253. There was evidence that Quilloin was unaware of the process for legally legitimizing his child until after Walcott filed the adoption petition. *Id.* at 254.

¹⁶² *Id.* at 256.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 255.

¹⁶⁵ *See id.* (“[T]he result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except [Quilloin].”). At least one commentator has interpreted the Court’s opinion to stand for the proposition that “an unwed father may have less protection when the biological mother is part of the family unit adopting the child.” Susan Swingle, Comment, *Rights of Unwed Fathers and the Best Interests of the Child: Can These Competing Interests Be Harmonized? Illinois’ Putative Father Registry Provides an Answer*, 26 LOY. U. CHI. L.J. 703, 714-15 (1995).

parents by their gender.¹⁶⁶ The Court effectively resolved that question in *Caban v. Mohammed*. In *Caban*, the Court struck down a New York statute that allowed an unmarried mother, but not an unmarried father, to contest adoption of their child.¹⁶⁷

Abdiel Caban and Maria Mohammed lived with each other for five years, during which they had two children and told others that they were married.¹⁶⁸ Mohammed eventually left Caban, took their two children with her, and married another man.¹⁶⁹ However, Caban continued to see his children regularly during weekly visits at their grandmother's apartment on the floor above where he lived.¹⁷⁰ Their grandmother eventually returned to her native Puerto Rico, taking her two grandchildren with her.¹⁷¹ During a visit to Puerto Rico, Caban picked up the children and returned with them to New York.¹⁷² Mohammed then filed a custody petition in New York Family Court, which granted Mohammed and her husband temporary custody and allowed Caban and his new wife to have visitation rights.¹⁷³ The Mohammeds then filed for adoption of the children. The Cabans responded with their own adoption filing.¹⁷⁴ The Court allowed the Mohammeds to adopt the children, divesting Caban of his parental rights in the process.¹⁷⁵ Caban was unable to adopt because Maria, the biological mother, withheld her consent.¹⁷⁶

In invalidating the statute, the Court noted that Caban's "parental relationship is substantial."¹⁷⁷ It reasoned that New York's law violated the Constitution because it "discriminate[d] against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child."¹⁷⁸ In particular, the law impermissibly presumed that unwed fathers lacked the parental capacity of mothers.¹⁷⁹

¹⁶⁶ *Caban v. Mohammed*, 441 U.S. 380, 389 n.7 (1979).

¹⁶⁷ *Id.* at 382.

¹⁶⁸ *Id.* At the time, Caban was still married to a previous wife. *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 383.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 383-84.

¹⁷⁶ *Id.* at 384.

¹⁷⁷ *Id.* at 387.

¹⁷⁸ *Id.* at 394. This caveat left the Court's ruling in *Quilloin* undisturbed. *See supra* text accompanying note 163.

¹⁷⁹ *See id.* ("The facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children.").

But four years later, the Court rejected an unwed father's attempt to intervene in his daughter's adoption and began again to chip away at a liberal reading of its earlier unwed father cases.¹⁸⁰ That father, Jonathan Lehr, had "never supported and rarely seen" his biological daughter, Jessica.¹⁸¹ Jessica's mother, Lorraine Robertson, married another man shortly after Jessica's birth.¹⁸² The Robertsons filed for adoption when Jessica was two years old.¹⁸³ The adoption was granted, but Lehr claimed it was invalid because he was never given notice of the adoption proceedings.¹⁸⁴ He only learned of the pending adoption petition after filing for a determination of paternity and visitation rights.¹⁸⁵ The adoption was granted before his paternity determination and visitation requests, which would ultimately be denied, were decided,¹⁸⁶ and Lehr challenged the adoption on due process grounds.¹⁸⁷

The New York law at issue, its putative father registry law, only allowed for notice of an adoption proceeding to unwed fathers when they registered their claim of paternity with the state.¹⁸⁸ As the Court framed it, fathers in Lehr's position had "the opportunity to receive notice simply by mailing a postcard to the putative father registry."¹⁸⁹ But Lehr claimed that "he had a constitutional right to prior notice and an opportunity to be heard" before his daughter's adoption, and that the statute's gender classification ran afoul of the Equal Protection Clause.¹⁹⁰

The Court rejected Lehr's arguments and held that the State had "adequately protected" his "inchoate interest in establishing a relationship with Jessica."¹⁹¹ The Court's understanding of Lehr's interest as "inchoate" was key to its analysis. The Court reasoned that "the rights of . . . parents are a counterpart of the responsibilities they have assumed," insinuating that paternal rights only stem from paternal actions.¹⁹² The

¹⁸⁰ Lehr v. Robertson, 463 U.S. 248 (1983).

¹⁸¹ *Id.* at 249-50.

¹⁸² *Id.* at 250. Importantly, "[t]he dispute did not concern the qualifications of Mr. Robertson as Jessica's adoptive father." Elizabeth Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 OHIO ST. L.J. 313, 314 (1984).

¹⁸³ Lehr, 463 U.S. at 250.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 253.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 250-51.

¹⁸⁹ *Id.* at 262 n.18.

¹⁹⁰ *Id.* at 255. Lehr was never "shown to be unqualified to exercise parental responsibilities and rights." Buchanan, *supra* note 182, at 314.

¹⁹¹ Lehr, 463 U.S. at 265.

¹⁹² *Id.* at 257.

Court homed in on what it perceived as a paucity of paternal actions on Lehr's part, noting that he had never lived with Jessica or Lorraine, never assisted them financially, and never offered to marry Lorraine.¹⁹³ Accordingly, his relationship did not acquire the "substantial protection under the Due Process Clause" which "an unwed father [who] demonstrates a full commitment to the responsibilities of parenthood" earns.¹⁹⁴ The Court reiterated that constitutional protection could not be earned by "the mere existence of a biological link,"¹⁹⁵ but conceded that its earlier unwed father cases did not allow for the application of laws like New York's where "the mother and father are in fact similarly situated."¹⁹⁶

When the Court next considered the case of an unwed father, its task was not nearly as simple. In *Michael H. v. Gerald D.*, the Court rejected the due process claims of an unwed man seeking to establish his paternity of a child he claimed to have conceived with a married woman.¹⁹⁷ Under the relevant California law, children born to married women living with their husbands were presumed to be the biological—and, for all intents, legal—products of that union.¹⁹⁸ Only the husband or wife could rebut that presumption under the state law.¹⁹⁹ A four-justice plurality of the Court rested its decision on "the absence of any constitutionally protected right to legal parentage on the part of . . . adulterous natural father[s]," and rejected the due process challenge of Michael, the putative natural father.²⁰⁰

Michael had had an affair with his neighbor, Carole, who was married to Gerald.²⁰¹ Carole gave birth to a daughter, Victoria, and confided in Michael that he may be Victoria's biological father.²⁰² Throughout the first three years of her life, Victoria lived with Carole.²⁰³ After that time, Carole had blood tests taken that demonstrated a 98.07% probability that Michael was Victoria's biological father.²⁰⁴ Months later, Carole and Victoria visited Michael in St. Thomas, where "Michael held Victoria out as his child."²⁰⁵ After two months, Carole left with Victoria, started living

¹⁹³ *Id.* at 252.

¹⁹⁴ *Id.* at 261.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 267.

¹⁹⁷ 491 U.S. 110, 111 (1989) (plurality opinion).

¹⁹⁸ *Id.* at 115.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 129 n.7.

²⁰¹ *Id.* at 113.

²⁰² *Id.* at 114.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

with another man in California,²⁰⁶ and began rebuffing Michael's attempts to visit Victoria.²⁰⁷ Michael subsequently filed an action to establish his paternity of Victoria and gain visitation rights, but Carole and Michael then reconciled before the suit was ultimately decided.²⁰⁸ Michael then lived with Carole and Victoria for an eight-month stretch, except for when he was abroad for business.²⁰⁹ During that time, Carole and Michael signed a stipulation agreeing that Michael was Victoria's natural father.²¹⁰ Carole later left Michael, rejoined Gerald, to whom she was still married, and instructed her lawyers not to file the stipulation.²¹¹ By the time the Supreme Court decided the case five years later, Carole, Gerald, and Victoria were living together.²¹²

California's law was based on an intent to protect the integrity of a marital relationship.²¹³ Michael asserted a violation of his substantive due process rights because that interest, in his view, was inadequate to terminate the parent-child relationship that he had formed with Victoria.²¹⁴ As the plurality noted, that argument was "predicated on the assertion that Michael ha[d] a constitutionally protected liberty interest in his relationship with Victoria."²¹⁵ But the plurality viewed *Stanley*, *Quilloin*, *Caban*, and *Lehr* as resting on "the historic respect . . . traditionally accorded to the relationships that develop within the *unitary* family."²¹⁶ Accordingly, the plurality limited its inquiry to whether individuals similarly situated to Michael and Victoria had historically "been treated as a protected family unit."²¹⁷ The plurality ruled that they had not, and noted that, in fact, the marital unit—here comprised of Gerald, Carole, and Victoria—was *actually* the unit that had been traditionally protected.²¹⁸ As

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 114-15.

²¹¹ *Id.* at 115.

²¹² *Id.*

²¹³ *Id.* at 131.

²¹⁴ *Id.* at 121.

²¹⁵ *Id.*

²¹⁶ *Id.* at 123 (emphasis added).

²¹⁷ *Id.* at 124.

²¹⁸ *Id.* In this sense, the Court heavily relied on the marital presumption. See *supra* notes 139–142 and accompanying text. The theories underlying the married and unmarried biological father distinction made in ICWA and the similar distinctions made in the Court's biology plus cases may stem from the same reasoning. See Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 648 (1993) (explaining that the premises underlying paternal rights in situations where a biological father is married to his child's biological mother and where an unmarried biological father has an established relationship with his biological child are both dependent on an understanding of paternity as "a *cultural* creation—and a choice—not the

such, the plurality held that it was not unconstitutional for a state to give preference to a husband over a putative biological father in establishing paternity.²¹⁹

The plurality's reasoning did not command a majority of the Court. Justice Stevens, writing separately and concurring in the judgment, rejected the plurality's contention that a parent-child relationship of a constitutionally protectable nature could never develop between an unwed father with a child born to a married mother.²²⁰ Justice Stevens's concurrence relied on the narrower contention that the California statute's allowance of a court, in its discretion, to grant visitation rights to any person with an interest in a child's welfare effectively protected Michael's due process rights because the California courts undertook that analysis.²²¹ The concurrence left the Court's biology plus jurisprudence intact, but with no clearly discernable formulation of its continued utility beyond the precise contours of the facts adduced in the cases the Court had already decided.

The erratic nature of the biology plus case law reflects what the Court has characterized as the "lurking problems" inherent in cases concerning "proof of paternity."²²² But despite the relatively concentrated period in which the Court expanded, reified, and curtailed the custodial rights of unwed fathers, the Court's biology plus cases fit a broader pattern of the Court inscribing the parameters of parental rights. Nearly half a century before *Stanley*, the Court recognized an individual right to "establish a home and bring up children" under the Fourteenth Amendment's Due

automatic correlate of a biological tie" (footnote omitted) [hereinafter Dolgin, *Just a Gene*]; David D. Meyers, *The Constitutionality of Best Interests Parentage*, 14 WM. & MARY BILL RTS. J. 857, 860 (2006) (noting that the marital presumption of parenthood at common law "protected *social* parentage over *biological* parentage"). However, in a modern context, where fluid family structures may allow for shifting notions of involvement, such a choice is complicated. See Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337, 350 (2002) ("There is widespread confusion about families in general and especially about children and the implications for children of the 'modern' conception of *adults* within families as autonomous individuals, connected only insofar as, and for as long as, they *choose* to be connected.") [hereinafter Dolgin, *Family Arbiter*].

²¹⁹ *Michael H.*, 491 U.S. at 129.

²²⁰ *Id.* at 133 (Stevens, J., concurring). Four other justices also rejected this proposition. *Id.* at 136 (Brennan, J., dissenting).

²²¹ *Id.* at 134 (Stevens, J., concurring); see also Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 449 (2007) ("Justice Stevens's rationale left Michael with the right to petition for visitation, regardless of whether he could be declared 'the father.'"). The Court later held the application of a similar law unconstitutional in *Troxel v. Granville*, 530 U.S. 57, 73 (2000). In *Troxel*, grandparents sought to establish visitation rights with their grandchild, whose father—their son—had died. *Id.* at 60. Justice Stevens dissented.

²²² *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (per curiam).

Process Clause.²²³ Just a few years later, it clarified that that right encompassed “the liberty of parents and guardians to direct the upbringing and education of children under their control.”²²⁴ This right existed primarily in parents, with states only permitted a subsidiary interest in the “custody, care and nurture” of children.²²⁵

The process of acknowledging parental rights continued in tandem with *Stanley* and its progeny, but it increasingly imparted a view of parenthood unmoored from biology. The Court acknowledged that “the usual understanding of ‘family’ implies biological relationships,” but reasoned that “biological relationships are not exclusive determination of the existence of a family.”²²⁶ In accordance with that view, its biology plus case law increasingly shuttered the parental rights of biological fathers unable to demonstrate their participation in a family unit bound by more than genetic ties. Central to these cases was the Court’s conclusion that actions, and not mere biology, were necessary for unwed fathers to have their paternal rights afforded constitutional protection.²²⁷ In *Stanley*, the Court saw a man who had acted as a primary caregiver and was wrongly divested of his parental rights.²²⁸ In *Quilloin*, the Court saw the opposite. But in both cases, the Court applied subjective standards to facts, etching a fact-centric notion of protectable paternal interests in the process.

Those interests were forged in the context of a broader reorientation of gender roles in the Court’s jurisprudence. The Court had long cast women in a singularly domestic sphere, portraying them as “the center of home and family life”²²⁹ even in the midst of “vast changes in the[ir] social and legal position[s].”²³⁰ The biology plus cases were primary disrupting forces in that myopic narrative, giving legal credence to the employ of men

²²³ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

²²⁴ *Pierce v. Soc’y of Sisters of Holy Names*, 268 U.S. 510, 534-35 (1925).

²²⁵ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

²²⁶ *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 843 (1977).

²²⁷ See Dolgin, *Just a Gene*, *supra* note 218, at 650 (“The Court’s decision in *Stanley* strongly suggests that the rights extended to Stanley depended on his position as a biological and a social father to his children.”); Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 *YALE L.J.* 1236, 1253 (2010) (“Stanley acted like a father, but perhaps more importantly, he acted like a *husband*, performing his parental role in a manner consistent with marital family norms.”); Woodhouse, *supra* note 1, at 1796 (“In the wake of *Stanley*, and the line of cases it inaugurated, the *conduct* of genetic or biological fathers has become a threshold adoption issue.”).

²²⁸ The dissent, however, characterized Stanley as “concerned with the loss of the welfare payments he would suffer as a result of the designation of others as guardians of [his] children.” *Stanley v. Illinois*, 405 U.S. 645, 667 (1972) (Burger, C.J., dissenting).

²²⁹ *Hoyt v. Florida*, 368 U.S. 57, 62 (1961).

²³⁰ *Goesaert v. Cleary*, 335 U.S. 464, 465-66 (1948).

in traditionally maternal caregiving roles. But the Court's commitment to shedding the gendered trapping of tradition has wavered at times as its opinions have embraced gender roles to sanction differences in the unequal burdens placed on the assumption of parental rights by men and women.²³¹ And even where the caregiving role of fathers is clear, the Court has impeded their assertions of parental rights.²³² To the extent that *Adoptive Couple* fits within the Court's biology plus jurisprudence, it too may stand for a strained view of what the proper course for asserting paternal rights entails.

IV. CONSIDERING STATE LAW INCORPORATION: A THRESHOLD ISSUE

ICWA is mired and buoyed by its interpretations, with expansive readings of its provisions giving weight to Congress's protectionist inclinations and narrow readings evincing the role that judicial discretion still plays in cabining American Indians' rights.²³³ The lack of a federal definition for "acknowledged or established" raises the question of whether such an issue of family law is better left for the states to determine. This Part briefly considers states' methods for determining paternity before considering the implications of wholesale adoptions of those definitions into ICWA.

A. Paternity by State

Title IV-D of the Social Security Act requires states to create and enforce procedures for establishing paternity as a condition for receiving federal funds for child support and welfare programs.²³⁴ Under Title IV-D, states must

²³¹ See *Nguyen v. INS*, 533 U.S. 53, 56-57, 73 (2001) (upholding a statute that "imposes different requirements for [a] child's acquisition of citizenship depending upon whether the citizen parent is the mother or the father"). *But see* *Sessions v. Morales-Santana*, 198 L. Ed. 2d 150, 174-75 (2017) (distinguishing *Nguyen* and invalidating a physical presence requirement's "gender-based distinction" in a citizenship statute).

²³² See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17-18 (2004) (denying standing to a father attempting to assert a First Amendment claim on behalf of his child because he lacked sole legal custody).

²³³ See Christine D. Bakeis, *The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe*, 10 NOTRE DAME J. L. ETHICS & PUB. POL'Y 543, 570 (1996) ("[T]he language of the ICWA is anything but clear."); Roger A. Tellinghuisen, *The Indian Child Welfare Act of 1978: A Practical Guide with [Limited] Commentary*, 34 S.D. L. REV. 660, 663 (1989) ("[I]t has become ever more apparent that the terms of the Act are unclear and invite litigation.")

²³⁴ 42 U.S.C. § 654(4)(A) (2012). That same law requires states to enter "into cooperative arrangements with . . . Indian tribes or tribal organizations" to affect the administration of child support plans. *Id.* § 654(7). A separate law, The Child Support Recovery Act of 1992, Pub. L.

“regularly and frequently publicize . . . the availability and encourage the use of procedures for voluntary establishment of paternity.”²³⁵ Those procedures also include the ability to locate parents for purposes of “enforcing child support obligations, or making or enforcing a child custody or visitation determination.”²³⁶

Under the law, states are required to have “[e]xpeditious administrative and judicial procedures” in place to establish paternity.²³⁷ States must also have procedures permitting a father to establish paternity of his child at any point before the child turns eighteen.²³⁸ Title IV-D also provides, in cases of contested paternity, for relevant parties to undergo genetic testing unless certain conditions are not met.²³⁹ For positive results, states are required to enact “[p]rocedures which create a rebuttable or, at the option of the State, conclusive presumption of paternity upon genetic testing results indicating a threshold probability that the alleged father is the father of the child.”²⁴⁰ For voluntary acknowledgments, states must provide an affidavit process and fully recognize valid affidavits signed in other states.²⁴¹ Putative fathers must be afforded “a reasonable opportunity to initiate a paternity action.”²⁴²

This regime of biology-dependent paternity determinations and the unfurling of states’ marital-minded parenthood orthodoxy post-*Stanley* has resulted in states adopting laws far more permissive towards and protective of paternal rights than that mandated by the Supreme Court.²⁴³ But the prevalence of states conferring paternal rights through determinations of “biology is in fact a far more fragile and insecure system of parental opportunity” where biology begets the convenience of claiming paternal rights, but does not guarantee their instantaneous acquisition.²⁴⁴ For many states, that opportunity is fairly consistent with the language of ICWA.

No. 102-521, 106 Stat. 3403, provides for federal penalties in limited circumstances for the failure to pay child support obligations.

²³⁵ 42 U.S.C. § 654(23) (2012).

²³⁶ *Id.* § 654(8).

²³⁷ *Id.* § 666(a)(2).

²³⁸ *Id.* § 666(a)(5)(A).

²³⁹ *Id.* § 666(a)(5)(B).

²⁴⁰ *Id.* § 666(a)(5)(G).

²⁴¹ *Id.* § 666(a)(5)(C)(iv). The state agencies which maintain birth records are required to provide voluntary paternity establishment procedures. *Id.* § 666(a)(5)(C)(iii)(I).

²⁴² *Id.* § 666(a)(5)(L).

²⁴³ Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461, 468.

²⁴⁴ Carbone, *supra* note 9, at 1322.

Indeed, that language is nearly identical to that of more than a dozen state laws that addressed issues of paternity at the time of ICWA's enactment.²⁴⁵

Similarly, many states now provide presumptions in favor of biological and legal paternity in instances where an unwed putative father, in conjunction with the child's mother, attests to his paternity through a formal state procedure.²⁴⁶ Other states forgo the formal requirement, mandating, like ICWA, that a putative father need only affirmatively acknowledge their paternity.²⁴⁷ In all, twenty-five states permit voluntary paternal acknowledgments through paternity registries, twenty-one allow acknowledgment through court affidavit, twenty-six permit paternity establishment through voluntary consent to identification on a birth certificate, and forty-one states permit court-ordered genetic testing to resolve paternity claims.²⁴⁸

B. *Rejecting Wholesale Incorporation*

The perceived wisdom of state law tending to define family structure absent extraordinary circumstances seemingly compels the incorporation of states' paternity laws in § 1903(9).²⁴⁹ That same wisdom has led to the incorporation of state law definitions in federal statutes bearing on family relations. In *De Sylva v. Ballentine*, the Supreme Court opted to defer to states' definitions of "children" for purposes of the federal Copyright Act of 1947.²⁵⁰ The Court reasoned that "the scope of a federal right is, of

²⁴⁵ See Brief for Casey Family Programs et al. as Amici Curiae Supporting Respondent at 32, 32 n.7, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (noting that at least sixteen states, like Congress, sought to "protect the child's ties to an acknowledged or established father").

²⁴⁶ See, e.g., MICH. COMP. LAWS § 722.1003(1) (2019) ("If a child is born out of wedlock, a man is considered to be the natural father of that child if the man joins with the mother of the child and acknowledges that child as his child by completing a form that is an acknowledgment of parentage.").

²⁴⁷ See, e.g., *State ex rel T.A.B. v. Corrigan*, 600 S.W.2d 87, 89-90 (Mo. Ct. App. 1980) (interpreting a state statute requiring that "the father of an illegitimate child . . . has acknowledged the child as his own by affirmatively asserting his paternity" in order to invoke a "legal relationship" with the child in court proceedings).

²⁴⁸ CHILDREN'S BUREAU, *THE RIGHTS OF UNMARRIED FATHERS* 3 (2018).

²⁴⁹ See *Elk Gove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17 (2004) ("One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations."); *In re Burrus*, 136 U.S. 586, 593-94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States."); Albertina Antogini, *From Citizenship to Custody: Unwed Fathers Abroad and at Home*, HARV. J. L. & GENDER 405, 456 (2013) ("The Supreme Court has little case law addressing custody, as it is by and large a product of state law."). But see generally Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297 (1998) (characterizing the traditional notion of states having sole responsibility for the development of family law as misplaced).

²⁵⁰ 351 U.S. 570, 580-81 (1956). *De Sylva* has been cited approvingly by at least one state court grappling with how to define "acknowledged or established" under § 1903(9). In *In re*

course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law.”²⁵¹ The Court further explained that “[t]his is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.”²⁵² The *De Sylva* Court’s use of state law was characteristic of the federal courts’ approach to issues of family law at the time.²⁵³

However, such deference undercuts the uniformity sought by ICWA²⁵⁴ and risks a relapse of the state court obstruction which the Act sought to quell.²⁵⁵ In fact, it may add to the disunity which already exists.²⁵⁶ It would also allow for the value judgments that animated Congress’s enactment of ICWA to befall the unwed fathers who attempt to establish parenthood under the Act.²⁵⁷

But beyond the policy risks which allowing for only state law incorporation may entail, incorporation is also undercut by common practices in statutory interpretation and the Supreme Court’s precedent in

Adoption of a Child of Indian Heritage, the Supreme Court of New Jersey inferred “a legislative intent to have acknowledgment or establishment of paternity determined by state law.” 543 A.2d 925, 935 (N.J. 1988). The *In re Adoption* court reasoned that ICWA “primarily was enacted to provide Indian parents with sufficient leverage to resist involuntary or induced voluntary placements of their children.” *Id.* at 943. Notably, this case was decided before the Supreme Court’s decision in *Mississippi Band of Choctaw Indians v. Holyfield.*, where the Court explained that “Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians.” 490 U.S. 30, 49 (1989). At least one commentator has suggested that the Supreme Court’s ruling in *Holyfield* “may lead to a reexamination of” *In re Adoption*. Tellinghuisen, *supra* note 233, at 674.

²⁵¹ *De Sylva*, 351 U.S. at 580.

²⁵² *Id.*

²⁵³ See Dolgin, *Family Arbiter*, *supra* note 218, at 354 (“Until the second half of the twentieth century, the legal system relied almost exclusively on principles of state law to resolve domestic disputes.”). Traditionally, federal courts were also barred from exercising jurisdiction over custody disputes. *Burrus*, 136 U.S. at 594 (“As to the right to the control and possession of this child, . . . it is one in regard to which neither the Congress of the United States nor any authority of the United States has any special jurisdiction.”).

²⁵⁴ 25 U.S.C. § 1902 (2012) (declaring that ICWA establishes “minimum Federal standards for the removal of Indian children from their families”).

²⁵⁵ See *supra* notes 7–9 and accompanying text.

²⁵⁶ See Christine Metteer, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38 SANTA CLARA L. REV. 419, 419 (1998) (noting that “state courts have continually disagreed about the Act’s requirements and when it should be applied”).

²⁵⁷ Some commentators have contended that ICWA’s jurisdictional scheme has already allowed for such value judgment to befall Native Americans. See Jeanne Louise Carriere, *Representing the Native American: Culture Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585, 610 (1994) (“In leaving questions open for Euro-American courts to answer, Congress entrusted determinations of the substance and value of Native American family culture to the state courts that it earlier had found to be culturally inadequate to make these determinations.”).

interpreting ICWA's provisions. This is evident in the Court's declaration in *Jerome v. United States* that "in the absence of a plain indication to the contrary," the Court "generally assume[s] . . . that Congress when it enacts a statute is not making the application of the federal act dependent on state law."²⁵⁸ The Court reiterated this principle of statutory construction in *Mississippi Band of Choctaw Indians v. Holyfield*, its first case to deal with ICWA.²⁵⁹ In *Holyfield*, the Court considered "whether there is any reason to believe that Congress intended the ICWA definition of 'domicile' to be a matter of state law."²⁶⁰ It answered in the negative. In doing so, the Court noted that its presumption against reliance on state law by Congress is made "in light of the object and policy of the statute" at issue.²⁶¹ The Court found the object and policy of ICWA to be at odds with a rendering of it as "a statute under which different rules apply from time to time to the same child, simply as a result of his or her transport from one State to another."²⁶² A similar recognition of Congress's intention to create a "uniform federal" law should weigh in favor of eschewing strictly state-law-based incorporation into the definition of "acknowledged or established" under § 1903(9).²⁶³

As a matter of statutory construction, the absence of a reference to state law in § 1903(9) is revealing. The Act often explicitly refers to state law for purposes of delineating where its application is intended. For example, § 1913(b) of the Act permits parents and Indian custodians to withdraw their "consent to a foster care placement under State law" to facilitate the return of their children.²⁶⁴ No such invocation of state law is present in § 1903(9). In contrast, "State law" is expressly included in the definition of "Indian custodian," merely three subsections before the definition of "parent."²⁶⁵

An incorporation of state law in the context of § 1903(9) would also run counter to clear Court precedent rejecting the application of state laws in the context of legislation concerning Indian affairs.²⁶⁶ That precedent has

²⁵⁸ 318 U.S. 101, 104 (1943).

²⁵⁹ 490 U.S. 30 (1989).

²⁶⁰ *Id.* at 43.

²⁶¹ *Id.* at 47 (internal quotation marks omitted). Viewed in the context of the *Holyfield* Court's reasoning, the *De Sylva* Court's allowance of state law to define "children" in the Copyright Act of 1947 is unremarkable. There, the Court noted that the "general scheme of the" Copyright Act looked to state law for its definitions of familial relationships. *De Sylva v. Ballentine*, 351 U.S. 570, 580-81 (1956).

²⁶² *Holyfield*, 490 U.S. at 46.

²⁶³ *Id.* at 46-47.

²⁶⁴ 25 U.S.C. § 1913(b) (2012).

²⁶⁵ *Id.* § 1903(6).

²⁶⁶ See *Rice v. Olson*, 324 U.S. 786, 789 (1945) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted the Nation's history.")

repeatedly recognized the independence of tribes from state laws in matters of “social relations”²⁶⁷—of which determinations of paternity surely qualify. A contrary determination would only serve to spawn “the vagaries of the laws of the several states”²⁶⁸ in place of the uniform Act.

However, this reality must necessarily be reconciled with the Supreme Court’s repeated instruction that congressional legislation in the realm of Indian affairs should be liberally construed in favor of the American Indians to whom it applies.²⁶⁹ In that respect, state laws, as discussed above, are often far more protective of paternal rights—and receptive to claims of paternity—than the Court’s biology plus cases. The paternity recognition methods currently utilized by states—including birth certificates, paternity tests, court affidavits, and paternity registries—also offer sensible approaches to satisfying § 1903(9)’s “acknowledged or established” language. For these reasons, where enough time has passed for a putative father to develop a constitutionally protectable relationship with his American Indian child, but where that father has not met state law paternity requirements consistent with § 1903(9)’s text and the Act’s protectionist tilt, a state court should next consider whether the putative father, consistent with the Court’s biology plus jurisprudence, has developed a parent–child relationship sufficient for due process protections to attach.²⁷⁰ In this sense, the constitutional law emanating

²⁶⁷ *United States v. Kagama*, 118 U.S. 375, 381 (1886). Conversely, the Court has recognized the “Federal Government’s broad authority to legislate” in the area of Indian affairs on a class-wide basis. *Duro v. Reina*, 495 U.S. 676, 692 (1990).

²⁶⁸ *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943).

²⁶⁹ *See, e.g., United States v. Nice*, 241 U.S. 591, 598 (1916) (“According to a familiar rule, legislation affecting the Indians is to be construed in their interest and a purpose to make a radical departure is not lightly to be inferred.”).

²⁷⁰ Following *Adoptive Couple*, at least one state court has implicitly embraced this approach, holding that ICWA’s reasonable doubt standard for the termination of parental rights be applied to a father of an Indian child “although he never had legal or physical custody rights as those terms are legally employed.” *In re Beers*, 325 Mich. App. 653, 675 (Mich. Ct. App. 2018). The court explained that the father in question, despite not having custody rights under state law, lived with his child and the child’s mother “as a family unit,” *id.*, and that the father had “an existing relationship” with his child. *Id.* at 676. The Act similarly compels the importation of more lenient standards to some of its provisions. *See* 25 U.S.C. § 1921 (2012) (“[W]here State or Federal law applicable to a child custody proceeding . . . provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.”). With regards to “acknowledged or established,” the incorporation of state law to define these terms need not include generally applicable paternity determination requirements; it may instead be state ICWA iterations intended to broaden the Act’s protections. *See In re Adoption of T.A.W.*, 383 P.3d 492, 507 (Wash. 2016) (noting that Washington’s state law version of ICWA provides broader protection to parents of Indian children than the federal ICWA). Those state law ICWA iterations may permissibly discard § 1903(9)’s “acknowledged or established” language entirely. *See Noah v. Kelly B.*, 67 P.3d 359, 368 (Okla. Civ. App. 2003) (“The Oklahoma Act does not

from the Court's biology plus doctrine is "interstitial,"²⁷¹ patching the gaps that may exist between state law and constitutionally protected paternal interests.²⁷²

Such applications of § 1903(9) must also take place with the recognition that ICWA and the federal government's trust responsibilities to American Indians involve "uniquely federal interests"²⁷³ which may require the displacement of state law. In those instances where too little time has passed between an American Indian child's birth and the assertion of paternity in a child custody proceeding by the child's unwed putative father, and where the father is granted no paternal rights under state law, a determination of paternity must be made independent of state law and with regard to reasonable interpretations of "acknowledged or established." The specifications of that interpretation stretch beyond the scope of this Comment, which focuses on the reach of "acknowledged or established" in instances where putative fathers have had an opportunity to develop meaningful relationships with their children. However, the Court's decision in *Holyfield* rejects the notion that custody itself is required for paternity to be established or acknowledged under § 1903(9). In *Holyfield*, the Court stated that ICWA "cannot be applied so as automatically to reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation."²⁷⁴ This suggests that the mere denial, purposeful or otherwise, of custody to unwed fathers immediately following their child's birth is insufficient to bar their later assumption of parenthood status under § 1903(9).

include the federal definition of 'parent' that excludes the unwed father where paternity has not been established or acknowledged.").

²⁷¹ Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 498 (1954).

²⁷² The application of state law here is a prudential one that in no way defeats the purpose of the Act. State courts have routinely held that state procedural requirements inconsistent with the purpose and text of ICWA are displaced by the Act. *See, e.g., In re A.O.*, 896 N.W.2d 652, 655-56 (S.D. 2017) (holding that a trial court's denial of a parent and tribe's request for transfer as untimely was improper because it failed to account for the considerations mandated by the Act in instances of transfer); *In re J.J.T.*, No. 09-17-00162-CV, 2017 WL 6506405 (Tex. App. 2017) (holding that a state "procedural rule which would deny the right to intervene in a child custody proceeding because the tribe did not file a written pleading prior to the hearing" is invalid in an ICWA-governed proceeding). State paternity laws inconsistent with the Act's "acknowledged or established language" would be similarly displaced.

²⁷³ *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1980).

²⁷⁴ *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 54 (1989) (internal quotation marks omitted).

V. FASHIONING A STANDARD

This Part outlines the often nebulous standard the Supreme Court has utilized in its biology plus cases. It begins by considering the rationale for interpreting § 1903(9) through the use of a biology plus framework. It then explores the contours of that framework, explicating its discernible principles in the process.

A. *A Constitutional Imperative*

The rooting of an “acknowledged or established” definition within the Court’s biology plus framework is supported by the legislative history of the Act. The House Report accompanying the Act explicitly notes that § 1903(9)’s definition of “parent” “is not meant to conflict with the decision of the Supreme Court in *Stanley v. Illinois*.”²⁷⁵ Accordingly, Congress intended to align its definition of “parent” with the Court’s *Stanley* doctrine, effectively conferring congressional sanction to impart the biology plus notion of parenthood into the statute.²⁷⁶ Indeed, the Court’s conception of a protectable relationship between an unmarried father and his biological child is consonant with § 1903(9)’s acknowledge-or-establish language. The adoption of a biology plus framework is also supported by ICWA’s explicit mention of Congress’s intention to create “minimum federal standards,”²⁷⁷ as the biology plus standard utilized in *Stanley* and its progeny etches the minimum that an unwed father must do to achieve a constitutionally protectable relationship with his child.

In rejecting calls for it to promulgate regulations giving a specific definition to “parent” under § 1903(9), the Bureau of Indian Affairs (BIA) adopted this understanding as well. It recognized that the “Supreme Court and subsequent case law has already articulated a constitutional standard regarding the rights of unwed fathers.”²⁷⁸ That standard, the constitutional baseline by which the rights of unwed fathers gain constitutional protection, is the minimum federal standard. In articulating that position, the BIA

²⁷⁵ H.R. REP. NO. 95-1386, at 21 (1978). In *Stanley*, the Court inextricably linked the termination of parental rights to the Due Process Clause of the Fourteenth Amendment by requiring states to provide hearings to determine individuals’ fitness as parents before their parental rights can be terminated. 405 U.S. 645, 649 (1972); *see supra* notes 143–154 and accompanying text.

²⁷⁶ Analogs in congressional awareness of judicial precedent can regularly be found throughout federal criminal common law. *See generally* Frank Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1913 (1999).

²⁷⁷ 25 U.S.C. § 1902 (2012).

²⁷⁸ Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,769 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23).

favorably cited the Alaska Supreme Court's recognition that other courts have interpreted *Stanley* to mean that an unmarried father who "manifests an interest in developing a relationship with [his] child cannot constitutionally be denied parental status based solely on the failure to comply with the technical requirements for establishing paternity."²⁷⁹ The BIA's understanding of the settled nature of "acknowledged or established" in ICWA following *Stanley* implicitly reflects an acknowledgment of the biology plus standard as governing their interpretation.²⁸⁰

That interpretation is similarly buttressed by the approach to interpreting ICWA first utilized by the Court in *Mississippi Band of Choctaw Indians v. Holyfield*. In *Holyfield*, the Court found it "helpful to borrow established common-law principles of domicile to the extent that they are not inconsistent with the objectives of the congressional scheme."²⁸¹ Here, too, the common law provides a pertinent analog in the holding out doctrine through which social fatherhood, as established by social conduct of a parental nature, is held to confer parental rights.²⁸²

To comport with the requirements of the holding out doctrine—and "hold out" a child to the world as one's biological offspring—a man must regularly engage in acts such as "changing the child's diapers; feeding him; taking him to the doctor; bathing him; . . . and providing or building a loving relationship with [his] child."²⁸³ The doctrine is rooted in a respect and formal acknowledgment of the acts deemed to connote parenthood in a

²⁷⁹ Bruce L. v. W.E., 247 P.3d 966, 978 (Alaska 2011) (internal quotation marks omitted).

²⁸⁰ The prior year, the BIA issued interim guidelines suggesting that unwed fathers "need only take reasonable steps to establish or acknowledge paternity" in order to satisfy the definition of "parent" under ICWA. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146, 10151 (Feb. 25, 2015).

²⁸¹ Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 47-48 (1989).

²⁸² Dowd, *supra* note 138, at 918. Though a product of common law, the doctrine has been embedded in state statutory law as well. See, e.g., S.C. CODE ANN. § 63-9-310(A)(5) (2019) (mandating paternal consent by unwed fathers for adoptions of their children "placed with the prospective adoptive parents six months or less after the child's birth" only when a father has "openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption, and the father openly held himself out to be the father of the child during the six months period"). The holding out doctrine has also been applied in other contexts. See, e.g., Case Note, *Partnership by Estoppel Based on a Holding Out by One Other Than the Party Sought to Be Held*—Borocato v. Serio, 3 MD. L. REV. 189 (1939) (describing a court's use of the holding out doctrine to determine that a business relationship existed).

²⁸³ Niccol D. Kording, *Little White Lies That Destroy Children's Lives—Recreating Paternity Fraud Laws to Protect Children's Interests*, 6 J.L. & FAM. STUD. 237, 244-45 (2004). Compare Dowd, *supra* note 138, at 919 (criticizing the holding out doctrine as "root[ed] in patriarchal privilege"), with Hendricks, *supra* note 221, at 431 (describing the Court's biology plus cases, which essentially incorporate the holding out doctrine, as "elevat[ing] the rights of men . . . by defining parenthood in terms of motherhood and making fatherhood fit a female model").

private setting that, when conferred to the world, also connote it to the public generally.²⁸⁴ The Court's cases dealing with parental rights have expressed broad support for such a rationale,²⁸⁵ often invoking it as a natural right.²⁸⁶

A federal standard for “acknowledged or established” under § 1903(9) is similarly supported by practical considerations stemming from the Court's resolution of the issues involved in *Adoptive Couple*. Though the Court did not pass upon the proper interpretation of § 1903(9)'s language regarding unwed fathers, it essentially constrained any effective constructions of “acknowledged or established”—at least for purposes of invoking the procedural protections of § 1912(d) and § 1912(f)²⁸⁷—to those consistent with biology plus case law by imposing custodial requirements on the Act's active efforts and parental rights termination provisions. Accordingly, in the wake of *Adoptive Couple*, some courts have dispensed with discussions of § 1903(9) with regard to unwed fathers, finding it unnecessary to consider where no familial relationship exists sufficient for a putative father to invoke § 1912(d) and § 1912(f).²⁸⁸

²⁸⁴ This aspect of the holding out doctrine is significant for its parallels to characteristics often ascribed to nuclear families. See Ristorph & Murray, *supra* note 227, at 1256-57 (“The marital, nuclear family is one that encourages . . . a certain kind of visibility . . . mean[ing] that the state has encouraged the view that public recognition as a family is something to be prized.”).

²⁸⁵ The Court has often given the holding out doctrine an implicit sanction. In *Michael H.*, a plurality of the Court noted that Gerald D., whose paternity claim it gave constitutional sanction over that of the child's biological father, “was listed as father on the birth certificate and has always held Victoria out to the world as his daughter.” *Michael H. v. Gerald D.*, 491 U.S. 110, 113-14 (1989) (plurality opinion). And in *Lehr*, the New York law which the Court upheld against a constitutional challenge provided for notice of adoption proceedings to “those who live openly with the child and the child's mother and who hold themselves out to be the father.” *Lehr v. Robertson*, 463 U.S. 248, 251 (1983).

²⁸⁶ See, e.g., *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977) (“[T]he liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights . . .” (footnote omitted)); Buchanan, *supra* note 182, at 323 (“That the Constitution particularly protects the custodial rights of biological parents who perform custodial responsibilities has been stated as a fact and explained in terms of traditional and natural right.”). Despite those notions of superconstitutionality, the Court has repeatedly construed those rights in constitutional terms. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (situating parental rights within the liberty interests guaranteed by the Fourteenth Amendment). Accordingly, the analysis below proceeds in constitutional terms.

²⁸⁷ In dicta, the Court strongly suggested that its statutory approach was equally applicable to the continued custody requirements in § 1912(e) and § 1912(f). See *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 652 (2013) (“Our interpretation of § 1912(d) is also confirmed by the provision's placement next to §§ 1912(e) and (f) That these three provisions appear adjacent to each other strongly suggests that . . . ‘breakup of the Indian family’ should be read in harmony with the ‘continued custody’ requirement.”).

²⁸⁸ See, e.g., *In re P.T.D.*, 424 P.3d 619, 623-24 (Mont. 2018) (noting that § 1912 ICWA provisions do not apply in the case of a putative father who “has had no meaningful contact . . . and has not established any relationship” without first considering whether he is a “parent” under § 1903(9)).

An interpretation of § 1903(9) consistent with biology plus principles is necessary lest its language become mere surplusage. The definitional gap presented by § 1903(9)'s text only calls for "the normal judicial filling of statutory interstices."²⁸⁹ But that filling need not invoke the machineries of judicial policymaking in the normal sense. The Court need only make clear what Congress made readily apparent from ICWA's text and structure: the federal minimum standard of the Constitution applies.²⁹⁰

B. *Articulating a Standard*

The Court has been vague at times in describing when constitutional protections attach to unwed fathers' attempts to claim legal paternal rights.²⁹¹ The difficulty in culling a workable standard from the Court's biology plus cases is a product of the cases often representing the extremes of exercises in paternal effort.²⁹² Still, the standard, once applied, is rigidly inapposite to the liminal determinations of paternity which its opacity seems to invite.²⁹³ But despite the generalities by which

²⁸⁹ Henry Friendly, *In Praise of Erie – And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 421 (1964).

²⁹⁰ This approach is not inconsistent with the Supreme Court's admonishments against placing congressional purpose above statutory text in interpreting statutes. *See, e.g.*, *Bd. of Governors, of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) ("Invocations of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the [legislative] process of compromise."). Rather, the purpose—creation of federal minimum standards—is embedded within ICWA's text and necessarily colors its judicial interpretation as well.

²⁹¹ *See* Sylvain, *supra* note 141, at 840 (noting that the Court did not "identify[] discernible boundaries to the 'substantial relationship' test" in *Caban*).

²⁹² *See* David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 763 (1999) (noting that "the Court's cases seem to contemplate only two models of fatherhood: the man of virtue who is integrally involved in the rearing of his children and the scofflaw who has slept on his rights while others changed diapers and read bedtime stories").

²⁹³ *See* Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 398-99 (2008) ("The law effectively has constructed a parent/stranger dichotomy in which one is either a parent, vested with the rights and responsibilities of caregiving, or one is a legal stranger without legal entitlements or obligations."); Nancy D. Polikoff, *This Child Has Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 471 (1990) ("Customarily, legal parenthood is an all-or-nothing status. A parent has all of the obligation of parenthood and all of the rights; a nonparent has none of the obligations and none of the rights."). At one point there was the possibility that a case such as *Michael H.*, where Justice Stevens's decisive fifth vote "left Michael with the right to petition for visitation, regardless of whether he could be declared 'the father'", Hendricks, *supra* note 221, at 449, would broker a middle ground. But since deciding *Michael H.*, the Court has struck down one statute which, similar to the California visitation law applicable to Michael, provided for visitation rights to a nonparent. *Troxel v. Granville*, 530 U.S. 57 (2000). This has cast doubt on the continued validity of a more moderate approach. *See* Elizabeth Bartholet, *Guiding*

the Court has dictated unwed biological fathers' rights, some discernible elements of their protected paternal interests have been elucidated.

The Court's conception of paternal—and parental—rights is one presaged on preexisting parent–child relationships both within the context of ICWA, as evinced by *Adoptive Couple*, and its general biology plus jurisprudence. The cases so far reveal that “the mere existence of a biological link does not merit . . . constitutional protection.”²⁹⁴ Similarly, “[r]andom gifts and visits by [a] biological parent are not sufficient to establish a familial relationship.”²⁹⁵ But unwed fathers' “fundamental liberty interest . . . in the care, custody, and management of their child[ren]” is not felled by their mere failure as “model parents” or even the temporary lapse of custodial rights.²⁹⁶ Rather, it fails when there is no relationship to dissolve.

However, in the context of ICWA, a “familial relationship” standard which solely adheres to the markers of family development present in traditional, nuclear families²⁹⁷ is inadequate and contrary to congressional intention.²⁹⁸ Instead, the standard must adapt to the cultural norms which ICWA was intended to protect, recognizing that the Court's biology plus framework was not fashioned in the ICWA context. But the Court's family jurisprudence is not anathema to “a larger conception of the family.”²⁹⁹ If

Principles for Picking Parents, 72 HARV. WOMEN'S L.J. 323, 327 (2004) (“*Troxel* makes it clear that ‘parents’ are constitutionally protected against inappropriate intervention in their families by nonparents, but it does nothing to limit how states may define parents and thus little to limit developments of the functional parent trend.”). The functional parenthood idea referenced by Bartholet “emphasiz[es] the daily, routine, and even mundane aspects of everyday parenting.” Jacobs, *supra* note 154, at 197; see also AM. LAW. INST., PRINCIPLES OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (2000) (encouraging a view of functional parenthood). But see Michael R. Clisham & Robin Fretwell Wilson, *American Law Institute's Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles or Obligatory Footnote?*, 42 FAM. L.Q. 573 (2008) (questioning the relevance of the ALI's recommendations).

²⁹⁴ *Lehr v. Robertson*, 463 U.S. 248, 261 (1983); Daniel V. Zinman, Note, *Father Knows Best: The Unwed Father's Right to Raise His Infant Surrendered for Adoption*, 60 FORDHAM L. REV. 971, 971-72 (1992) (interpreting the Court's unwed father cases to stand for the proposition that “a natural father's right to veto the adoption of his child does not derive from a biological link alone: it must be accompanied by an existing parental relationship with his child”).

²⁹⁵ *Dallas*, *supra* note 139, at 373.

²⁹⁶ *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

²⁹⁷ See Dolgin, *Family Arbiter*, *supra* note 218, at 342 (describing the “nuclear family” as “composed of a working husband-father, a stay-at-home wife-mother, and their children”).

²⁹⁸ However, “preferences for nuclear families alone does not explain the unwed father cases” and is therefore unnecessary to consider in fashioning a biology plus test under § 1903(9). Hendricks, *supra* note 221, at 445; *id.* at 448 (“The Court's emphasis on cohabitation between father and child seems driven more by its interest in daily caretaking than by loyalty to the nuclear family.”).

²⁹⁹ *Moore v. E. Cleveland*, 431 U.S. 494, 505 (1977) (plurality opinion).

anything, it embraces it.³⁰⁰ Its recognition of the nature and importance of acknowledging protections which should be afforded to extended families may serve as a helpful guide for courts grappling with how to weigh the contributions of unwed fathers which will be sufficient to establish a parental right cognizable under the Constitution, and ICWA as a result.

It has been suggested that “*familial acts*”—“prototypically” those that resemble “the development of a spousal or spouse-like relationship between a father and his child’s mother”—are the only type that pass muster under the Court’s unwed father precedent.³⁰¹ However, such a construction of the biology plus standard in the context of ICWA would conflict with Congress’s recognition of American Indians engaged in “a cultural tradition in which networked caregiving, rather than autonomous parental caregiving is the norm.”³⁰²

The Court’s biology plus precedent has also been understood to “suggest[] that the most important factor in determining whether a genetic father will be entitled to constitutional protection of his parental rights is his relationship with the mother.”³⁰³ The application of a standard permitting a court to weigh a mother’s opinion in a determination of a putative father’s parental rights brings with it a host of concerns about the ability of unwed fathers to develop the “substantial relationship” which the Court’s jurisprudence gives constitutional protection.³⁰⁴ In *Lehr*, the Court did not acknowledge the parental rights of a father who had been deceived as to his biological child’s whereabouts by her birth mother.³⁰⁵ Justice Breyer’s concurrence

³⁰⁰ See *id.* at 505 n.15 (acknowledging that the Court has previously vested constitutional protection in the caregiving rights of an aunt in the absence of the “natural parents”).

³⁰¹ Dolgin, *Just a Gene*, *supra* note 218, at 672.

³⁰² Melissa Murray, *Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 422 (2008); see also Graham, *supra* note 34, at 5 (“For many Native American nations, ‘family’ denotes extensive kinship networks that reach far beyond the Western nuclear family.”); McCartney, *supra* note 48, at 546 (“In the American Indian culture, the rights of the extended family in its children are just as real and important as parental rights.”); Woodward, *supra* note 50, at 38-39 (1975) (“In the extended family, the child-rearing functions are typically distributed beyond the sphere of the non-Indian family nucleus (mother, father, and siblings) so that grandparents, uncles, aunts, and other relatives and even friends within the tribal community often share the responsibilities and joys of bringing up the children.”).

³⁰³ Katherine K. Baker, *Bargaining or Biology?: The History and Future of Paternity Law and Parental Status*, 14 CORNELL J. L. & PUB. POL’Y 1, 34 (2004).

³⁰⁴ See Woodhouse, *supra* note 1, at 1797 n.221 (“[M]others have the power, in practice, to prevent fathers from receiving notice by refusing to disclose their identity, and the power to prevent them from actually developing a relationship by preventing contact.”).

³⁰⁵ *Lehr v. Robertson*, 464 U.S. 248, 262 (White, J., dissenting). But see *id.* at 265 n.23 (majority opinion) (rejecting the dissent’s characterization and noting that “[t]here is no

in *Adoptive Couple*, in which he emphasized that the case did not “involve special circumstances such as a father who was deceived about the existence of the child or a father who was prevented from supporting his child,” casts significant doubt on whether the Court would so readily accept such an outcome in the context of ICWA.³⁰⁶

But interpretations of the Court’s biology plus jurisprudence which cast the Court as consigning the rights of unwed fathers to the judgments of their children’s mothers reflect a misunderstanding of the Court’s consideration of biological mothers’ perceptions in determining the parental rights of biological fathers.³⁰⁷ In *Stanley*, the Court’s seminal biology plus case, the Court did not endeavor to take into account the views of the mother of Peter Stanley’s children when determining his constitutionally protected parental rights, as she was deceased. Rather, the Court looked to the *role* which he played in his children’s lives. As the Court took great pains to explain, his role was that of a primary caregiver, akin to a single mother. Accordingly, “stereotypical maternal” acts of child rearing, and “not merely begetting,” are those that render an unwed father’s actions sufficient to pass the Court’s biology plus test.³⁰⁸

That test has often taken the form of a traditional “best interest” analysis.³⁰⁹ Long a standard in family law proceedings involving issues

suggestion in the record that appellee engaged in fraudulent practices that led appellant not to protect his rights”).

³⁰⁶ *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 667 (2013) (Breyer, J., concurring); see also Dale, *supra* note 6, at 361 n.28 (“The Supreme Court cases have not definitively answered the question of what happens constitutionally in the context of a putative father who is unable to develop a relationship with a natural child through no fault of his own.”). At least one state court has held that *Adoptive Couple* is inapplicable when a birth father has been deceived by his biological child’s biological mother about the birth and whereabouts of the child. See E.T. v. R.K.B. (*In re B.B.*), 417 P.3d 1, 32 n.34 (Utah 2017) (describing *Adoptive Couple* as “no controlling precedent on the precise issue before this court”). This is consistent with similar state court rulings prior to *Adoptive Couple*. See, e.g., Noah v. Kelly B., 67 P.3d 359, 366 n.11 (Okla. Civ. App. 2003) (“[A] father may assert paternity, and all rights associated therewith, when the true facts have been withheld from him.”). Notably, the Court in *Adoptive Couple* did not confine its reading of § 1912(f)’s safeguards for parental rights termination decisions to apply only where a parent had physical custody of their child. See *Adoptive Couple*, 570 U.S. at 650 (“Biological Father should not have been able to invoke § 1912(f) in this case, because he had never had legal or physical custody of Baby Girl as of the time of the adoption proceedings.”). Accordingly, though physical custody of the child may be sufficient for purposes of demonstrating the paternal actions sufficient to establish that an unwed father is a “parent” under § 1903(9), it is not necessary to invoke ICWA’s substantive protections for the termination of parental rights where legal custody, pursuant to state law, exists.

³⁰⁷ See Hendricks, *supra* note 221, at 447 (“As a matter of doctrine, the Court did *not* hold that unwed fathers were protected when and because they were similar to married fathers; they were protected when and because they were similar to biological mothers.”).

³⁰⁸ *Id.*

³⁰⁹ The best interest test has been described as follows:

of custody and child welfare, the best interest standard “illustrates the ability of nineteenth- and twentieth-century family law to solidify, though generally *not to design*, social mores.”³¹⁰ In *Quilloin*, the Court utilized the standard and “considered the effect of a continued relationship on the child above the interest of the unwed father.”³¹¹

But the best interest standard embedded in ICWA is akin to earlier articulations of family law in which parental rights were fundamental.³¹² The “best interests of Indian Children” proposition set forth in ICWA is one consonant with “the stability and security of Indian tribes and families.”³¹³ The typical best interest analysis incorporates no such consideration of broader societal interests.³¹⁴ However, ICWA “is based on the fundamental assumption that it is in the Indian child’s best interest that its relationship to the tribe be protected.”³¹⁵ Accordingly, any application of the biology plus standard in the context of ICWA must adhere to the best interest principles inherent in ICWA, not those seemingly followed by the Court in its unwed father cases.³¹⁶

First, it seeks to avoid the placement of a child with an individual who is unfit. Second, it seeks to choose among otherwise fit individuals. It applies essentially middle class values to determine what setting will serve to protect the child from physical and emotional injury on the one hand and to a [sic] better the child physically, emotionally, and educationally on the other. While racial, ethnic, and religious factors may play a role in determining placements, they are secondary in importance. Finally, the best interest test, in its modern formulation, relies on a number of psychological factors such as the concept of the psychological parent

Dale, *supra* note 6, at 367-68 (footnotes omitted). The “psychological parent is not necessarily a biological parent, but is the person to whom the child feels an emotional attachment.” Carriere, *supra* note 257, at 618. This standard is in line with “[m]odern family law [which] proceeds from the dismantling of the system designed to insure that children would be raised by their genetic parents.” June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Uncertainty*, 11 WM. & MARY BILL RTS. J. 1011, 1020 (2003).

³¹⁰ Dolgin, *Family Arbiter*, *supra* note 218, at 356.

³¹¹ Sylvain, *supra* note 141, at 841 n.92.

³¹² See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”).

³¹³ 25 U.S.C. § 1902 (2012).

³¹⁴ See Bo Eskay, Review, *H.B. 2168—Codifying a Shift in Social Values Toward Transracial Adoption*, 28 ARIZ. ST. L.J. 711, 732 (1996) (“Cultural extinction may represent the one circumstance in which value preferences distinct from a particular child’s interests are weighty enough to override the best interest standard.”).

³¹⁵ *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 50 n.24 (1989).

³¹⁶ This break with the traditional best interests standards is consistent with a growing body of commentary which has developed in critique of the best interests standard in recent years. See generally Gary Crippen, *Stumbling Beyond the Best Interests of the Child: Reexamining Child*

In those cases, the Supreme Court has never explicitly identified the point at which a biological father's due process rights can no longer be invoked to establish legal paternity.³¹⁷ However, the Court's decision in *Lehr* demonstrates that no constitutionally protectable right attaches to an unwed father-child relationship where the unwed father is contesting the paternity claim of another, does not seek to formally establish that relationship until two years after the child's birth, and has not previously developed a substantial relationship with his child.³¹⁸ Still, a degree of flexibility is essential because "[t]he precise parameters of the relationship between a biological father and a child vary with each case, and circumstantial differences necessarily affect the case's outcome."³¹⁹ Accordingly, the ability of an unwed father of an Indian child to satisfy the minimum constitutionally sufficient standards of parenthood and of § 1903(9), hinges on his ability to "grasp[]" the "opportunity" for childrearing which he gains by way of his biological connection to his child and "accept[]" some measure of responsibility for the child's future."³²⁰ The degree to which a putative father of an Indian child has grasped that opportunity must ultimately be an individualized inquiry grounded in the constitutional principles of the unwed father cases and the goals of the Act.³²¹

Custody Standard-Setting in the Wake of Minnesota's Four Year Experience with the Primary Caretaker Preference, 75 MINN. L. REV. 427, 499-500 (1990).

³¹⁷ In *Smith v. Organization of Foster Families for Equality & Reform*, however, the Court did give constitutional sanction to the State of New York's decision that eighteen months was the point at which "foster care begins to turn into a more permanent and family-like setting requiring procedural protection." 431 U.S. 816, 854-55 (1977).

³¹⁸ See *supra* notes 180-196 and accompanying text; see also Meyer, *supra* note 142, at 129 ("[T]he ability of unwed fathers to establish their paternity today often depends upon whether they took prompt action to assume legal responsibility for their children or instead dawdled while others changed diapers and bought formula.").

³¹⁹ Sylvain, *supra* note 141, at 838.

³²⁰ *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

³²¹ Notably absent from this construction of a workable constitutional standard in which to situate unwed fathers' acknowledgment or establishment of their paternity is a focus on their children's views and perspectives. In many ways, such a glaring omission models the pre-Industrial Age era, where the "interests of children were not relevant to determinations of custody and parentage." JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE* 217 (1997). Modern family law similarly "defines parenthood from a curiously adult-centric perspective that gives little currency to the ability of children to recognize and claim their mothers and fathers." Woodhouse, *supra* note 1, at 1795; see also *Quilloin v. Walcott*, 434 U.S. 246, 251 n.11 (1978) (noting that the child whose adoption was at issue had "expressed a desire to be adopted by" the appellee and continue to visit with the appellant, but not overtly weighing that factor in its disposition of the case). It is worth considering whether the beliefs of a child should factor into paternity decisions under § 1903(9). Indeed, some may contend that such a consideration should be part of any best interest test. This Comment does not endeavor to take up that task or to alter the Court's biology plus framework from its parent-centric perspective. Rather, it installs that framework, as is, into

C. *The Potential of a Biology Plus § 1903(9)*

In *Adoptive Couple*, the Court effectively reinforced the *Lehr* majority's admonition that "the rights of parents are a counterpart of the responsibilities they have assumed."³²² But it did so in a way that drastically limited the scope of unwed fathers of Indian children's ability to assume those responsibilities, all but ensuring that their untimely invocations of ICWA—the Court's so-called "ICWA trump card"³²³—prove fatal in the absence of extant socially or legally paternal ties. *Adoptive Couple* then, like its biology plus forebearers,³²⁴ stands for the proposition that the mere capacity for the production of a paternal relationship between a child and his biological father is insufficient for ICWA's benefits to attach to the claim of an unwed father.

The application of the biology plus standard to "acknowledged or established" would not alter the outcome of *Adoptive Couple*, where the Court assumed arguendo that Biological Father was a parent for purposes of the Act. The Court's determination that Adoptive Couple were "the only parents [Baby Girl] had ever known" was central to its holding and effectively foreclosed Biological Father from asserting a superior paternal right despite his biological ties.³²⁵ Even with a more lenient definition of "parent," following *Adoptive Couple* an unwed father would need to demonstrate the "continued custody" which the Court viewed as necessary to invoke § 1912(f)³²⁶ and prove that "the breakup of the Indian family" would occur to assert the "active efforts" requirement under § 1912(d).³²⁷

But defining "acknowledged or established" remains essential beyond the particular provisions considered by the Court in *Adoptive Couple*. An unwed putative father's status as a "parent" under the Act is salient for

ICWA. The Act does, however, permit the consideration of the Indian child's preferences in adoptive, foster care, and preadoptive placements. 25 U.S.C. § 1915(c) (2012).

³²² *Lehr*, 463 U.S. at 257.

³²³ *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 656 (2013). Concerns that requests for compliance with ICWA by putative fathers are used to unnecessarily delay child custody proceedings have also been evinced by state courts. *See, e.g., In re R.E.K.F.*, 698 N.W.2d 147, 151 (Iowa 2005) ("[W]e share the State's concern that a party might wrongly attempt to use the tribal notice provisions of the Iowa ICWA as a delay tactic . . ."). Despite these concerns, the Act itself provides for the delay of state court child custody proceedings upon the involvement of a parent, Indian custodian, or tribe of the Indian child. 25 U.S.C. § 1912(a) (2012).

³²⁴ *See Dallas, supra* note 140, at 384 n.93 ("Where the putative father has not first developed a relationship with the child, current Supreme Court doctrine gives him no right to claim access to her; potential relationships between biological parents and children are not protected.").

³²⁵ *Adoptive Couple*, 570 U.S. at 641.

³²⁶ 25 U.S.C. § 1912(f) (2012).

³²⁷ *Id.* § 1912(d).

notification of involuntary state court proceedings,³²⁸ appointment of counsel,³²⁹ the validation of consent to foster care placement,³³⁰ the withdrawal of consent during adoption proceedings,³³¹ the potential consideration of preferences in adoptive, preadoptive, and foster care placement,³³² the return of a child following an “improper[]” removal,³³³ and for determinations of Indian custodianship.³³⁴ Indian custodians, in turn, can assert many of the same rights as parents under ICWA.

The incorporation of biology plus principles into state courts’ interpretations of “acknowledged or established” would align § 1903(9) with the Supreme Court’s requirements for paternal rights to gain constitutional sanction. This could assuage a Court uncomfortable with the specter of a § 1903(9) unmoored from traditional modes of paternity establishment. As such, ICWA’s definition of “parent” would be brought into the fold of a broader subset of caselaw with which its parameters could be defined.

Most importantly, a biology plus interpretation of § 1903(9) would ease the interpretive tensions experienced by state courts struggling to grapple with an ambiguous provision of a substantial federal law. The Court’s reticence to get involved in resolving ICWA interpretive splits among state courts has left the courts with little in the way of meaningful guidance by which to resolve those splits. The biology plus case law could rectify that

³²⁸ *Id.* § 1912(a) (“In any involuntary proceeding . . . where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent . . . of the pending proceedings and of their right of intervention.”).

³²⁹ *Id.* § 1912(b) (“In any case in which the court determines indigency, the parent . . . shall have the right to court-appointed counsel in any removal, placement, or termination proceeding.”).

³³⁰ *Id.* § 1913(a) (“Where any parent . . . consents to a foster care placement . . . such consent shall not be valid unless executed in writing and recorded before a judge . . . and accompanied by the presiding judge’s certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent . . .”).

³³¹ *Id.* § 1913(c) (“In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.”).

³³² *Id.* § 1915(c) (“Where appropriate, the preferences of the Indian child or parent shall be considered . . .”).

³³³ *Id.* § 1920 (“Where any petitioner in an Indian child custody proceeding . . . has improperly removed the child from custody of the parent . . . or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent . . .”).

³³⁴ *Id.* § 1903(6) (“‘Indian custodian’ means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child.”).

by imbuing § 1903(9) with well-established principles created for the sole purpose of determining the types of paternity issues implicated by the Act.

CONCLUSION

Family relations remain a vital part of the fabric of modern society.³³⁵ ICWA represents Congress's contention that American Indian family structures belong within that fabric as well. In many ways, the Supreme Court's biology plus jurisprudence reflects its fear of fatherhood as a mercurial state, ebbing and flowing with the dilatory whims of biological fathers inconsistently choosing to assert their paternal rights. That jurisprudence began with a large grant of protection to fathers like Peter Stanley, but was later winnowed to include almost exclusively fathers like Peter Stanley. But in the course of that narrowing, the Court emphasized principles of paternity which have reshaped family law and situated fatherhood firmly within American jurisprudence. Extending that scope to include ICWA has the benefit of clarifying an otherwise obscure provision and reifying ICWA's place within the tapestry of American family law.

³³⁵ See *Moore v. E. Cleveland*, 431 U.S. 494, 503-04 (1977) ("It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."); *McCartney*, *supra* note 48, at 546 ("The family is the primary means by which a culture is transmitted, and is the most important influence on the development of culture.").