

IS THE INDIAN CHILD WELFARE ACT LOSING STEAM?: NARROWING NON-CUSTODIAL PARENTAL RIGHTS AFTER *ADOPTIVE COUPLE V. BABY GIRL*

Courtney Hodge*

*In 2013, the United States Supreme Court handed down a decision in *Adoptive Couple v. Baby Girl*, a decision that will have long-term effects on the use of the Indian Child Welfare Act by non-custodial Native parents. Congress passed the Indian Child Welfare Act in 1978 in response to the high volume of Native children that had been removed from their families and their tribes through the child welfare system. In the decades since the law was enacted, several state courts have sought to limit the application of the law through a state court created doctrine known as the Existing Indian Family Exception. Since the 2000s, that doctrine has been losing support among state legislatures and courts. Although *Adoptive Couple* does not explicitly endorse the exception, the opinion closely tracks the reasoning states courts have used to apply the exception.*

This Note analyzes how the majority opinion of the Supreme Court overlooks the rights and interests of non-custodial Native parents, who should also be able to invoke the Indian Child Welfare Act in a case involving their child. This Note also analyzes the recent guidelines and rules issues by the Bureau of Indian Affairs, which have started to fill in the holes of the application of the Indian Child Welfare Act left by the Supreme Court. However, as this Note will show, additional action, either by Congress or at the state level, is needed to ensure that future Native parents can use the Indian Child

* J.D. Candidate 2017, Columbia Law School; B.A. 2014, Georgetown University. The author would like to thank Professor Jane Spinak for her guidance and advice throughout the writing process. The author would also like to thank Todd Densen and the staff of the Columbia Journal of Race and Law for their invaluable editing contributions.

Welfare Act to ensure that their child remains connected to his or her heritage.

I.	INTRODUCTION.....	192
II.	BACKGROUND.....	198
	A. Historical Context Prior to the Passage of the Indian Child Welfare Act	198
	B. The Indian Child Welfare Act: Passage and Purpose.....	206
	C. Implementation of the ICWA and the Existing Indian Family Exception.....	210
	D. Critiques of the Existing Indian Family Exception.....	218
III.	ADOPTIVE COUPLE V. BABY GIRL: THE NEW EXISTING INDIAN FAMILY EXCEPTION CASE?.....	219
	A. Factual Background of <i>Adoptive Couple v. Baby Girl</i>	219
	B. The United States Supreme Court's Decision in <i>Adoptive Couple v. Baby Girl</i>	221
	C. Justice Sotomayor's Dissenting Opinion in <i>Adoptive Couple v. Baby Girl</i>	224
	D. Improper Interpretation of ICWA	227
	E. <i>Adoptive Couple</i> and the Existing Indian Family Exception.....	229
	F. Constitutional Rights of Non-Custodial Fathers following <i>Adoptive Couple</i>	231
IV.	REVIVING THE INDIAN CHILD WELFARE ACT.....	234
	A. The New Final Rule for Indian Child Welfare Act Proceedings	235
	B. Amending the Indian Child Welfare Act.....	240
V.	CONCLUSION	243

I. INTRODUCTION

Throughout the first half of the 20th century, Native children were placed in boarding schools and foster care at an alarmingly high rate under the guise of education and

protection.¹ These troubling child removal practices developed as part of a long tradition of policies aimed at assimilating tribal members into mainstream American society. In 1978, Congress took a major step towards protecting the future of Native American tribes. Following extensive evidence on the treatment of Native American children, Congress enacted the Indian Child Welfare Act (“ICWA” or “Act”) in order to:

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

Congress hoped the ICWA would help slow the trend of removing Native American children from their homes and keep more children with their families and tribes.³ The purpose of the ICWA is to establish procedural safeguards in state custody proceedings regarding Native American children that protect the interests of Native children, families, and tribes.⁴ Specifically, § 1902 achieves this goal by providing for “the placement of Indian children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.”⁵ Under §

¹ This Note uses the term “Native” or “Native American” exclusively, except when “Indian” is used in the language of a statute, case, or other cited material.

² Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901 to 1903, 1911 to 1923, 1931 to 1934, 1951, 1952, 1961 to 1963 (2012)).

³ H.R. REP. NO. 95-1386, at 8 (1978).

⁴ *Id.* at 19.

⁵ 25 U.S.C. § 1902 (2012).

1911, except where otherwise vested in the state by existing federal law, tribes have jurisdiction over any child welfare case when the child lives on the reservation, is a ward of a tribal court, or the state does not have good cause to remove the case to state court.⁶ The Act places a burden on state agencies to make an active effort to keep children with their families before removing the child.⁷ The purpose of this Act was not to displace the state's traditional role in child welfare proceedings, but rather to establish minimum standards.⁸

Since 1978, state courts have interpreted the language of the ICWA in a variety of ways. Some state courts have used the language to create additional protections.⁹ Other courts, however, have worked to limit the application of the ICWA as much as possible.¹⁰ The Kansas Supreme Court played an important role in the trend towards limiting the application of the ICWA. Four years after the ICWA was passed, the Supreme Court of Kansas ruled in *In re Adoption of Baby Boy L.* that the ICWA did not apply in certain instances where a child was not removed from a Native American family.¹¹ The court considered the legislative history, the policy motives behind the law, and the actual language of the Act in order to determine that the ICWA was only intended to regulate proceedings in which the child had been removed from an intact family.¹² This opinion marked the development of the Existing Indian Family Exception, a state court created prerequisite to the application of the ICWA. Although the exception has never been adopted in a majority of states, it has been influential. At its height, nearly half of the states were forced to address the exception either in the courts or the

⁶ 25 U.S.C. § 1911 (2012).

⁷ 25 U.S.C. § 1912(d) (2012).

⁸ H.R. REP. NO. 95-1386, at 19 (1978).

⁹ For a discussion of the increased state court protections, see Kelsey Vujnich, A Brief Overview of the Indian Child Welfare Act, State Court Responses, and Actions Taken in the Past Decade to Improve Implementation Outcomes, 26 J. AM. ACAD. MATRIM. L. 183, 191–93 (2013).

¹⁰ *Id.* at 193–200.

¹¹ *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982).

¹² *Id.* at 175–76.

state legislatures.¹³ As of 2012, only eight states still applied the exception.¹⁴ Many other states have either rejected the exception outright or overturned a previous case applying the exception.¹⁵ Most notably, the Kansas Supreme Court overturned *In re Adoption of Baby Boy L.* in 2009.¹⁶ After this decision, scholars believed that other courts would also stop using the Existing Indian Family Exception.¹⁷ However, a recent Supreme Court case calls into question the actual decline of the exception.

In 2013, the Supreme Court ruled on the ICWA for only the second time in *Adoptive Couple v. Baby Girl* and found that the Act did not apply where a Native American parent never had custody of the child.¹⁸ The case involved the adoption placement of a Native American girl, whose father was a member of the Cherokee tribe, but whose mother was not Native American.¹⁹ Baby Girl's parents were estranged at the time of her birth and her mother surrendered her for adoption soon after.²⁰ Only after the Birth Father received notice of the adoption did he intervene and challenge the placement under the ICWA.²¹ The South Carolina Supreme Court ruled that the ICWA applied and granted the Birth Father custody, but the United States Supreme Court reversed that decision.²² The majority opinion built its case around two phrases from § 1912(d) and § 1912(f): "breakup of

¹³ Dan Lewerenz & Padraic McCoy, *The End of "Existing Indian Family" Jurisprudence: Holyfield at 20, In the Matter of A.J.S., and the Last Gasps of a Dying Doctrine*, 36 WM. MITCHELL L. REV. 684, 686 (2010).

¹⁴ Vujnich, *supra* note 9, at 197.

¹⁵ *Id.*

¹⁶ See *In re A.J.S.*, 204 P.3d 543, 549 (Kan. 2009) (expressly overruling *Baby Boy L.* and the Existing Indian Family doctrine).

¹⁷ See Lewerenz & McCoy, *supra* note 13, at 722 (highlighting that the ruling of *In re A.J.S.* gives lawyers and legislatures in states that still applied the Existing Indian Family Exception new and persuasive grounds for reconsidering the use of the exception).

¹⁸ *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2557 (2013).

¹⁹ *Id.* at 2558.

²⁰ *Id.*

²¹ *Id.* at 2558–59.

²² *Id.* at 2559.

the Indian family” and “continued custody,” respectively.²³ Using the exact dictionary definitions of “breakup” and “continued,” the Court reasoned that the provisions were focused on traditional, Anglo-American family units rather than situations where one parent had not previously been involved in the child’s life.²⁴ Justice Sotomayor wrote a detailed dissent highlighting the flaws in the logic of the majority opinion and the widespread effects the decision will have on the claims of all non-custodial Native American parents.²⁵

The United States Supreme Court never explicitly used or referenced the Existing Indian Family Exception in *Adoptive Couple*. However, the decision interpreted the ICWA in a way that mirrors the analysis in *In re Adoption of Baby Boy L.* and other Existing Indian Family Exception cases. Both decisions developed out of a belief that the ICWA does not apply to non-custodial parents because they are not expressly mentioned in the Act. In addition, both decisions highlight similar language in the ICWA to support their holdings that Congress intended for the Act to apply only to intact families. Based on this comparison, the ruling in *Adoptive Couple* not only weakens the ICWA by implicitly affirming the Existing Indian Family Exception, but also questions the rights of non-custodial parents under the ICWA.

This Note examines the weakening power of the ICWA as it applies to non-traditional family structures. By taking a closer look at the connection between the decision in *Adoptive Couple* and the Existing Indian Family Exception, this Note illuminates how the Supreme Court’s 2013 decision will have devastating long-term effects on the child welfare proceedings of Native American children. Justice Sotomayor noted in her dissenting opinion that *Adoptive Couple* will effectively deny other deserving parents of ICWA protection.²⁶ This ruling

²³ *Id.* at 2560–64.

²⁴ *Adoptive Couple*, 133 S. Ct. at 2560, 2562.

²⁵ *Id.* at 2572–86.

²⁶ *Id.* at 2573.

also overlooks the child's interest in staying connected to the tribe simply because she does not come from a traditional family structure. Ultimately, the ruling reaffirms several cultural misconceptions about the kinds of families that deserve protection, something Congress hoped to avoid when they passed the ICWA. Without action from Congress to amend the language of the ICWA, many more parents will be precluded from the protection that the Act was meant to provide. Part II of this Note outlines the historical context leading up to the passage of the ICWA as well as the relevant elements of the legislation. Part II also addresses the court interpretations of ICWA, including the development of the Existing Indian Family Exception in state courts and *Mississippi Band of Choctaw Indians v. Holyfield*, the only other Supreme Court case to address the ICWA.²⁷

Part III takes a closer look at *Adoptive Couple*. This section lays out the reasoning in the majority opinion as well as the relevant critiques from the dissent. Part III then compares *Adoptive Couple* to the Existing Indian Family Exception case law. Finally, Part III illustrates that even if *Adoptive Couple* does not fully revive the Existing Indian Family Exception, the case has still narrowed the class of parents who can intervene in the proceedings of their children under the ICWA. At a minimum, the opinion jeopardizes the rights of non-custodial parents to intervene in the adoption of their children to the same extent that a custodial parent could under the ICWA. Finally, Part IV presents a potential amendment to the ICWA that seeks to clarify congressional intent and broaden the application of the Act in light of *Adoptive Couple*. The proposed amendment would change the definition section to make clear that the ICWA applies in all child custody proceedings. The amendment would also create a separate subpart of § 1912 that sets a new standard of termination of parental rights for non-custodial fathers.

²⁷ *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

II. BACKGROUND

The following section details the various factors that inspired the passage of the ICWA, the language of the law itself, and the case law that has developed since the 1980s that has limited the use and effectiveness of the Act. Subsection A details the assimilation driven historical practices of the United States government that inspired the passage of the Indian Child Welfare Act. Subsection B lays out a description of the Act itself. The final subsection discusses the ways in which the ICWA has been interpreted. While the ICWA is clear in its policy concerns, the statutory language is not as clear. The Bureau of Indian Affairs (“BIA”) has issued two sets of guidelines, in 1979 and 2015, as well as a binding rule that is effective as of December 12, 2016. Both sets of guidelines focus on how to interpret the ICWA, but they are not binding on states. Thus, state courts have interpreted the language of the Act in a variety of ways—some that broaden the Act’s protections and others that limit it. Subsection C goes into detail about some of these interpretations, including the BIA guidelines, state court practices and exceptions, and the only other Supreme Court case interpreting the ICWA. This section also goes in-depth about one particular state court exception, the Existing Indian Family Exception, and its development, application, and critiques.

A. Historical Context Prior to the Passage of the Indian Child Welfare Act

Historically, the relationship between the Federal Government and Native American tribes has been tenuous at best. Research suggests that since the 19th century, the federal government has primarily used land use laws and educational policies to intervene in Native American culture and families in order to achieve their goal of assimilation. Until recently, the Federal Government supported laws and policies focused on securing land for white settlers and to

assimilate Native Americans into “civilized” culture.²⁸ The government feared that traditional tribal land use practices would inhibit the process of assimilation.²⁹ Native Americans lived in communal societies that controlled land in a communal manner, which conflicted with Anglo-American land use practices.³⁰

Federal land use policies focused on removing land from tribes and restructuring tribal land to conform to mainstream ideas of property. As white settlers continued to move west and demanded more land in the 19th century, the Federal Government created new treaties designed to take increasing amounts of tribal land.³¹ The government signed treaties that promised to reserve the remaining lands and to provide Native Americans with clothing and shelter in exchange for agreements from the tribes to cede their land to the government and move to reservations.³²

The government also passed the Allotment Acts to further decentralize the communal property system.³³ Under the Allotment Acts, land was further divided and granted to individuals rather than tribes. The United States held the land in a trust for twenty-five years, during which time the land could not be sold or taxed.³⁴ A particularly famous allotment act, the 1887 Dawes Act, allowed the President of

²⁸ See Patrice H. Kunesh, *Transcending Frontiers: Indian Child Welfare in the United States*, 16 B.C. THIRD WORLD L.J. 17, 19–22 (1996) (explaining a number of laws focused first on securing land for white settlers and then on land policies meant to help Native Americans assimilate); Vujnich, *supra* note 9, at 184–85 (detailing several laws and policies throughout the 19th and early 20th centuries that focused on land removal and boarding schools targeted at Native tribes).

²⁹ Kunesh, *supra* note 28, at 20–21.

³⁰ *Id.*

³¹ *Id.* at 20.

³² *Id.*

³³ See, e.g., Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331 to 334, 339, 341, 342, 348, 349, 354, 381 (2012)).

³⁴ Kunesh, *supra* note 28, at 21.

the United States to make land grants to individuals.³⁵ The United States falsely assumed that Native Americans would willingly forgo their communal land system in favor of individual land holdings.³⁶ Such practices continued as late as the 1950s through the Bureau of Indian Affairs' relocation programs. This practice sought to move Native Americans from their homelands to urban areas.³⁷

Native American communities are generally structured around kinship and communal property practices. White settlers believed that close extended family bonds needed to be broken in order for them to gain greater control of Native lands.³⁸ Thus, in conjunction with supporting land use policies that sought to weaken and assimilate Native Americans into Anglo-American culture, the government also worked to intervene and separate Native American families. Specifically, the government supported federal and state policies that removed Native American children from their parents and placed them in environments that would effectively assimilate them into mainstream practices.³⁹ This assimilation primarily took place by sending Native American children to boarding schools and by removing them from their families through the child welfare system.⁴⁰

One of the most prominent assimilation practices of the late 19th and early 20th centuries was to control the education of Native American children. The United States achieved this method of controlled assimilation through a network of day schools and boarding schools both on and off reservations.⁴¹ In 1819, Congress passed the Indian

³⁵ Vujnich, *supra* note 9, at 184.

³⁶ Kunesh, *supra* note 28, at 21.

³⁷ Vujnich, *supra* note 9, at 185.

³⁸ *Cf.* Kunesh, *supra* note 28, at 22 (explaining that both communal property practices and the close extended family bonds of Indian families were viewed as barriers to assimilation).

³⁹ Kunesh, *supra* note 28, at 22.

⁴⁰ *Id.* at 22–24.

⁴¹ Denise K. Lajimodiere, *American Indian Boarding Schools in the United States: A Brief History and Their Current Legacy*, in INDIGENOUS

Civilization Act Fund, which set aside funds to set up schools that would “civilize” Native American children.⁴² The schools were designed to remove the “barbaric” traces of tribal culture and to inculcate Native children with the habits of civilized society.⁴³ The BIA sponsored a number of boarding schools.⁴⁴ Missionaries and other private citizens that received funding from the government ran many other schools.⁴⁵

Initially, boarding and day schools were set up on or near reservations.⁴⁶ However, it was believed schools so close to reservations were not removed enough from tribal life and that boarding schools off of reservations were the best option to assimilate Native children into Anglo-American culture.⁴⁷ This led to the rise of off-reservation schools.⁴⁸ Most of these boarding schools were built in the west.⁴⁹ However, the most famous off-reservation boarding school was the Carlisle Indian School of Pennsylvania, which was founded by Col. Richard Henry Pratt in 1879.⁵⁰ Children were often sent across the country to live at school for up to eight years. During this time, students were not allowed to communicate with their families or friends.⁵¹ All aspects of traditional Native American culture were prohibited.⁵² Such prohibited practices of traditional Native American culture included dressing in tribal clothing, speaking native languages, or

PEOPLES’ ACCESS TO JUSTICE, INCLUDING TRUTH AND RECONCILIATION PROCESSES 255, 257 (Wilton Littlechild & Elsa Stamatopoulou eds., 2014).

⁴² *Id.* at 256.

⁴³ Vujnich, *supra* note 9, at 185.

⁴⁴ Northern Plains Reservation Aid, *Native American History and Culture: Boarding Schools*, PARTNERSHIP WITH NATIVE AMERICANS, http://www.nrcprograms.org/site/PageServer?pagename=airc_hist_boarding_schools [https://perma.cc/9WNE-KVSL].

⁴⁵ Lajimodiere, *supra* note 41, at 256.

⁴⁶ Northern Plains Reservation Aid, *supra* note 44.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Kunesh, *supra* note 28, at 22–23.

⁵² *Id.*

participating in religious ceremonies.⁵³ Pratt also developed the “outing” system, which sent students to live and work for white families during the summer months, instead of returning home.⁵⁴ While the Carlisle school closely monitored these placements, most other schools that adopted “outing” programs did not, thus allowing students to be exploited.⁵⁵

Native American parents resisted sending their children to boarding schools and often encouraged their children to run away from these schools.⁵⁶ However, agents resorted to withholding rations or sending in police to enforce the enrollment policies.⁵⁷ Due to compulsory attendance laws enacted in the 1890s, twenty-nine percent of Native American children were enrolled in boarding schools by 1931.⁵⁸ As of 1909, twenty-five off-reservation schools had been founded along with 157 on-reservation boarding schools and 307 day schools.⁵⁹ Between 1879 and 1960, an estimated 100,000 Native American children passed through the boarding school system.⁶⁰ In 1971, Congress found that over 34,000 children lived in institutions, which is more than seventeen percent of the total number of school aged Native American children.⁶¹

Even more pervasive than the placement of Native children in boarding schools was the removal of children from their families and tribes through the child welfare system. In the early to mid-20th century, the BIA often worked in conjunction with state authorities to remove Native children from their families and place them in non-Native homes.⁶² Removing Native American children from their families became a regular practice. For example, Valencia Thacker

⁵³ *Id.*

⁵⁴ Northern Plains Reservation Aid, *supra* note 44.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Lajimodiere, *supra* note 41, at 256.

⁵⁹ *Id.* at 257.

⁶⁰ *Id.*

⁶¹ H.R. REP. NO. 95-1386, at 9 (1978).

⁶² Kunesh, *supra* note 28, at 23.

testified to the American Indian Policy Review Commission Task Force, "I can remember [the welfare worker] coming and taking some of my cousins and friends. I didn't know why and I didn't question it. It was just done and it had always been done."⁶³ In 1971 and 1972, nearly one in four Native American children under the age of one had been adopted.⁶⁴ Based on two surveys conducted by the Association of American Indian Affairs in 1969 and 1974, between twenty-five percent and thirty-five percent of all Native American children had been removed from their families and placed in foster care, adoptive homes, or institutions.⁶⁵

The BIA, in connection with states and religious organizations, also used the child welfare system to justify removing Native American children from their homes, usually on the basis that the child was being neglected in some way.⁶⁶ However, findings of neglect were more often based on discriminatory and culturally insensitive attitudes.⁶⁷ For instance, based on the close extended family ties of Native American tribes, children often spent a lot of time with extended family members rather than their parents.⁶⁸ In addition, social workers also used the impoverished nature of tribes to justify removing children.⁶⁹ Poor housing, lack of electricity or plumbing, and chronic health problems all contributed to the idea that parents neglected Native children.⁷⁰ This practice overlooked the fact that the

⁶³ H.R. REP. NO. 95-1386, at 8 (1978).

⁶⁴ *Id.* at 9.

⁶⁵ This statistic was included as part of the congressional findings on the state of Indian children. H.R. REP. NO. 95-1386, at 9 (1978).

⁶⁶ Kunesh, *supra* note 28, at 23.

⁶⁷ See Michelle L. Lehmann, *The Indian Child Welfare Act of 1978: Does It Apply to the Adoption of an Illegitimate Indian Child?*, 38 CATH. U. L. REV. 511, 516 (1989) ("Congress found that cultural bias against Indians contributed to the high rate of placements in that non-Indian caseworkers were insensitive to, or ignorant of, traditional Indian values.").

⁶⁸ Kunesh, *supra* note 28, at 24.

⁶⁹ Sloan Philips, Note, *The Indian Child Welfare Act in the Face of Extinction*, 21 AM. INDIAN L. REV. 351, 353 (1997).

⁷⁰ Kunesh, *supra* note 28, at 23-24.

reservation system created the very issues of dependence, poverty, and disease that were later used as reasons to view Native Americans as unfit parents.⁷¹ Combining all of these factors, state agencies justified summarily removing children from their homes.⁷²

Leading up to the passage of the ICWA, Congress studied the child placement practices of several states and found a grave disparity between the placements of Native American children versus non-Native children.⁷³ In Minnesota, for example, Native American children were placed in foster care or adoptive homes at a rate five times greater than other children.⁷⁴ In South Dakota, forty percent of adoptions conducted by the Department of Welfare between 1967 and 1968 were of Native American children, yet they only made up only seven percent of the juvenile population.⁷⁵ Most strikingly, Native American children living in Wisconsin were 1,600% more likely to be separated from their families than children of other demographics.⁷⁶

Not only were Native American children systematically removed from their families at increased rates, but they were also subsequently placed almost exclusively with non-Native families. One federally supported program, the Indian Adoption Project, was viewed as an “enlightened adoption practice” because of its express goal to place Native American children in non-Native homes.⁷⁷ The project facilitated the placement of 395 Native American children in

⁷¹ *Id.* at 24.

⁷² Kunesh, *supra* note 28, at 23–24; *see also*, Philips, *supra* note 69, at 352–53.

⁷³ *See* H.R. REP. NO. 95-1386, at 8–9 (1978) (comparing the statistical data of Native children in foster care or adopted children with non-Native children).

⁷⁴ *Id.* at 9.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Shawn L. Murphy, Comment, *The Supreme Court’s Revitalization of the Dying “Existing Indian Family” Exception*, 46 MCGEORGE L. REV. 629, 631 (2014).

interracial homes between 1958 and 1967.⁷⁸ This practice was unique at a time when interracial adoptions were generally discouraged.⁷⁹

Decades of such overt child removal practices have had adverse effects both on the children at issue as well as tribal culture at large. Native American children suffered the trauma of being removed from their families and having to adjust to a different social and cultural environment.⁸⁰ Native American children raised in non-Native homes were found to experience more social problems during adolescence.⁸¹ Drs. Carl Mindell and Alan Gurwitt of the American Academy of Child Psychology found that Native American children experienced ethnic confusion and a sense of abandonment when raised in non-Native homes.⁸² Denise K. Lajimodiere conducted an interview with twenty former boarding school students and found four major themes in their stories: 1) A sense of cultural loss, loneliness, and displacement when they returned home; 2) physical, mental, and sexual abuse; 3) unresolved grief, mental health issues, relationship issues, and alcohol abuse; and 4) healing through returning to Native American spirituality.⁸³ The first three themes further illustrate the devastating effects of the child removal and boarding school practices. The fourth theme, however, underlines the importance of re-establishing a connection with tribes.

In addition to the individual harm of removing Native American children from their families and tribes, these practices also created concerns about the continued existence of tribes. During the ICWA's congressional hearings, Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw

⁷⁸ *Id.* at 632.

⁷⁹ *Id.* (noting that "race matching" dominated the adoption proceedings at the time).

⁸⁰ H.R. REP. NO. 95-1386, at 9 (1978).

⁸¹ Lehmann, *supra* note 67, at 515.

⁸² *Id.* at 515–16.

⁸³ Lajimodiere, *supra* note 41, at 257–58.

Indians and representative of the National Tribal Chairmen's Association, testified that:

Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.⁸⁴

One of the Congressmen spearheading the passage of the ICWA, Rep. Morris Udall (D-Wis.), expressed concern over the inordinately high number of child welfare proceedings which placed Indian children into non-Indian homes, stating: "The wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today."⁸⁵ Native American tribes were on track for extinction by the early 1970s, which prompted Congress to take steps to prevent that possibility.

B. The Indian Child Welfare Act: Passage and Purpose

In response to the overwhelming evidence presented to Congress regarding the treatment of Native American children, Congress passed the ICWA in 1978. The purpose of the Act was to set a minimum standard of practice regarding the removal of Native American children from their families.⁸⁶

⁸⁴ *In re* A.J.S., 204 P.3d 543, at 548 (Kan. 2009) (quoting part of the 1978 Congressional Hearings).

⁸⁵ H.R. REP. NO. 95-1386, at 9 (1978).

⁸⁶ 25 U.S.C. § 1902 (2012).

Specifically, the Act intended to protect and preserve tribes and to give tribes jurisdiction over child welfare proceedings.⁸⁷ Section 1902 provides that “it is 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 establishing standards to regulate “the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.”⁸⁸

The ICWA provides standards for every stage of the child welfare proceedings, including the initial jurisdiction, termination of parental rights and placement, and conduct after final proceedings. Section 1903 defines the key terms of the statute. An Indian child is “any unmarried person who is under age eighteen and is either: (a) a member of an Indian tribe, or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”⁸⁹ Further, a parent is defined as “any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established.”⁹⁰

Section 1911 dictates who has jurisdiction over child custody proceedings of Native American children. Jurisdiction is automatically granted to the tribe when the child is domiciled on that reservation.⁹¹ In cases where the child is not domiciled on the reservation, the case should also be transferred to the tribe unless the state court can show “good cause” not to transfer.⁹² In § 1912, the Act also requires state agencies to take active efforts to keep families together

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ 25 U.S.C. § 1903(4) (2012).

⁹⁰ 25 U.S.C. § 1903(9) (2012).

⁹¹ 25 U.S.C. § 1911(a) (2012).

⁹² 25 U.S.C. § 1911(b) (2012).

before seeking to place a child in foster care or ultimately terminating parental rights.⁹³ In addition, the state must show 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.”⁹⁴

If a Native parent wants to voluntarily place a child in care, the Act provides consent requirements, the right of parents or a tribe to petition the court, and the ability of the parent to withdraw consent at a later time.⁹⁵ Finally, the Act lays out a set of preferences for the placement of a child removed from his or her parents. The state must first try to place the child with an extended family member, with another Native American family of the child’s tribe, or with a Native American family of a different tribe.⁹⁶ Only after those options have been exhausted can a child be placed with a non-Indian family.⁹⁷ Interpretation and enforcement of the Act is largely left to the states. A few provisions grant the Secretary of the Interior the authority to make decisions.⁹⁸ As this Note will discuss below, the lack of a uniform interpretation has led to a diverse set of outcomes.

In 1979, the BIA issued a set of guidelines interpreting every section of the ICWA. However, these guidelines were not binding on state courts. The guidelines only reflected the interpretations of the Department of Interior. The BIA noted in the introduction that some points suggest interpretations

⁹³ 25 U.S.C. § 1912(d) (2012).

⁹⁴ 25 U.S.C. § 1912(f) (2012) (creating a stricter standard than the general procedures for terminating parental rights).

⁹⁵ 25 U.S.C. § 1913 (2012) (making it easier for parents to withdraw consent from an adoption).

⁹⁶ 25 U.S.C. § 1915(a) (2012).

⁹⁷ See 25 U.S.C. § 1915(a) (2012) (listing the three preferred placements in order and placing no further restrictions thereafter if they are impracticable).

⁹⁸ See 25 U.S.C. § 1918(a) (2012) (requiring the Secretary to approve a tribe’s petition to reassume jurisdiction of child custody proceedings where a tribe had previously become subject to state jurisdiction).

of the ICWA's language whereas other portions simply restated the language used in the Act.⁹⁹ The most innovative section of the 1979 guidelines was section A. This section established that the policy behind the Act was to keep Native American children with their families, give tribes greater authority, and place children that were removed into other Native American homes.¹⁰⁰ Moreover, the BIA suggested that state court proceedings "shall follow strict procedures and meet stringent requirements to justify any result in an individual case contrary to these preferences."¹⁰¹ In addition, the guidelines stated that the ICWA should be liberally construed in favor of a result that is consistent with the stated policy.¹⁰²

In 2015, the BIA issued an updated set of guidelines that explained terms in greater detail and outlined when and how the ICWA should apply.¹⁰³ The BIA noted that those guidelines also include recommendations from the Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence and developments in ICWA jurisprudence.¹⁰⁴ The 2015 guidelines drastically restructure section A to include a list of key term definitions, including "active efforts," "custody," "Indian child," and "parent."¹⁰⁵ Section A also clarifies when the Act applies and directs that the Act not be limited based on the Existing Indian Family Exception.¹⁰⁶ However, the guidelines do not expressly state the ability of non-custodial parents to invoke the ICWA when necessary. In 2016, the BIA drafted a new set of rules, which added a new subpart to the Department of

⁹⁹ Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,585 (Nov. 26, 1979).

¹⁰⁰ *Id.* at 67,585–86.

¹⁰¹ *Id.* at 67,586.

¹⁰² *Id.*

¹⁰³ Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146 (Feb. 25, 2015).

¹⁰⁴ *Id.* at 10,146.

¹⁰⁵ *Id.* at 10,150–51.

¹⁰⁶ *Id.* at 10,151–52.

Interior's regulations for implementing the ICWA.¹⁰⁷ These new rules are binding on state courts and help to fill in gaps left by the 2015 guidelines on the Existing Indian Family Exception. In order to fully understand the significance of the 2015 guidelines and 2016 rule, it is important to first understand the underlying justifications for the Existing Indian Family Exception to the application of the ICWA.

C. Implementation of the ICWA and the Existing Indian Family Exception

Congress established broad standards for child welfare proceedings regarding Native American children. However, the ICWA does not give state courts much guidance on how to implement the statute. Additionally, the Bureau of Indian Affairs' comprehensive guidelines do not bind the states. As such, state courts have applied the ICWA differently. Some states have interpreted elements of the Act in ways that increase protections to Native American families.¹⁰⁸ For example, South Dakota and Colorado require clear and convincing evidence before the state can terminate parental rights under § 1912(f).¹⁰⁹ Other states have created exceptions to the ICWA in an attempt to limit its application. One of the most well-known and potentially devastating state court exceptions is the Existing Indian Family Exception, which Kansas first developed four years after the enactment of the ICWA.

In 1982, the Kansas Supreme Court ruled in *Baby Boy L.* that the ICWA was not intended to apply in cases where a traditional family had not previously existed.¹¹⁰ *Baby Boy L.* was born to an unwed, non-Native mother in January 1981.¹¹¹

¹⁰⁷ Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23).

¹⁰⁸ Vujnich, *supra* note 9, at 191–93.

¹⁰⁹ *People ex rel. P.B.*, 371 N.W.2d 366, 371–72 (S.D. 1985); *People ex rel. C.A.J.*, 709 P.2d 604, 606 (Colo. App. 1985).

¹¹⁰ *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982).

¹¹¹ *Id.* at 172.

The Birth Mother signed consent papers for the adoption on the same day and the adoptive parents filed with the court soon after.¹¹² Notice was subsequently given to the Birth Father who was incarcerated at the time.¹¹³ At this point, the state filed an amendment to find the father to be an unfit parent and terminate his rights.¹¹⁴ The Birth Father subsequently filed to deny the adoption, find him a fit parent, and grant him custody of the child.¹¹⁵ The initial adoption proceeding only dealt with whether the Birth Father was a fit and proper parent.¹¹⁶ The court later learned that the Birth Father was an enrolled member of the Kiowa tribe, which led the father to amend his petition alleging that the ICWA applied.¹¹⁷ The Kiowa tribe also filed papers seeking to intervene and, over the Birth Mother's objections, enrolled Baby Boy L. in the tribe.¹¹⁸ The Birth Father and Kiowa tribe also filed for a change in temporary custody and change in jurisdiction under the ICWA.¹¹⁹

The trial court ruled that the ICWA did not apply, denied the Birth Father's petition for change in custody and jurisdiction, and found the current adoptive placement suitable.¹²⁰ In support of the ruling, the court noted that the child in question was the illegitimate child of a non-Native mother.¹²¹ In addition, the child had never been in the care or custody of his father, was not a member of a Native American family nor had he been a part of any Native American family.¹²² Finally, the child was not domiciled on a reservation and had not been removed from the family by

¹¹² *Id.*

¹¹³ *Id.* at 172–73.

¹¹⁴ *Id.* at 173.

¹¹⁵ *Id.*

¹¹⁶ *Baby Boy L.*, 643 P.2d at 173.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 174. The term “illegitimate child” is used in this sentence to reflect the language from the case.

¹²² *Baby Boy L.*, 643 P.2d at 174.

reason of neglect or abuse, which was the focus of the legislation.¹²³

The Birth Father and Kiowa tribe appealed arguing in part that the ICWA applies where the child is member of a tribe and is acknowledged by the Birth Father, who is also a member of a tribe.¹²⁴ Upon review, the Supreme Court of Kansas upheld the lower court's decision based on the policy behind the ICWA, its legislative history, and the wording of the Act itself.¹²⁵ The court analyzed several sections of the Act in order to further support the holding that the ICWA was only intended to apply to intact families. First, the court quoted part of § 1902, which established that the Act is intended "to promote the stability and security of Indian tribes and families."¹²⁶ The majority argued that § 1902 makes clear that it intended to set minimum standards for the removal of Native American children from Native American families and tribes.¹²⁷ The Act was not intended to control the placement of an illegitimate child who was never a part of the tribal culture.¹²⁸

The majority also took note of the elements of the congressional hearings included in § 1901(4) which highlighted the high rate of Native American families that are broken up through removal.¹²⁹ Subsequently, the court highlighted that the language in §§ 1916(b), 1920, and 1922 reflects concerns of removal from an existing Native American family.¹³⁰ This includes language regarding the exclusive jurisdiction for children domiciled on the reservations in § 1911(a), as well as a focus on the efforts to prevent the break-up of a family in § 1912(d).¹³¹ Finally, the court reasoned that

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 175.

¹²⁶ *Id.* at 175 (emphasis omitted) (quoting 25 U.S.C. § 1902 (1978)).

¹²⁷ *Baby Boy L.*, 643 P.2d at 175.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

applying the ICWA in this case would have created a result Congress did not intend.¹³² The court found that the Birth Mother only consented to the two named appellees adopting the child and refused to consent to any other adoptive parent,¹³³ and that if that adoption were denied then the mother's consent would be void and the child would return to her custody.¹³⁴ The court believed Congress never intended such a "ridiculous result" where a child may not be adopted because of the choices of his mother.¹³⁵ The Kansas Supreme Court ruling essentially created a prerequisite to the application of the ICWA. Several other states adopted a similar reasoning in the wake of *Baby Boy L.*¹³⁶

In 1989, the United States Supreme Court decided *Mississippi Band of Choctaw Indians v. Holyfield*, the only other ICWA case the Court has taken.¹³⁷ While that case did not expressly address the Existing Indian Family Exception, some scholars contend that the Court's ruling implicitly rejected the exception.¹³⁸ In *Holyfield*, the biological parents were unmarried, registered members of the Mississippi Band of Choctaw Indians who lived on the Choctaw Reservation.¹³⁹ Prior to giving birth to twins, the mother moved off the reservation to live with the adoptive parents.¹⁴⁰ In the initial adoption decree, the court did not take into account the Native American heritage of the twins or the provision of the ICWA.¹⁴¹ Two months after the decree was entered the Choctaw tribe moved to vacate the adoption on the grounds

¹³² *Id.*

¹³³ *Baby Boy L.*, 643 P.2d at 177.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See *In Re S.A.M.*, 703 S.W.2d 603 (Mo. App. 1986); *In re Adoption of T.R.M.*, 525 N.E.2d 298 (Ind. 1988).

¹³⁷ *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

¹³⁸ Vujnich, *supra* note 9, at 196.

¹³⁹ *Holyfield*, 490 U.S. at 37.

¹⁴⁰ *Id.* at 38.

¹⁴¹ *Id.*

that they had exclusive jurisdiction under the ICWA because the twins were domiciled on the reservation.¹⁴²

The Mississippi state court declined to apply the ICWA because the twins were not physically born on the reservation and never had contact with the tribe.¹⁴³ First, the Supreme Court recounted the congressional hearings leading up to the ICWA with a focus on the testimony about “the harm to Indian parents and their children who were involuntarily separated by decisions of local welfare authorities” and “the impact on the tribes themselves of the massive removal of their children.”¹⁴⁴ After discussing the question of domicile, the Court also discussed that Congress intended for ICWA to apply to adoption placements because of “evidence of the detrimental impact on the children themselves of . . . placements outside their culture.”¹⁴⁵ Ultimately, the Supreme Court decided to vacate the adoption placement because the ICWA did apply, thus giving the tribe jurisdiction over the case.¹⁴⁶ Based on this analysis, the Court reversed the lower court’s decision on the basis that the mother was domiciled on the reservation and therefore so were the twins, even though they had never been to the reservation.¹⁴⁷ The Court also deferred to the Choctaw tribe to determine if the tribe’s interest to raise the children outweighs allowing the children to remain with their adoptive parents off the reservation.¹⁴⁸

On the one hand, *Holyfield* can be read narrowly as simply addressing the question of jurisdiction under the ICWA. On the other hand, this case can be read more broadly in recognizing the main purpose of the ICWA, and for applying the Act to the placement of children that had not been removed from a previously existing family. The Court carefully examined Congress’s intent for the Act and quoted

¹⁴² *Id.*

¹⁴³ *Id.* at 39.

¹⁴⁴ *Id.* at 34.

¹⁴⁵ *Holyfield*, 490 U.S. at 49–50.

¹⁴⁶ *Id.* at 53–54.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 54.

extensively from the Act's congressional hearings. Furthermore, the Court applied the Act to the adoption of a set of twins who were given up for adoption by an unwed mother, a situation that would be covered by the ICWA under the Existing Indian Family Exception. For this reason, some scholars¹⁴⁹ and state courts¹⁵⁰ have cited *Holyfield* to support rejecting the Existing Indian Family Exception.

Most states have abolished or rejected the Existing Indian Family Exception by either case law or statute.¹⁵¹ Additionally, some states never recognized this exception. For example, the Supreme Court of New Jersey declined to adopt the *Baby Boy L.* opinion in *In re Adoption of Child of Indian Heritage*.¹⁵² The New Jersey court rejected *Baby Boy L.* because it used the voluntariness of the conduct of the mother in relinquishing the child for adoption as a “determinative jurisdictional test,” which the Act itself does not establish as a factor.¹⁵³ Instead, the court looked at the ICWA as a whole and found that it was meant to include all proceedings that result in the termination of the parent-child relationship based on the language in § 1903(1)(i)–(ii) and the procedures for a voluntary termination of parental rights listed in § 1913.¹⁵⁴ The court noted that while the mother has a right to advocate for the best interests of her child, consideration must also be given to the father and to Congress's goal in maintaining a relationship between the child and the tribe.¹⁵⁵

Several other states once applied the exception, but have since rejected it. In Oklahoma, for example, the state

¹⁴⁹ See Lewerenz & McCoy, *supra* note 13, 699–702.

¹⁵⁰ See *In re Adoption of T.N.F.*, 781 P.2d 973, 978 (Alaska 1989); *In re Adoption of Baade*, 462 N.W.2d 485, 489–90 (S.D. 1990) (overruling a previous case upholding the Existing Indian Family Exception in light of *Holyfield*).

¹⁵¹ Vujnich, *supra* note 9, at 197–98.

¹⁵² *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

courts initially applied the exception.¹⁵⁶ However, the legislature amended the Oklahoma Indian Child Welfare Act in 1994 to include that tribes possess a valid governmental interest in Indian children “regardless of whether or not said children are in the physical or legal custody of an Indian parent or Indian custodian at the time state proceedings are initiated.”¹⁵⁷ The Act was further amended to stipulate that “the Oklahoma Indian Child Welfare Act applies to all state voluntary and involuntary child custody court proceedings involving Indian children, regardless of whether or not the children involved are in the physical or legal custody of an Indian parent or Indian custodian at the time state proceedings are initiated.”¹⁵⁸ Subsequently, the Oklahoma Supreme Court overturned their previous decisions in light of *Holyfield* and changes in the legislative language.¹⁵⁹

The most significant rejection of the Existing Indian Family Exception was the Supreme Court of Kansas decision overruling *Baby Boy L*. In 2009, the Kansas Supreme Court heard *In re A.J.S.*, a case regarding the adoption of a Cherokee child whose mother was not Native American and whose father was a member of a tribe but had not been involved in the child’s life prior to the proceedings.¹⁶⁰ The district court ruled that the ICWA did not apply based on *Baby Boy L*.¹⁶¹ The Kansas Supreme Court, however, overturned *Baby Boy L* in light of *Holyfield*, as well as changing attitudes towards the exception in other states.¹⁶² The court cited the ruling in *Holyfield* as highlighting “the central importance of the relationship between an Indian child and his or her tribe, independent of any parental relationship.”¹⁶³ Furthermore, the court recognized that *Holyfield* determined that the ICWA

¹⁵⁶ See *In re S.C.*, 833 P.2d 1249, 1254–56 (Okla. 1992).

¹⁵⁷ 1994 Okla. Sess. Law Serv. 30 (West).

¹⁵⁸ *Id.*

¹⁵⁹ *In re Baby Boy L.*, 103 P.3d 1099, 1103–06 (Okla. 2004).

¹⁶⁰ *In re A.J.S.*, 204 P.3d 543, 544 (Kan. 2009).

¹⁶¹ *Id.*

¹⁶² *Id.* at 549.

¹⁶³ *Id.* at 547.

grew out of concerns for preserving the tribal interests in children, interests that could not be defeated by the parents' choices.¹⁶⁴ The court quoted extensively from *Holyfield*, focusing on the sections that included testimony from the congressional hearings, in order to support this interpretation.¹⁶⁵

The Kansas Supreme Court also took into account the development of ICWA interpretation and common law to help support their decision to overturn *Baby Boy L.* First, the court recognized that an extensive number of states had either outright rejected the exception or had once followed the exception but have since overruled those decisions.¹⁶⁶ In addition, the court noted that there have been two unsuccessful efforts to amend the ICWA in light of the Existing Indian Family Exception, one directed at overruling it and the other endorsing it.¹⁶⁷ The court also took note of other states and commentators, who have criticized the practice.¹⁶⁸ Most importantly, the court found that the logic in *Baby Boy L.* was flawed and at odds with the language of the Act.¹⁶⁹ In *Baby Boy L.*, the court ruled in part that the child would never be placed with a family if the ICWA applied because the mother refused to consent to any other adoptive placement.¹⁷⁰ However, in *In re A.J.S.* the court determined that the mother's testimony only goes to her intentions, and that the father and the tribe still have a right to be heard.¹⁷¹ Congress intended to protect the interests of both parents as well as the tribe and the child when it passed the ICWA.

¹⁶⁴ *Id.* at 548.

¹⁶⁵ *Id.* at 547–48.

¹⁶⁶ *In re A.J.S.*, 204 P.3d at 548–49.

¹⁶⁷ *Id.* at 549 (comparing Indian Child Welfare Act Amendments of 1987, S. 1976, 100th Cong., 1st Sess., 133 CONG. REC. (1987), which sought to overrule the exception, with H.R. 3275, 104th Cong. (1996), which sought to endorse the exception).

¹⁶⁸ *Id.* at 550.

¹⁶⁹ *Id.* at 549.

¹⁷⁰ *In re Adoption of Baby Boy L.*, 643 P.2d 168, 177 (Kan. 1982).

¹⁷¹ *In re A.J.S.*, 204 P.3d at 550.

Those interests should not be overlooked simply because of the desires of the Birth Mother. Taking all of these factors into account, the Kansas Supreme Court overturned *Baby Boy L.*, a moment that for many signaled the end of the Existing Indian Family Exception.¹⁷²

D. Critiques of the Existing Indian Family Exception

In addition to a number of state courts rejecting the Existing Indian Family Exception, scholars have also raised a number of critiques. First, there are concerns that the exception ignores the plain language of the ICWA text.¹⁷³ Congress defined an Indian child as a child who is a member of a tribe or who is the biological child of a person who is a member and the child is eligible for membership.¹⁷⁴ However, the Existing Indian Family Exception adds additional requirements. Under the exception, the child must also be living in an Indian family or have a relationship with the tribal culture.¹⁷⁵

Other critiques focus on the lack of uniform results between states. For example, Cheyaña Jaffke argues that the use of the Existing Indian Family Exception is both “unreliable and inconsistent” with the language of the ICWA.¹⁷⁶ The Act was intended to create a federally uniform standard. However, the exception creates different outcomes in different states based on which states apply or reject the exception. Furthermore, different courts have different understandings of what constitutes a family. Also, Charmel Cross argues that the Existing Indian Family Exception is

¹⁷² Lewerenz & McCoy, *supra* note 13, at 718–22.

¹⁷³ See Cheyaña L. Jaffke, *Judicial Indifference: Why Does the “Existing Indian Family” Exception to the Indian Child Welfare Act Continue to Endure?*, 38 W. ST. U. L. REV. (2011).

¹⁷⁴ 25 U.S.C. § 1903(4) (2012).

¹⁷⁵ Jaffke, *supra* note 173, 142–43.

¹⁷⁶ *Id.* at 148–49.

inconsistent with the ICWA, specifically § 1913.¹⁷⁷ Cross writes that the Existing Indian Family Exception would suggest that children released for adoption at the hospital would not fall under the ICWA.¹⁷⁸ However, she contends that § 1913 covers just this scenario.¹⁷⁹ It requires that consent for voluntary placements be given at least ten days after the child's birth.¹⁸⁰ Therefore, "[i]f Congress did not intend for the Act to apply to Native American infants adopted directly from the hospital then there would not be a need for Section 1913's requirements."¹⁸¹

III. *ADOPTIVE COUPLE V. BABY GIRL: THE NEW EXISTING INDIAN FAMILY EXCEPTION CASE?*

A. Factual Background of *Adoptive Couple v. Baby Girl*

At the time Baby Veronica, the child at the center of *Adoptive Couple v. Baby Girl*, was conceived, her parents were engaged.¹⁸² Despite the engagement, the father refused to provide financial support until the two were married.¹⁸³ The couple's relationship subsequently ended five months into the pregnancy and they had little contact after that point.¹⁸⁴ In June 2009, before Baby Veronica was born, the mother asked if the father would either provide support or relinquish his rights.¹⁸⁵ The Birth Father agreed, via a text message, to relinquish his rights.¹⁸⁶ The Birth Father did not provide any support to the Birth Mother or attempt to partake in his

¹⁷⁷ Charmel L. Cross, *The Existing Indian Family Exception: Is it Appropriate to Use a Judicially Created Exception to Render the Indian Child Welfare Act of 1978 Inapplicable?*, 26 CAP. U. L. REV. 847, 879 (1997).

¹⁷⁸ *Id.* at 891.

¹⁷⁹ *Id.*

¹⁸⁰ 25 U.S.C. § 1913(a) (2012).

¹⁸¹ Cross, *supra* note 177, at 891.

¹⁸² *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2558 (2013).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

daughter's life.¹⁸⁷ After deciding to place Baby Veronica up for adoption, the Birth Mother contacted the Cherokee nation because she believed the Birth Father to be a member.¹⁸⁸ However, due to mistakes in the letter, the nation did not find the father in their records.¹⁸⁹ The Birth Mother moved forward with the adoption.¹⁹⁰ She chose a non-Native family from South Carolina.¹⁹¹ The adoptive parents were present when Baby Veronica was born in Oklahoma and the Birth Mother relinquished her parental rights the following day.¹⁹² Four months after the birth, the Birth Father received notice of the adoption, at which point he signed papers stating that he accepted service but that he did not consent to the adoption.¹⁹³ The Birth Father subsequently requested a stay of the adoption proceedings and filed for custody of Baby Veronica.¹⁹⁴

In South Carolina Family Court, a trial was held to determine the adoption placement of Baby Veronica.¹⁹⁵ Before the start of the trial, family court determined that the ICWA applied to this case.¹⁹⁶ The trial court ruled that the adoptive couple had not met its burden under § 1912(f) to show that the child would experience harm in the care of her father.¹⁹⁷ Thus, the adoption was denied and the father gained custody. The South Carolina Supreme Court affirmed that decision.¹⁹⁸ It found that the father was considered a parent under the ICWA.¹⁹⁹ The court held that the adoptive couple failed to show that they had taken active efforts to maintain the family

¹⁸⁷ *Id.*

¹⁸⁸ *Adoptive Couple*, 133 S. Ct. at 2558.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Adoptive Couple*, 133 S. Ct. at 2558.

¹⁹⁵ *Id.* at 2559.

¹⁹⁶ *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 635 (S.C. 2012).

¹⁹⁷ *Adoptive Couple*, 133 S. Ct. at 2559.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

set out in § 1912(d).²⁰⁰ In addition, the couple failed to show harm to the child if she remained in her father's care as required under § 1912(f).²⁰¹ Finally, the court determined that even if the biological father was deemed unfit, the placement preferences under § 1915(a) would still apply to Baby Veronica's case.²⁰²

B. The United States Supreme Court's Decision in *Adoptive Couple v. Baby Girl*

On appeal, the United States Supreme Court addressed the application of three sections of the ICWA to the facts of the case: § 1912(f) and § 1912(d), regarding termination of parental rights, and § 1915(a), regarding placement preferences.²⁰³ The Court assumed that the biological father was a parent under the ICWA, but held that the statute did not apply in this case because Baby Veronica had not been removed from a previously intact family.²⁰⁴ Further, the Birth Father did not have custody of the child, which prevented him from invoking the ICWA.²⁰⁵ Finally, the Court held that the placement preferences under § 1915(a) did not bar the adoptive couple from taking custody of the child.²⁰⁶

The Court began its inquiry with § 1912(f). The majority focused on the meaning of "continued custody" to conclude that the section applied to parents that have or previously had custody of their child.²⁰⁷ Section 1912(f) does not apply to parents that never had physical or legal custody

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Adoptive Couple*, 133 S. Ct. at 2554–55.

²⁰⁴ *Id.* at 2556–57.

²⁰⁵ *Id.* at 2562.

²⁰⁶ *Id.* at 2564. The Supreme Court also discussed the applicability of the placement preferences under § 1915(a), but determined that they do not apply in this case. This analysis is not relevant to issues addressed in this Note and is therefore not discussed.

²⁰⁷ *Id.* at 2560.

of the child.²⁰⁸ The Court justified this reading based on the statutory language of § 1901(4), which states that the purpose of the ICWA is to prevent “unwarranted removal of Indian children from Indian families due to cultural insensitivity and biases of social works and state courts.”²⁰⁹ The Court concluded that where the non-Native parent, who had sole custody rights, voluntarily places a Native American child up for adoption, the ICWA’s primary goal is not at issue and therefore the § 1912(f) does not apply.²¹⁰

In addition, the Court also found persuasive the non-binding guidelines issued by the Bureau of Indian Affairs in 1979, which suggest that § 1912(f) focused on removal of a child from a family.²¹¹ The relevant guideline states that under § 1912(f) “[a] child may not be *removed* simply because there is someone else willing to raise the child who is likely to do a better job . . . [i]t must be shown that . . . it is dangerous for the child to *remain* with his or her *present* custodians.”²¹² Based on this interpretation of § 1912(f), the Birth Father could not invoke the ICWA because he never had legal or physical custody of his daughter. It is an undisputed fact that the Birth Father never had physical custody of Baby Veronica.²¹³ In addition, under state laws in South Carolina and Oklahoma, the biological father never had legal custody.²¹⁴ Based on this analysis, the United States Supreme Court found that South Carolina erred in holding that §

²⁰⁸ *Id.*

²⁰⁹ *Adoptive Couple*, 133 S. Ct. at 2561.

²¹⁰ *Id.* at 2560–61.

²¹¹ *Id.*

²¹² Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,593 (Nov. 26, 1979) (emphasis added).

²¹³ *Adoptive Couple*, 133 S. Ct. at 2562.

²¹⁴ *Id.*; see also S.C. CODE ANN. §63-17-20(B) (2010) (“Unless the court orders otherwise, the custody of an illegitimate child is solely in the natural mother unless the mother has relinquished her rights to the child”); OKLA. STAT., tit. 10, § 7800 (West 2013) (“Except as otherwise provided by law, the mother of a child born out of wedlock has custody of the child until determined otherwise by a court of competent jurisdiction”).

1912(f) barred a termination of the Birth Father's parental rights.²¹⁵

The Court then turned to the language of § 1912(d), emphasizing, “to prevent the breakup of the Indian family,” in order to hold that this provision did not apply in this case.²¹⁶ The Court held that “breakup” refers to the discontinuance of a relationship. Therefore, the section only applied to cases where the termination of parental rights would result in the breakup of a Native American family. Where a parent abandons the child before birth and never had custody of the child, there is no “breakup” of a family relationship, and thus § 1912(d) does not apply.²¹⁷

The majority opinion suggests that this interpretation is consistent with the stated purpose of the statute, the BIA guidelines, and the statutory language of other § 1912 subsections.²¹⁸ First, the majority quotes part of § 1902, which states that the purpose of the Act is to set-up certain “standards for the *removal* of Indian children from their families.”²¹⁹ Second, the majority quotes a section of the 1979 BIA guidelines, suggesting that § 1912(d) is intended “to alleviate the need to *remove* the Indian child from his or her parents or Indian custodians, not to facilitate a *transfer* of the child to an Indian parent.”²²⁰ Finally, the Court looks to the language in § 1912(e) and § 1912(f), which requires a showing that the “continued custody” of the child by the parent will result in serious harm before placing a child in foster care or terminating their parental rights.²²¹ The court uses these sections to suggest that the phrase “breakup of the Indian family” should be read in a similar manner as “continued

²¹⁵ *Adoptive Couple*, 133 S. Ct. at 2562.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 2563.

²¹⁹ *Id.* at 2563 (quoting 25 U.S.C. § 1902 (2014)) (emphasis added).

²²⁰ *Id.* (internal quotations omitted).

²²¹ *Adoptive Couple*, 133 S. Ct. at 2563; *see also* 25 U.S.C. § 1912(e)–(f) (2012).

custody.”²²² The majority opinion also suggests that it would be “unusual” and “bizarre” to apply § 1912(d) to this case and require social workers or adoptive parents to attempt to encourage the Birth Father, who had previously been absent, to take an interest in becoming a parent.²²³ The Court felt this would dissuade prospective adoptive parents and consequently prevent Native American children from finding permanent homes.²²⁴ In conclusion, the Supreme Court determined that the ICWA did not apply to a Native American parent who qualified as a parent under the statute, but who never had custody of the child. Thus, the Supreme Court granted Adoptive Couple custody of Baby Veronica.

C. Justice Sotomayor’s Dissenting Opinion in *Adoptive Couple v. Baby Girl*

Justice Sotomayor’s dissent in *Adoptive Couple* highlights the flaws in the complex analysis of the majority opinion. Sotomayor focuses on two main issues with the majority opinion: the fact that the analysis is based on a single phrase from § 1912(f) and that the majority expressly challenges Congress’s explicitly stated purpose for the statute.²²⁵ The dissent argues that the majority’s reading skews the structure and scope of the Act and will have much broader long-term consequences.²²⁶ Furthermore, Justice Sotomayor suggests that the majority opinion is inconsistent with the ruling in *Holyfield*, which holds that the ICWA was intended to create uniform federal definitions.²²⁷ Finally, Justice Sotomayor notes that the majority’s illogical reading of the statute would have been explainable if it was meant to avoid anomalous results or further a congressional policy, but this was not the case here.²²⁸

²²² *Adoptive Couple*, 133 S. Ct. at 2563.

²²³ *Id.* at 2563–64.

²²⁴ *Id.* at 2564.

²²⁵ *Id.* at 2572.

²²⁶ *Id.* at 2573.

²²⁷ *Id.* at 2574.

²²⁸ *Adoptive Couple*, 133 S. Ct. at 2580.

The dissenting opinion's first section suggests that the statute does not support a reading where the Birth Father is deemed a parent, but then denied the substantive protections of the law.²²⁹ The majority's interpretation of "continued custody" in § 1912(f) "cannot bear the interpretive weight the majority would place on it."²³⁰ The reading of "breakup of the Indian Family" from § 1912(d) is a narrow construction that is not supported by the text.²³¹ Additionally, the dissent highlights that excluding non-custodial fathers from the ICWA "misapprehends the ICWA's structure and scope" and creates an "illogical piecemeal" of federal and state law.²³² Essentially, the majority's reasoning "necessarily extends to *all* Indian parents who have never had custody of their children, no matter how fully those parents have embraced the financial and emotional responsibilities of parenting."²³³

To illustrate this point, the dissent describes a biological father who has been involved in the life of his child, but never had custody and therefore cannot benefit from the protections of the ICWA.²³⁴ While the majority suggests that this outcome is based in state law, such an outcome conflicts with Congress's original intent to create a uniform federal standard.²³⁵ The dissent asserts that it is illogical to suppose that Congress intended for the ICWA to both set "minimum Federal standards" for the termination of parental rights and also create a "patchwork of federal state law" to apply to the same process.²³⁶ The dissent sees no reason why Congress would intend to "leave protection of the parental rights of a subset of ICWA parent[s] dependent on the happenstance of where a particular child custody proceeding takes place."²³⁷ Instead, based on the totality of the commands, the standards

²²⁹ *Id.* at 2575.

²³⁰ *Id.* at 2577.

²³¹ *Id.* at 2575.

²³² *Id.* at 2573.

²³³ *Adoptive Couple*, 133 S. Ct at 2573.

²³⁴ *Id.* at 2578–79.

²³⁵ *Id.* at 2579.

²³⁶ *Id.*

²³⁷ *Id.* (internal quotation marks omitted).

set forth in the ICWA should apply to the termination of all parental rights of Native American parents.²³⁸

The dissent next addresses the “textually strained and illogical reading of the statute” that is not justified by a need to avoid anomalous results or further a congressional policy.²³⁹ First, regarding § 1912(d), the dissenting opinion argues that § 1912(d) should apply to this case.²⁴⁰ Social services “can and do provide” rehabilitative services to family relationships where the father previously did not have custody of the child.²⁴¹ Placing an evidentiary burden on the party moving to terminate the father’s rights is both necessary and justified because erroneously terminating parental rights has devastating effects on the family.²⁴²

Under the majority opinion’s reasoning, Congress could not have intended for the ICWA “to recognize a parent-child relationship between Birth Father and Baby Girl that would have to be legally terminated (either by valid consent or involuntary termination) before the adoption could proceed.”²⁴³ In other words, courts should not recognize a biological father as a parent just to terminate his rights without any additional consideration. Such a practice is not the most efficient use of judicial resources. The dissent notes that while these laws can lead to distressing outcomes, “biological fathers have a valid interest in a relationship with their child” and children have a similar “interest in knowing their biological parents.”²⁴⁴ Furthermore, it does not logically follow that the ICWA would “render the legal status of an Indian father’s relationship with his biological child fragile, but would instead grant it a degree of protection commensurate with the more robust state-law standards.”²⁴⁵

²³⁸ *Id.* at 2579–80.

²³⁹ *Adoptive Couple*, 133 S. Ct. at 2580.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* at 2581.

²⁴⁴ *Id.* at 2582.

²⁴⁵ *Adoptive Couple*, 133 S. Ct. at 2583.

Rather than preventing anomalous results, the majority opinion created conflicting results.

Justice Sotomayor's dissent highlights the major flaws in the majority opinion's reasoning. Two key points from this dissent will be important in the subsequent sections of this Note: 1) the fact that this case will affect ICWA protections for all non-custodial biological fathers, and 2) that biological fathers have an interest in having a relationship with their children. Without further intervention, the ICWA will no longer have authority over a class of biological fathers that deserve the protection of the statute.

D. Improper Interpretation of ICWA

Justice Sotomayor's dissent in *Adoptive Couple* raises several key issues with the Court's analysis, but does not address every relevant criticism of the decision. An article by Dustin Jones, written the year after *Adoptive Couple* was decided, further critiques the Court's analysis.²⁴⁶ Jones's article goes beyond the dissenting opinion and analyzes the ways in which *Adoptive Couple* disregards congressional intent and creates a legal vacuum regarding absentee Native American parents that state law will ultimately control. More importantly, the Jones article draws a connection between the *Adoptive Couple* decision and the Existing Indian Family Exception.

Jones argues that *Adoptive Couple* creates two classes of Native American parents, which contradicts the legislative history and intent of the ICWA.²⁴⁷ While Congress intended for the ICWA to protect tribal interests and parental rights in Native American children, the majority opinion selectively reads the legislative history in order to get a specific outcome

²⁴⁶ Dustin C. Jones, *Adoptive Couple v. Baby Girl: The Creation of Second-Class Native American Parents Under the Indian Child Welfare Act of 1978*, 32 LAW & INEQ. 421 (2014).

²⁴⁷ *Id.* at 435–41.

and deprive a non-custodial parent of his rights.²⁴⁸ First, Jones contends that the court's selective reading of "continued custody" imposes a value judgment on absentee Native American parents that is not in the legislative history of the ICWA.²⁴⁹ Second, Jones notes that the use of "parent" in the legislative history of the ICWA differs from its use in the majority opinion.²⁵⁰ Based on legislative history, the "House Report defines 'parent' to mean 'any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom.'"²⁵¹ However, the majority opinion defines "parent" based on the legal or physical custody a Native American parent has or does not have over the child in question.²⁵²

The Jones article also argues that the *Adoptive Couple* decision does not follow the canons of Indian Law construction.²⁵³ The rules of construction apply where a statute is ambiguous.²⁵⁴ The ICWA is ambiguous on how to treat absentee Native American parents. Following the canons of construction, an ambiguous expression is resolved in favor of Native American parties and treaties are interpreted as the tribes would have interpreted them.²⁵⁵ The language of the treaty or statute should be liberally constructed in favor of Native Americans.²⁵⁶ However, the majority opinion does not adhere to a favorable reading of the ICWA.²⁵⁷ Instead, the majority's "cherry-picking of some language" from the statute and legislative history overlooks

²⁴⁸ *Id.* at 438–39; see also 25 U.S.C. § 1902 (2012) (declaring "that it is 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").

²⁴⁹ Jones, *supra* note 246, at 439.

²⁵⁰ *Id.* at 439–40.

²⁵¹ *Id.* (quoting H.R. REP. NO. 95-1386, at 2 (1978)).

²⁵² *Id.* at 439.

²⁵³ *Id.* at 440–42.

²⁵⁴ *Id.* at 441.

²⁵⁵ Jones, *supra* note 246, at 440–41.

²⁵⁶ *Id.* at 441.

²⁵⁷ *Id.*

the policy behind the ICWA as well as the hope of granting greater sovereignty to tribes.²⁵⁸ Overall, the Jones article expands on the critiques laid out by Justice Sotomayor in her dissent.

E. *Adoptive Couple* and the Existing Indian Family Exception

The most important critique of *Adoptive Couple* focuses on how the analysis in that case is very similar to the logic used in the Existing Indian Family Exception cases. There are two ways of interpreting the *Adoptive Couple* opinion: 1) broadly such that the decision renews support for the Existing Indian Family Exception; or 2) narrowly and contained to the facts and analysis of the case. Although *Adoptive Couple* does not reference the Existing Indian Family Exception or any case law on the subject, the reasoning behind the exception is similar to reasoning in *Adoptive Couple* and thus the outcomes will be similar.²⁵⁹ Factually, *Adoptive Couple* is very similar to *Baby Boy L.* In addition, the courts in both cases conduct a selective analysis of the ICWA to determine that it does not apply to non-custodial Native American parents. This section highlights the similarities between *Adoptive Couple* and *Baby Boy L.* By pointing out these similarities, this section strives to show how *Adoptive Couple* implicitly affirms the Existing Indian Family Exception and the potential negative effects of this close connection.

Factually, both decisions highlight the fact that the relevant birth fathers had not provided financial support to the child or attempted to be a part of the child's life. Both cases involve a non-Native, unwed mother who consented to the adoption of her child shortly after birth.²⁶⁰ In both cases, the birth father was not involved during the pregnancy or

²⁵⁸ *Id.*

²⁵⁹ Kathleena Kruck, Notes and Comments, *The Indian Child Welfare Act's Waning Power After Adoptive Couple v. Baby Girl*, 109 NW. U. L. REV. 445, 470 (2015).

²⁶⁰ *Adoptive Couple*, 133 S. Ct. 2558; *Baby Boy L.*, 643 P.2d at 172.

present at the birth of their child, had not given any financial support to the child or the mother, and had not expressed an interest in being a part of the child's life.²⁶¹ Only after they received notice of the child's adoption by a non-Indian family did the fathers attempt to stop the adoptions under ICWA.²⁶² Based on these facts, both decisions determined that Congress only intended to regulate previously intact families, which did not exist in either of these situations.²⁶³

There are also similarities in the analysis and reasoning of *Adoptive Couple* and *Baby Boy L.* Both decisions focus on similar phrases and sections of ICWA to support a finding that the Act does not apply. Both cases highlight "continued custody" and "breakup of an Indian family" from § 1912(d) and § 1912(f).²⁶⁴ The Kansas Supreme Court cites to "continued custody" and "breakup of an Indian family" in *Baby Boy L.* as part of a list of ICWA sections that support its interpretation that the ICWA only protects intact families.²⁶⁵ While the court did not engage in an in-depth analysis of the language, it still used the language to limit the ICWA as applying to non-custodial parents. The Supreme Court in *Adoptive Couple* used the same language to conduct a detailed analysis of what Congress intended by its use of "continued custody" and "breakup of the Indian Family."²⁶⁶ However, the Supreme Court ultimately came to the same conclusion as the Kansas Supreme Court. Implicitly, both cases share a belief that where the language is silent on a question of jurisdiction or definitions, the ICWA does not apply.²⁶⁷ Therefore, because the ICWA does not address the rights of absentee or non-

²⁶¹ *Adoptive Couple*, 133 S. Ct. at 2558; *Baby Boy L.*, 643 P.2d at 172–73.

²⁶² *Adoptive Couple*, 133 S. Ct. at 2558–59; *Baby Boy L.*, 643 P.2d at 173.

²⁶³ *Adoptive Couple*, 133 S. Ct. at 2562–63; *Baby Boy L.*, 643 P.2d at 175–76.

²⁶⁴ *Adoptive Couple*, 133 S. Ct. at 2560, 2563; *Baby Boy L.*, 643 P.2d at 175.

²⁶⁵ *Baby Boy L.* 643 P.2d at 175.

²⁶⁶ *Adoptive Couple*, 133 S. Ct. at 2560–64.

²⁶⁷ Jones, *supra* note 246, at 445.

custodial parents, Congress never intended for the Act to protect the rights of that class of parents.

Based on the analysis above, *Adoptive Couple* may bolster support for the Existing Indian Family Exception. The majority opinion in *Adoptive Couple* follows a similar reasoning to that used in *Baby Boy L.*, which provides support for the logic and conclusion in the Existing Indian Family Exception cases.²⁶⁸ Moreover, the decisions reinforce the cultural misconceptions about traditional family structures by not recognizing a biological father who does not live with or have custody of his child.²⁶⁹ On the other hand, *Adoptive Couple* does not expressly support or adopt the Existing Indian Family Exception. *Adoptive Couple* can be read in a way that is limited to the interpretation of a few sections and only applies in a limited number of cases where the non-custodial parent seeks to intervene in an adoption. Even if the majority decision in *Adoptive Couple* is sufficiently narrow to avoid reaffirming the Existing Indian Family Exception, it has still limited the application of the ICWA in a negative way.

F. Constitutional Rights of Non-Custodial Fathers following *Adoptive Couple*

Adoptive Couple limits the category of parents who are eligible for protection under ICWA. The majority contends that Congress purposefully excluded fathers who have not acknowledged their child, established their paternity, or attempted to gain custody of their child. This ruling is particularly devastating to parents who never had the opportunity to have a relationship with their child. Such examples include parents who are incarcerated, deployed overseas, and parents who were unaware of the child because

²⁶⁸ Kruck, *supra* note 259, at 468–69.

²⁶⁹ *Id.* at 469.

the birth was concealed from them.²⁷⁰ As Justice Sotomayor highlights in her dissent, the Court's ruling will also prevent fathers who have never had legal custody from invoking the protections of ICWA. This will include fathers would otherwise have provided for their child.²⁷¹ In addition, the opinion runs counter to the constitutional rights of non-custodial fathers. The dissenting opinion addresses the constitutionality of the non-custodial father and the importance of upholding the parent-child relationship.²⁷²

The United States Supreme Court decided a number of cases in the 1970s and 1980s that established the rights of a non-custodial father to be involved in the upbringing of his children.²⁷³ Constitutional protections of non-custodial fathers, however, have only been extended to fathers who had previously established a relationship with their child. In *Stanley v. Illinois*, the Court established that a father has an interest in his children that must be protected absent a countervailing interest.²⁷⁴ The father in this case, Peter Stanley, sought to intervene in the placement of his children, who entered the child welfare system when their mother died, pursuant to Illinois law.²⁷⁵ Stanley, however, had once lived with the children and had been part of their lives prior to the death of their mother.²⁷⁶ The United States Supreme Court found that Stanley was entitled to a hearing about his fitness as a parent before losing his parental rights under the Due Process and Equal Protection clauses of the Fourteenth Amendment.²⁷⁷ The Court determined that just because

²⁷⁰ Danielle J. Larson, Note, *You're Breaking Up: The Faulty Connection Between Congressional Intent and Supreme Court Interpretation in Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013), 93 NEB. L. REV. 517, 538–39 (2014).

²⁷¹ *Adoptive Couple*, 133 S. Ct. at 2578–80.

²⁷² *Id.* at 2582.

²⁷³ See, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972); *Caban v. Mohammed*, 441 U.S. 380 (1979).

²⁷⁴ *Stanley*, 405 U.S. at 651.

²⁷⁵ *Id.* at 646.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 649.

unmarried fathers were usually found to be unfit parents does not allow the state to forego a hearing for every unmarried father.²⁷⁸

A few years later, the United States Supreme Court determined in *Caban v. Mohammed* that creating different standards for intervening in an adoption based on gender violated the Equal Protection Clause.²⁷⁹ In that case, the Birth Father motioned to intervene in the adoption of his children by their stepfather, but was unable to under New York law.²⁸⁰ The Court determined that mothers and fathers are not so different to warrant different treatment under the law.²⁸¹ In both *Stanley* and *Caban*, the Birth Fathers had been a part of their children's lives prior to the adoption proceedings at issue.

In subsequent cases, fathers who had not been previously involved in their child's life were not granted the same protections under *Stanley* and *Caban*. In *Quilloin v. Walcott*, for example, the Birth Father had not been involved in his child's life for the last eleven years, but wanted to prevent the child's stepfather from adopting the child.²⁸² The United States Supreme Court held that applying a "best interests of the child" standard did not violate the Due Process Clause where the Birth Father had never made an attempt to gain custody of the child.²⁸³ Furthermore, the Equal Protection Clause did not require the same standard as for fathers who had previously taken on the responsibility of being a parent.²⁸⁴ The similar situation between the Birth Father in *Quilloin* and *Adoptive Couple* further supports the determination that the ICWA should not apply to the Birth

²⁷⁸ *Id.* at 656.

²⁷⁹ *Caban v. Mohammed*, 441 U.S. 380, 391–92 (1979).

²⁸⁰ *Id.* at 383–84.

²⁸¹ *Id.* at 391–92.

²⁸² *Quilloin v. Walcott*, 434 U.S. 246, 249–50 (1978).

²⁸³ *Id.* at 255.

²⁸⁴ *Id.* at 256.

Father in *Adoptive Couple*.²⁸⁵ Still, the dissenting opinion in *Adoptive Couple* argues that recognizing the parent-child relationship aligns with the purpose of the ICWA to provide greater protection for the familial bond of Native American families than state law currently grants.²⁸⁶ A system of uniform ICWA rights to parents furthers the policy to maintain Native tribes and families.

IV. REVIVING THE INDIAN CHILD WELFARE ACT

As the previous section illuminates, the ruling in *Adoptive Couple v. Baby Girl* will potentially have drastic and harmful effects on the application of the ICWA. The United States Supreme Court did not explicitly apply the Existing Indian Family Exception in any part of its opinion. The Court also did not draw on any of the state cases that have applied the exception. Even so, the language in the majority opinion closely tracks the language of the decision in *Baby Boy L.* and other Existing Indian Family Exception cases, which may signal the re-emergence of the exception. Even absent a full resurgence of the Existing Indian Family Exception, *Adoptive Couple* still weakens the ICWA as it pertains to a class of Native American parents, namely non-custodial parents. In order to protect the parental rights of all Native Americans and to ensure that any Native American parent can invoke the ICWA, the language of the Act must be amended.

In 2015, the Bureau of Indian Affairs published an updated set of guidelines for the ICWA, which includes language meant to address the potential effects of the Existing Indian Family Exception. However, the Bureau's 2015 guidelines do not clarify what law should determine continued custody, what factors should or should not be used to

²⁸⁵ See *Quilloin*, 434 U.S. at 249–50 (noting Birth Father did not attempt to establish that he was the father of the child in question for eleven years); *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2558 (2013) (finding the Birth Father “made no meaningful [attempt] to assume his responsibility of parenthood” and he later signed the papers consenting to the adoption).

²⁸⁶ *Adoptive Couple*, 133 S. Ct. at 2575.

determine application, and how to evaluate when to terminate the parental rights of a non-custodial parent. Many commentators felt that the 2015 Guidelines did not go far enough. They wanted the Department of Interior to issue binding regulations regarding the implementation of the ICWA to ensure uniform application across the nation.²⁸⁷ After accepting comments on a draft rule, the Bureau issued a final rule that adds a new subpart to 25 C.F.R. 23 and is effective as of December 12, 2016.²⁸⁸ The first part of this section describes the new rule, the additions made, and the areas where the BIA declined to go further. Although the new rule imposes additional interpretations and regulations for state courts, it does not go far enough towards creating a uniform federal standard with respect to the rights of non-custodial fathers. Thus, the second part of this section proposes either a congressional amendment to the ICWA or, in the alternative, calls for new state laws to increase the protections of unwed Native fathers.

A. The New Final Rule for Indian Child Welfare Act Proceedings

Pursuant to 25 U.S.C. § 1952, the Department of Interior has the authority to issue necessary rules and regulations relevant to carrying out the Act.²⁸⁹ In March 2015, the Department released a proposed rule for comment. After receiving comments from a variety of organizations and individuals that work with Native American children and have expertise in child-welfare, the Department issued a final

²⁸⁷ Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38784 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23).

²⁸⁸ *Id.* at 38,778.

²⁸⁹ 25 U.S.C. § 1952 (1978); *see also* Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38,785 (June 14, 2016) (concluding that the Department's rulemaking authority includes authority to issue binding rules at this time because of the ICWA's "broad and general" grant of rulemaking authority to the Department).

rule which added a new subpart to 25 C.F.R. 23.²⁹⁰ This final rule is effective as of December 12, 2016.²⁹¹

The final rule updates the current rule and adds an additional section aimed at promoting uniform application and clarifying state court implementation.²⁹² This rule includes updated definitions of “continued custody” and “Indian Child,” as well as the description of the application of the Act.²⁹³ The comments and responses to the final rule also highlight that these changes were made to create a uniform federal standard, address discrepancies in state courts, and directly address the Existing Indian Family Exception.²⁹⁴ The comments to the rule express that conflicting application can threaten rights that the Act meant to protect.²⁹⁵

The final rule defines “continued custody” as physical custody and/or legal custody, under any applicable tribal law or tribal custom or state law, that a parent or Indian custodian already has or had at any point in the past.²⁹⁶ The only change between this definition and the one issued in 2015 is the inclusion of using tribal law, tribal custom, or state law to determine custody for the purposes of continued custody.²⁹⁷ The comments to the new rules note that this definition aligns with the ICWA and *Adoptive Couple*. First, the definition is in line with the ICWA, which defines legal custody and parental rights based on tribal and state law in other sections

²⁹⁰ Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38,778 (June 14, 2016).

²⁹¹ *Id.*

²⁹² *Id.* at 38,779.

²⁹³ *Id.* at 38,865–66.

²⁹⁴ *Id.* at 38,782.

²⁹⁵ *Id.*

²⁹⁶ Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38,865 (June 14, 2016).

²⁹⁷ The 2015 BIA guidelines define “continued custody” as “physical and/or legal custody that a parent already has or had at any point in the past. The biological mother of a child has had custody of a child.” Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. at 10,151 (Feb. 25, 2015).

of the Act.²⁹⁸ Second, the rule includes custody that a parent had at some point in the past, which it views as in line with holding in *Adoptive Couple* that the Birth Father never had physical or legal custody.²⁹⁹

The Department declined to include that a biological father has “continued custody” even without physical or legal custody, unless he abandoned the child prior to birth. However, biological mothers are automatically presumed to have custody of the child.³⁰⁰ The comments note that this definition is consistent with *Adoptive Couple*’s determination that the father never had custody of his daughter under the applicable state law. Declining to include this broader definition of custody will have the greatest impact on unwed Native fathers, similar to the father in *Adoptive Couple*, who cannot establish custody under state law but who have shown an interest in directing their child’s future. The rule also declines to set a hierarchy of law to look to, tribal or state. It can be inferred from rest of the Act that tribal law should take priority, but the rule leaves open the possibility for state law to take priority.³⁰¹

Next, the final rule defines “parent” as “any biological parent or parents of an Indian child, or any Indian who has lawfully adopted an Indian child” and “does not include the unwed biological father where paternity has not been acknowledged or established.”³⁰² A few commenters have

²⁹⁸ Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38,792 (June 14, 2016).

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ See H.R. REP. NO. 95-1386, at 23 (1978) (stating that the focus of the placement preferences provision of 25 U.S.C. § 1915 is “to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society”); 25 U.S.C. § 1911 (2012) (granting jurisdiction to tribal courts except for a showing of a good cause for state courts to have jurisdiction and granting tribes the right to intervene in state court child custody proceedings regarding a member of their tribe).

³⁰² Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38,865 (June 14, 2016).

suggested creating a federal standard for establishing or acknowledging paternity following a state court split and Justice Sotomayor's dissent in *Adoptive Couple*.³⁰³ As discussed above, part of Sotomayor's dissent argues that the Court's decision is inconsistent with its decision in *Holyfield*, holding that Congress intended for the ICWA to create a uniform federal standard.³⁰⁴ Along those lines, it is illogical for Congress to create both a minimum federal standard and a patchwork of federal and state law for termination of parental rights.³⁰⁵ The commenters recommended that the rule include language from the 2015 guidelines that "requir[es] an unwed father to 'take reasonable steps to establish or acknowledge paternity.'"³⁰⁶ However, relying on the constitutional rights already granted to unwed fathers in *Stanley v. Illinois*, and the subsequent cases, the Department rejected this recommendation.³⁰⁷

The commenters also note that many state courts have already interpreted ICWA to require an unwed father to at least make reasonable efforts to establish paternity even if they do not have to fully comply with other state requirements.³⁰⁸ But this assumption does not go far enough. As established in *Stanley* and subsequent cases, non-custodial parents have an equally important interest in raising their children that is parallel to that of custodial parents.³⁰⁹ If custodial and non-custodial parents generally have similar interest in their relationship with and upbringing of their

³⁰³ *Id.* at 38,795.

³⁰⁴ *Adoptive Couple*, 133 S. Ct. at 2574, 2579 (2013). See *supra* notes 225–45 and accompanying text for a full explanation of Justice Sotomayor's dissent.

³⁰⁵ *Adoptive Couple*, 133 S. Ct. at 2574, 2579. See *supra* notes 225–45 and accompanying text for a full explanation of Justice Sotomayor's dissent.

³⁰⁶ Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38,795 (June 14, 2016); see also Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. at 10,151 (Feb. 25, 2015).

³⁰⁷ Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38,796 (June 14, 2016) (citing *Stanley v. Illinois*, 405 U.S. 645 (1972)).

³⁰⁸ *Id.* (citing *Bruce L v. W.E.* 247 P.3d 966 (Alaska 2011)).

³⁰⁹ See *supra* notes 269–81 and accompanying text.

children, there should not be a difference between custodial and non-custodial Native American parents under the ICWA. However, *Adoptive Couple* essentially creates two different levels of protection for Native American parents based on prior custody that does not account for their similar parental interests.

The rule also clarifies when the ICWA applies to custody proceedings. The most relevant portion of this section details which factors cannot be used to determine when the ICWA should apply. These factors include: “participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child’s blood quantum.”³¹⁰ Although the final rule does not expressly reject the use of the Existing Indian Family Exception, the comments suggest that the new language is meant to focus on the substance of the case rather than exceptions to the use of the ICWA.³¹¹ The 2015 guidelines stated that the Existing Indian Family Exception should not limit the application of the ICWA.³¹² The new rule goes further to spell out exactly what factors cannot be used to determine whether or not the ICWA applies in cases that otherwise qualify.³¹³

Since the updated regulations took effect in December 2016, it is unclear what effect the updated rules will have. However, these regulations are an improvement from the BIA guidelines issued in 2015. The new rule provides more clarity in defining relevant terms and narrows state court discretion in determining when to reject the application of the ICWA with a limited number of factors courts can use. Most importantly the new rule is binding on state courts.

³¹⁰ Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38,802 (June 14, 2016).

³¹¹ *Id.*

³¹² Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. at 10,152 (Feb. 25, 2015).

³¹³ Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38,868 (June 14, 2016).

Ultimately, the forthcoming rules go as far as possible under federal law within the confines of the language of the ICWA and case law. However, the rule fails to provide greater protection for unwed fathers, especially with regards to establishing paternity, custody, and termination rights. Implementing these important protections at the federal level requires a congressional amendment. The next section suggests an amendment to establish a federal standard of paternity in ICWA and to clarify the termination process. Alternatively, since the ICWA is just a minimum standard, there is also suggestion to increase protections through state legislatures and courts.

B. Amending the Indian Child Welfare Act

Congress should amend § 1903 and § 1912 to include: 1) biological fathers to the same degree as biological mothers; and 2) to create a different standard of termination for non-custodial parents. Although the new rule determines that continuous custody is not relevant, it does not create a federal standard for determining custody or terminating parental rights. Thus, any amendment to the ICWA should address the constitutionally protected rights of non-custodial parents to ensure that the Act applies equally to all Native American parents irrespective of previous custody. Specifically, the Act should be amended to include new sub-sections to § 1903, to further define when the ICWA applies, and to § 1912, to extend the ICWA to parents who did not have custody of their child prior to the proceedings but still have an interest in the proceedings.

Congress has not amended the ICWA since the law was originally enacted in 1978, although there have been a few proposed amendments over the years. In 1987, Senator Daniel Evans introduced amendments to the ICWA that would have clarified the intent of the language and expanded the application of the Act to adoption proceedings of

illegitimate children given up shortly after birth.³¹⁴ Essentially, Senator Evans's amendments were aimed at dismantling the Existing Indian Family Exception. Since the exception grew out of a narrow reading of the ICWA suggesting that the statute only applied to intact families, Senator Evans's amendments would have expanded the application to include families that were never intact.³¹⁵ The relevant amendments would have changed the definitions laid out in § 1903 as well as the language of § 1912. The 1987 amendments sought to change § 1903(1) to make clear that the ICWA applied to all child custody proceedings irrespective of the child's connection to the tribe, culture, or the parent who is a member of a tribe.³¹⁶ The proposal also would have amended the language of § 1912(e)–(f) from “continued custody” to simply “custody of the child by the parent.”³¹⁷ The proposal went to committee hearings, but was ultimately unsuccessful.³¹⁸

The suggested 1987 amendments begin to address the flaws in the recent interpretations of the ICWA and therefore should be reconsidered by Congress today. The proposed § 1903 changes would move to expand the application of the ICWA to all Native American children. Combined with the new Department of Interior rule which lists factors that are not to be considered, the ICWA would have a much broader application.

Senator Evans also proposed changes to § 1912(e)–(f). Those changes would remove the “continued custody” language that the United States Supreme Court found

³¹⁴ Lehmann, *supra* note 67, at 513.

³¹⁵ S. 1976, 100th Cong., 1st Sess., 133 CONG. REC. 36,601, 36,602 (1987) (redefining “child custody proceeding” as a proceeding involving an Indian child even if the child never lived with an Indian parent).

³¹⁶ Lehmann, *supra* note 67, at 539; S. 1976, 100th Cong., 1st Sess., 133 CONG. REC. 36,601, 36,602 (1987).

³¹⁷ Lehmann, *supra* note 67, at 540.

³¹⁸ *Id.* at 513; *see also, In re A.J.S.*, 204 P.3d at 549.

persuasive in *Adoptive Couple*.³¹⁹ This amendment may no longer be necessary in light of the new Department of Interior rule, which defines “continued custody” in a way to make clear that any prior custody is sufficient.³²⁰

However, an additional amendment to § 1912 is necessary in order to grant non-custodial parents the same protections under the Act. A new subsection (f) should be created to directly address non-custodial parents and prevent courts from summarily terminating their rights if they have previously expressed an interest in the adopting proceedings. The relevant language should be similar to: “In order to involuntarily terminate the parental rights of a non-custodial parent, the court must first determine that the parent’s involvement in the child’s life or adoption placement would seriously harm the child. This section only applies to non-custodial parents that have demonstrated interest in the child or the relevant proceedings.” The purpose of this new section is to ensure that non-custodial parents do not lose their parental rights without a similar inquiry into their ability as parents as that of custodial parents under § 1912(d)–(f).

In an era where interracial relationships are common, there is an increased likelihood that a child will have a non-Native American mother, but a Native American father, such as Baby Veronica. While that father may not be part of the child and mother’s life before the birth or want to adopt the child himself, he may still want to ensure that his child remains connected to his tribe. Ideally, this amendment will give more Native American parents the authority to intervene in adoption placements. This will also force courts to examine the interests of the birth father and child in conjunction with the birth mother.

If Congress adopted the suggested amendments first proposed in 1987 along with the additional amendments to §

³¹⁹ S. 1976, 100th Cong., 1st Sess., 133 CONG. REC. 36,601, 36,604 (1987).

³²⁰ 25 C.F.R. § 23.2.

1903 and § 1912 that have been proposed here, the updated language should supersede the statutory interpretation laid out in *Adoptive Couple*. The forthcoming rule is a start towards strengthening the language of the ICWA. However, the proposed amendments address the troubling outcome, referenced in Justice Sotomayor's dissent, of a patchwork of federal and state laws concerning non-custodial fathers.³²¹ The purpose of the amendments is to ensure that the ICWA applies to the broadest number of parents and children. Broadening the application of the ICWA favors Native Americans in that it gives them greater authority over protecting the membership of their tribes, keeps children connected to their heritage, and will go a long way toward achieving the ICWA's ultimate goal.

Alternatively, allowing states to impose their own laws would increase the protections of the ICWA, even without a federal standard. Section 1902 makes clear that the ICWA only sets minimum standards, thus implying that states may pass additional laws where necessary.³²² Many states have already taken such actions. For example, many states already took steps to prohibit the use of the Existing Indian Family Exception.³²³ In addition, several states have also adopted more lenient standards for biological fathers looking to establish paternity under the ICWA.³²⁴ Creating changes within each state may be a viable option if establishing a federal standard is not possible.

V. CONCLUSION

The Indian Child Welfare Act plays an important role safeguarding Native American families and tribes. Congress passed the Act in 1978 following extensive evidence that Native American tribes were in danger of extinction due in

³²¹ *Adoptive Couple*, 133 S. Ct. at 2579.

³²² 25 U.S.C. § 1902 (2012).

³²³ See *supra* notes 151–72 and accompanying text.

³²⁴ Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38,796 (June 14, 2016).

part to the large number of children being removed from their families and culture. The purpose of the ICWA is to prioritize maintaining tribal bonds and grant tribes greater autonomy in child custody proceedings. Despite this clear objective, some states have worked to limit the application of the ICWA through case law. Specifically, the Existing Indian Family Exception has been used since the early 1980s as a prerequisite to the ICWA. Though at one point fairly common, the application of the Existing Indian Family Exception began to decline in the 2000s. Despite this shift away from the exception, the United States Supreme Court applied a similar logic in the *Adoptive Couple v. Baby Girl* decision.

Although the United States Supreme Court never explicitly uses or references the Existing Indian Family Exception case law, the analysis in *Adoptive Couple* closely follows that in *Baby Boy L.* and other cases. The majority opinion of *Adoptive Couple* draws upon the Existing Indian Family Exception, and also further limits the application of the ICWA to only parents who had custody of the child at some point prior to the proceedings. This application not only denies many deserving Native American parents from using the ICWA, but also facilitates removing Native American children from their cultural history. While the new BIA binding rule makes progress towards expanding the application and protection of the ICWA, additional amendments from Congress are necessary to realize the goals of the ICWA and to protect the rights of all parents. This Note lays out potential amendments to the ICWA or potential state action, both of which will broaden the application of the ICWA. Without such amendments or state action, an entire class of parents, non-custodial parents, will be cut out of the ICWA scheme. Limiting the availability of the ICWA in this manner will decrease the Act's ability to achieve its underlying goals: to keep Native children connected to their tribes and to protect tribal interests in future generations. In the absence of a revised ICWA or potential state action, tribes will lose out on a whole group of children, a group unable to qualify for protection under the ICWA because their non-custodial parent was unable to invoke the Act.