NOTES

ADOPTING "BIOLOGY PLUS" IN FEDERAL INDIAN LAW: *ADOPTIVE COUPLE V. BABY GIRL*'S REFASHIONING OF ICWA'S FRAMEWORK

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This Note argues that the Supreme Court's decision in Adoptive Couple v. Baby Girl *creates an apparent tension in federal Indian law. The Court's characterization of the broader aims of the Indian Child Welfare Act of 1978 and of biology's role within it appears irreconcilable with previous interpretations of the Act—including the Court's own reading in* Mississippi Band of Choctaw Indians v. Holyfield *and that of lower courts that have adopted the existing-Indian-family exception. This Note looks to an area outside of federal Indian law—immigration law—to resolve this tension. Specifically, this Note suggests that the Court adopted the "biology plus" standard from its unwed-father cases as further developed in the context of the Immigration and Nationality Act of 1952. Reading* Adoptive Couple *as a continuation of the Court's "biology plus" jurisprudence not only resolves the apparent tension, but also reveals new insights about the role of the Indian family in transmitting tribal membership in its cultural, social, and political sense.*

INTRODUCTION

Adoptive Couple v. Baby Girl[1] is a deceptively simple case.[2] On first reading the nine-page majority opinion,[3] one might conclude that the case settled a routine custody dispute between the adoptive parents and

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1. 133 S. Ct. 2552 (2013).

2. Indeed, Justice Sotomayor made a similar suggestion at the beginning of her dissenting opinion in *Adoptive Couple*. She wrote, "A casual reader of the Court's opinion could be forgiven for thinking this an easy case . . . in which the text of the applicable statute points the way to the only sensible result. In truth, however, the path from the text . . . to the result . . . is anything but clear . . . ." Id. at 2572 (Sotomayor, J., dissenting).

3. The brevity of *Adoptive Couple* is particularly striking in comparison to the Court's lengthier opinions. See generally Adam Liptak, Justices Are Long on Words but Short on Guidance, N.Y. Times (Nov. 17, 2010), http://www.nytimes.com/2010/11/18/us/18 rulings.html (on file with the *Columbia Law Review*) ("The opinions in *Citizens United v. Federal Elections Commission* . . . spanned 183 pages and more than 48,000 words, or about the length of 'The Great Gatsby.' The decision [is] ninth on the list of longest majority opinions . . . .").

the biological father of a little girl.[4] Indeed, if read in this way, the result—that a biological father who had voluntarily relinquished his parental rights before his daughter's birth could not reassert those rights[5]—appears unremarkable.[6]

A closer look at the Court's decision, however, reveals a more complicated story. This is in part because the child-custody proceeding at the center of *Adoptive Couple* was one involving placement of a Native American child[7] and thus implicated the Indian Child Welfare Act of 1978 (ICWA),[8] the complex set of federal provisions governing child-custody proceedings concerning placement of Indian children.[9] And further complicating matters, the Court's novel interpretation[10] of ICWA in *Adoptive Couple* seems irreconcilable with previous interpretations of the Act—including the Court's own reading twenty-four years earlier in

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4. See *Adoptive Couple*, 133 S. Ct. at 2558–59 (detailing custody dispute between adoptive parents and biological father).

5. Id. at 2562, 2564 (finding provisions of Indian Child Welfare Act of 1978 (ICWA) protecting parental rights inapplicable); see also infra Part I.B.2 (examining Court's holding Biological Father could not invoke ICWA provisions meant to protect parental rights). For consistency, this Note retains the redacted version of the parties' names used by the courts, see, e.g., *Adoptive Couple*, 133 S. Ct. at 2556–59 (using redacted form of names), though the identities of Biological Father, Birth Mother, Baby Girl, and Adoptive Couple have been made clear through the numerous news reports about the case, see, e.g., Andrew Cohen, Indian Affairs, Adoption, and Race: The Baby Veronica Case Comes to Washington, Atlantic (Apr. 12, 2012, 10:52 AM), http://www.theatlantic.com/national/archive/2013/04/indian-affairs-adoption-and-race-the-baby-veronica-case-comes-to-washington/274758/ [hereinafter Cohen, Indian Affairs] (on file with the *Columbia Law Review*) (identifying Biological Father, Birth Mother, Baby Girl, and Adoptive Couple, respectively, as Dusten Brown, Christina Maldonado, Veronica, and Matt and Melanie Capobianco).

6. This is not to suggest, however, that a custody dispute might not have significant and complex effects on the lives of those involved. The parties in this case have received significant media attention. See, e.g., Sandy Banks, Looking for Lessons in the Wrenching Case of Baby Veronica, L.A. Times (Sept. 27, 2013), http://articles.latimes.com/2013/sep/27/local/la-me-0928-banks-baby-veronica-20130928 (on file with the *Columbia Law Review*) (discussing those involved in *Adoptive Couple*); Cohen, Indian Affairs, supra note 5 (same); Dan Frosch & Timothy Williams, Justices Say Law Doesn't Require Child to Be Returned to Her Indian Father, N.Y. Times (June 25, 2013), http://www.nytimes.com/2013/06/26/us/justices-order-return-of-indian-child-to-adoptive-parents.html (on file with the *Columbia Law Review*) (same). This attention alone could be enough to have very real and substantial consequences for those involved in the dispute. And of course the outcome of the dispute directly impacted the lives of at least four individuals.

7. *Adoptive Couple*, 133 S. Ct. at 2557 n.1 ("It is undisputed that Baby Girl is an 'Indian Child' as defined by the ICWA . . . .").

8. 25 U.S.C. §§ 1901–1963 (2012) (setting forth codified provisions of ICWA).

9. See id. §§ 1903, 1911 (giving Indian tribe exclusive jurisdiction over and Indian parent right to intervene in child-custody proceedings involving Indian child).

10. See infra Part II (explaining how Court's reading is novel).

Mississippi Band of Choctaw Indians v. Holyfield[11] and that of lower courts that have adopted the "existing Indian family" exception.[12] Indeed, the outcome of the decision itself is confusing. The Court effectively ruled that an individual *is* a parent under one of ICWA's provisions, but that the same individual is *not* a parent under two other ICWA provisions.

This Note argues that *Adoptive Couple* is in fact consistent with the Supreme Court's recent jurisprudence outside of federal Indian law. Specifically, *Adoptive Couple* imports the Court's "biology plus" standard,[13] used to establish the existence of a father–child relationship, from the Court's unwed-father line of cases[14] as it developed in the context of immigration law.[15] Creating parallelism between federal Indian law and immigration law, two seemingly unrelated areas of law, in turn suggests a possible means of resolving the tension within ICWA jurisprudence resulting from the Court's decision, partly by reimagining the role of family within ICWA.

Part I of this Note briefly examines ICWA itself before continuing to a discussion of the Court's decision in *Adoptive Couple* and its interpretation of the Act. Part II argues that the Court recast the aims of ICWA and departed from previous understandings of the Act, so that *Adoptive Couple* appears irreconcilable with these interpretations. Part II thus examines previous readings of ICWA's aims, particularly as offered by the Court in *Holyfield*, and understandings of ICWA as premised only on "biology,"[16] a view adopted by courts applying the existing-Indian-family exception.

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11. 490 U.S. 30 (1989); see infra Part II.A (offering examination of *Holyfield* and suggesting Court's decision in *Adoptive Couple* might be at odds with this previous decision).

12. See infra Part II.B (discussing existing-Indian-family exception and how Court's recent decision is apparently in tension with it).

13. See infra notes 150–153 and accompanying text (explaining biology-plus standard).

14. See infra note 150 (defining unwed-father cases as set of cases involving challenges unwed fathers have brought to laws related to parental rights).

15. A recent piece, The Supreme Court, 2012 Term—Leading Cases, 127 Harv. L. Rev. 198, 368 (2013), makes a similar suggestion regarding the Court's adoption of the biology-plus standard. That piece specifically suggests that *Adoptive Couple* is in keeping with the Court's "parental rights" cases, id. at 376, but focuses on a broader range of cases than this Note does. This Note instead argues that *Adoptive Couple* is best read through the lens of a narrower set of cases: those involving the biology-plus standard in the immigration context. See infra Part III.A.2 (likening *Adoptive Couple* to citizenship-transmission line of cases). Further, this Note focuses on how reading through this lens can resolve the tensions resulting from the Court's decision. See infra Part II (arguing *Adoptive Couple* apparently in tension with previous understandings of ICWA); infra Part III (suggesting how this tension can be resolved).

16. This Note uses "biology" to refer to ancestry, descent, blood or blood quantum, and genetic heritage or relationship and treats these terms as interchangeable.

But Part III reconciles the apparent tension by reading *Adoptive Couple* through the lens of the Court's "citizenship transmission" cases.[17] These cases, most notably *Nguyen v. INS*,[18] involved the biology-plus standard in the context of the Immigration and Nationality Act of 1952 (INA).[19] Understanding *Nguyen* and *Adoptive Couple* as fundamentally related in turn provides insight about the real effects of *Adoptive Couple* and how, going forward, courts can implement the Supreme Court's decision.

I. *ADOPTIVE COUPLE V. BABY GIRL*: A NEW CHAPTER IN ICWA JURISPRUDENCE

Congress enacted ICWA in 1978 in response to growing concern that removing Indian children from tribes could have detrimental effects both on tribal survival and on the social and psychological development of Indian children.[20] *Adoptive Couple* marked only the second occasion on which the Supreme Court has examined ICWA. The Court's prior decision addressing the Act—*Holyfield*—focused primarily on an ICWA provision related to tribal jurisdiction over child-custody proceedings.[21] *Adoptive Couple* turned instead to the question of when an unwed Indian father can invoke ICWA's protections to gain custody of his biological child.[22] Ultimately, the Court found that, in order to qualify as a parent under ICWA, an unwed biological father must have had custody at some

17. This structure and terminology is borrowed from Albertina Antognini, From Citizenship to Custody: Unwed Fathers Abroad and at Home, 36 Harv. J.L. & Gender 405 (2013). Antognini suggests that there are two main categories within the unwed-father cases: those related to domestic laws—which she describes as the "domestic equal protection" cases, see id. at 409–10, 415—and those related to immigration—which she describes as the "citizenship transmission" cases, id. at 407. Though she nominally distinguishes between the two sets of cases, the aim of her article is to "uncover deep-seated similarities" between them. Id. at 410.

18. 533 U.S. 53 (2001).

19. Antognini, supra note 17, at 407.

20. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 2, 92 Stat. 3069, 3069 (codified at 25 U.S.C. § 1901 (2012)).

21. 490 U.S. 30, 40–41 (1989).

22. See Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2559–60 (2013) (suggesting central issue in decision was father's ability to invoke ICWA's protections and pointing to role this determination would play in Biological Father's acquiring custody of Baby Girl). Technically, the Supreme Court case involved an issue of whether Biological Father could invoke these provisions to protect his parental rights from termination. Id. at 2557. But custody is still fundamentally tied to this issue. It was the parental right Biological Father sought. Adoptive Couple v. Baby Girl, 731 S.E.2d 550, 556, 565 (S.C. 2012) (describing case as a *custody* dispute), rev'd, 133 S. Ct. 2552. Indeed, custody has elsewhere been characterized as the most important parental right. See, e.g., Michael H. v. Gerald D., 491 U.S. 110, 118–19 (1989).

prior point or a nonbiological relationship with the child.[23] The biological father in *Adoptive Couple* did not meet this standard.[24]

To fully understand the Court's decision in *Adoptive Couple*, however, it will prove useful to first examine the Act itself, particularly Congress's intent in enacting ICWA and a few of the Act's key provisions. Part I.A thus begins with a brief overview of ICWA.[25] Part I.B then continues to a discussion of the Court's decision in *Adoptive Couple*.

A. *The Indian Child Welfare Act: Why, What, and How*

Under the Indian Commerce Clause, Congress has plenary power over Indian affairs and therefore has broad authority to legislate on matters related to Native Americans.[26] One of the areas in which Congress has exercised this power is in the context of the adoption and custody of Indian children. Specifically, Congress passed the Indian Child Welfare Act of 1978, an act that governs child-custody proceedings involving placement of Indian children[27] and those involving termination of parental rights.[28] This section offers a brief overview of ICWA. It first examines Congress's purposes for enacting ICWA and then discusses several of its provisions, particularly those implicated by the Court's decision in *Adoptive Couple*.

1. *ICWA's Legislative History: The "Why."* — Congress's primary impetus for enacting ICWA was mounting concern that removing Indian children from tribes could possibly endanger long-term tribal survival and the well-being of Indian children. At congressional hearings held prior to ICWA's passage, Congress reviewed a number of studies and heard testimony from many individuals about the abuse perpetrated by state authorities against Indian communities through removal of Indian children

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

24. Id.

25. This Part provides an overview of certain key provisions of ICWA that are particularly relevant to the Supreme Court's ICWA jurisprudence but does not offer an in-depth examination or analysis of the entire Act. For a more thorough examination of ICWA, see generally, e.g., Michael C. Snyder, An Overview of the Indian Child Welfare Act, 7 St. Thomas L. Rev. 815 (1995) (providing detailed examination of Act's provisions); Roger A. Tellinghuisen, The Indian Child Welfare Act of 1978: A Practical Guide with [Limited] Commentary, 34 S.D. L. Rev. 660 (1989) (discussing provisions and judicial interpretations of ICWA).

26. See U.S. Const. art. I, § 8, cl. 3 (granting Congress power "[t]o regulate Commerce . . . with the Indian tribes"); Robert N. Clinton, Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government, 33 Stan. L. Rev. 979, 991–1009 (1981) (discussing sources and limits of federal control over Indian affairs).

27. 25 U.S.C. §§ 1903(1), 1911 (2012).

28. Id. § 1913.

from their families and tribes.[29] Congress found that federal intervention was necessary to prevent this abuse.[30]

At one of these hearings, Senator James Abourezk cited statistics showing that approximately a quarter of all Indian children had been removed from their families and placed in foster or adoptive care, or had been sent to boarding schools.[31] The rate of removal of children from Indian communities was anywhere from five to twenty-five times greater than that of children in non-Indian communities, for which the rate was approximately one out of every fifty children.[32] According to Senator Abourezk, this removal "str[uck] at the heart of Indian communities by literally stealing Indian children" and was akin to "cultural genocide," as it placed the children in settings in which "their entire Indian way of life [was] smothered."[33]

According to Calvin Isaac, the tribal chief of the Mississippi Band of Choctaw Indians and a member of the National Tribal Chairmen's Association, the removal of Indian children from their communities would prove detrimental to the tribes as well. Chief Isaac testified:

> 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.[34]

Chief Isaac's testimony emphasized the inextricable ties between the welfare of Indian children and that of Indian tribes.

The concerns identified by those such as Senator Abourezk and Chief Isaac form some of ICWA's key considerations. ICWA's statutory text thus begins by pointing to Congress's findings about the growing

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29. Cohen's Handbook of Federal Indian Law § 11.01[2] (Neil Jessup Newton et al. eds., 5th ed. 2012) [hereinafter Cohen's Handbook].

30. Id.

31. Problems that American Indian Families Face in Raising Their Children and How These Problems Are Affected by Federal Action or Inaction: Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior & Insular Affairs, 93d Cong. 1 (1974) (statement of Sen. Abourezk) ("It appears that for decades Indian parents and their children have been at the mercy of arbitrary or abusive action of local, State, Federal, and private agency officials. Unwarranted removal of children from their homes is common in Indian communities.").

32. Id.

33. Id. at 2.

34. Indian Child Welfare Act of 1978: Hearings on S. 1214 Before the Subcomm. on Indian Affairs & Pub. Lands of the H. Comm. on Interior & Insular Affairs, 95th Cong. 190, 193 (1978) (statement of Calvin Isaac, Tribal Chief, Mississippi Band of Choctaw Indians, and Member, National Tribal Chairmen's Association).

abuse.[35] It announces a national policy "to protect 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 placement of [Indian] children in foster or adoptive homes which will reflect the unique values of Indian culture."[36] The rest of ICWA's provisions are the means through which Congress hoped to further these various purposes.

2. *ICWA's Provisions: The "What" and "How."* — ICWA offers strict definitions of who qualifies as an Indian child or parent. It applies to any child who either is "a member of an Indian tribe" or "is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[37] The statute defines "parent" as "any biological parent . . . 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 . . . ."[38] Although the definition includes an unwed father who *has* proved paternity, it leaves the question of *how* one must prove paternity unresolved.[39] Both of these definitions affect how courts understand ICWA[40] and, though not themselves central to *Adoptive Couple*, played an important role in the Court's decision.[41]

In furtherance of Congress's stated goals, ICWA's provisions contemplate and protect both the rights of Indian tribes and those of Indian parents or custodians. For example, Indian tribes have exclusive jurisdiction in child-custody proceedings involving an Indian child who resides on or is domiciled in the tribe's reservation, subject to certain exceptions.[42] This provision, as the *Holyfield* Court found, is essential to further-

35. See 25 U.S.C. § 1901(4)–(5) (2012) (finding "alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them" and "[s]tates . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families").

36. Id. § 1902.

37. Id. § 1903(4).

38. Id. § 1903(9).

39. Id.

40. See, e.g., In re Bridget R., 49 Cal. Rptr. 2d 507, 520, 527–30 (Ct. App. 1996) (discussing potential application of definitions and, on basis of understanding of these provisions, finding ICWA could pose constitutional problems under Equal Protection Clause); infra Part II.B (discussing how these provisions—because their application is in part based on biological relationships—might affect a court's decision to adopt existing-Indian-family exception).

41. See infra Part I.B (examining Court's understanding of who meets definition of "parent" for purposes of § 1912(d) and (f)); infra notes 82–85 and accompanying text (discussing Court's reference to definition of "Indian child" under § 1903(4) and its role in Court's decision).

42. 25 U.S.C. § 1911(a). This provision was at the center of the Court's previous decision related to ICWA, Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30

ing tribes' interests.[43] And, for adoption and other similar proceedings, ICWA's preference for placement of the child with a member of the child's extended family, another member of the tribe, or another Indian family[44] can be characterized as a means of bolstering Indian tribes' social and cultural values.[45]

Further, several of ICWA's provisions protect the rights of Indian parents or custodians.[46] Section 1912(d) and (f), the two provisions at issue in *Adoptive Couple*,[47] for instance, safeguard the interests of parents and custodians by setting a heavy burden that must be satisfied before parental or custodial rights can be terminated.[48] It is the protections of these provisions that Biological Father sought in *Adoptive Couple*.[49]

(1989), which will be examined further below. See infra Part II.A.2. Section 1911 includes several other important provisions, though these were not at issue in *Adoptive Couple*. In cases in which the child is not domiciled on or does not reside on a reservation, state courts are to transfer foster-care-placement or termination-of-parental-rights proceedings to the tribe's jurisdiction, absent good cause to the contrary. Id. § 1911(b). Additionally, § 1911(c) gives the Indian child, the Indian custodian of the child, and the child's tribe the right to intervene in foster-care-placement proceedings or parental-rights-termination proceedings. Id. § 1911(c).

43. See infra notes 103–107 and accompanying text (summarizing Court's basis for this claim and its role in *Holyfield*).

44. 25 U.S.C. § 1915(a)–(b).

45. See id. § 1915(d) ("The standards to be applied in meeting the preference requirements of this section shall be prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties."). The Supreme Court has characterized § 1915(a) as the "most important substantive requirement imposed on state courts." *Holyfield*, 490 U.S. at 36. "More than any other substantive requirement, these preferences reflect the underlying assumption of ICWA that Indian children have a strong interest in preserving their tribal ties, and their best interests coincide with their tribes'." Cohen's Handbook, supra note 29, § 11:05[2].

46. For example, § 1921 requires application of the law that is most protective of parental or custodial interests when state or federal law is applicable. 25 U.S.C. § 1921 ("In any case where State or Federal law applicable to a child custody proceeding . . . provides a higher standard of protection to the rights of the parent or Indian custodian . . . than the rights provided under [ICWA], the State or Federal court shall apply the State or Federal standard."). Section 1913, which governs voluntary termination of parental rights, effectively mandates that parents fully understand the consequences of terminating their parental rights before they can terminate those rights. See id. § 1913(a) ("Where any parent . . . voluntarily consents to . . . termination of parental rights, such consent shall not be valid unless executed in writing and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood . . . ."). Under § 1913, even when a parent has voluntarily terminated rights, he or she might still be able to regain custody if a final decree has not been entered. Id. § 1913(c). Section 1913(d) provides that a parent may withdraw consent after entry of a final decree if consent was obtained through fraud or under duress. Id. § 1913(d).

47. Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2556–57 (2013).

48. See 25 U.S.C. § 1912(d), (f) (requiring proof "beyond a reasonable doubt" parent's continued custody would result in "serious emotional or physical damage to the

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

Having offered a brief overview of ICWA's provisions, this Part next discusses the Supreme Court's most recent (and only second thus far) interpretation of the Act. At its most fundamental level, *Adoptive Couple* was a simple custody dispute between the adoptive parents and the biological father of a little girl.[50] However, the central issue examined in *Adoptive Couple* proved to be more complex: When does an unwed biological father who satisfies the definition of "parent" for the purposes of one of ICWA's provisions also qualify as a "parent" for the purposes of two different ICWA provisions? The answer is not as straightforward as one might expect.

Part I.B.1 begins by detailing the facts of *Adoptive Couple*. Part I.B.2 then continues by examining the Court's decision and reasoning.

1. *The Facts of* Adoptive Couple v. Baby Girl. — *Adoptive Couple* centered on a dispute over the adoption of the child of Biological Father, a member of the Cherokee Nation, and Birth Mother, a non-Indian.[51] The couple's relationship ended shortly after Birth Mother became pregnant.[52] Biological Father chose to relinquish his parental rights,[53] and Birth Mother then put their daughter, Baby Girl, up for adoption.[54] Through a private agency, she selected Adoptive Couple, a non-Indian South Carolina couple, as Baby Girl's adoptive parents.[55]

Biological Father had never had custody of Baby Girl.[56] He provided no financial assistance to Baby Girl, nor did he make any "meaningful attempt[] to assume his responsibility of parenthood" during the first few months after Baby Girl's birth.[57] Approximately four months after Baby Girl's birth, Biological Father received formal notice from Adoptive Couple about the pending adoption.[58] Biological Father initially did not

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child" to terminate parental rights of parent of Indian child).

49. *Adoptive Couple*, 133 S. Ct. at 2556–57.

50. See id. at 2558–59 (setting forth facts of custody dispute).

51. Id. at 2558.

52. Id.

53. Id. Birth Mother, in a text message, gave Biological Father the choice of either paying child support or relinquishing his parental rights; Biological Father chose the latter (also via text message). Id.

54. Id.

55. Id. Before Birth Mother put Baby Girl up for adoption, Birth Mother's attorney sent an inquiry letter to the Cherokee Nation to determine Biological Father's enrollment status. Id. But because the letter contained a misspelling of Biological Father's name, the Nation was unable to verify Biological Father's membership. Id.

56. Id.

57. Id. (quoting Petition for a Writ of Certiorari app. B at 122a, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12-399) (filed under seal)) (internal quotation mark omitted).

58. Id.

contest the adoption, but he subsequently requested a stay of the proceedings and sought custody.[59]

The custody dispute was initially presented before the Charleston County Family Court.[60] After a brief trial, the family court ultimately gave custody of Baby Girl, who was by then twenty-seven months old,[61] to her biological Indian father instead of to the couple that had begun the process of adopting her.[62] The South Carolina Supreme Court later affirmed the family court's decision to give custody to Biological Father.[63] The court found that Biological Father met the statutory definition of "parent" under 25 U.S.C. § 1903.[64] Reading this definition as governing ICWA's other provisions, the court found § 1912(d) and (f) barred termination of his parental rights.[65] Establishing paternity through DNA testing was enough, the court found, to satisfy the § 1903(9) definition of "parent."[66] The court rejected Adoptive Couple's argument that unwed fathers must show something beyond biology in order to have parental rights protectable by ICWA.[67] Biology alone was enough.[68]

2. *The Supreme Court's Decision.* — The Supreme Court granted certiorari.[69] It ultimately held that ICWA did not preclude termination of Biological Father's parental rights.[70] The Court's interpretation of § 1912(d) and (f) proved key in its decision to overturn the state supreme court's ruling.[71]

Section 1912(f) specifies that parental rights may not be terminated "in the absence of a determination, supported by evidence beyond a reasonable doubt . . . that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical

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59. Id. at 2558–59.

60. Adoptive Couple v. Baby Girl, 731 S.E.2d 550, 556 (S.C. 2012), rev'd, 133 S. Ct. 2552.

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

62. *Adoptive Couple*, 731 S.E.2d at 556.

63. Id. at 552.

64. Id. at 560.

65. Id. at 562–63.

66. Id. at 560; see 25 U.S.C. § 1903(9) (2012) (including unwed father who *has* acknowledged or established paternity in definition of "parent").

67. *Adoptive Couple*, 731 S.E.2d at 559–60.

68. Id. at 560. Technically, Biological Father also had to complete the additional step of contesting the adoption once he realized that his daughter had been placed for adoption. Id.

69. Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2559 (2013).

70. Id. at 2562, 2564.

71. The Court accepted, arguendo, that Biological Father satisfied the definition of "parent" under § 1903(9), id. at 2560, which defines "parent" as "any biological parent . . . of an Indian child . . . . It does not include the unwed father where paternity has not been acknowledged or established," 25 U.S.C. § 1903(9).

damage to the child."[72] The Court focused on the presence of the term "continued" in the provision. According to the Court, § 1912(f) refers to custody that a parent has already, or had at some point in the past.[73] The provision does not, however, apply where the child was *never* in the parent's custody.[74] Thus, because Biological Father had never had legal or physical custody of Baby Girl, he could not invoke § 1912(f).[75] Under this reading, for the purposes of § 1912(f), an individual has a protectable parental right only if he or she had custody of the child at some prior point.

The Court then examined § 1912(d). This provision provides that "[a]ny party seeking to effect . . . termination of parental rights to[] an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."[76] The Court, again focusing on the statute's text, held that "when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody, there is no 'relationship' that would be 'discontinu[ed]'—and no 'effective entity' that would be 'end[ed]'—by the termination of the Indian parent's rights."[77] Section 1912(d) does not apply when the Indian family has long been dissolved—or, as in the instant case, never existed. The Court effectively found a requirement that an Indian parent be part of an Indian family in order to invoke § 1912(d).[78] The family entity the Court had in mind is not necessarily one with a traditional form. Rather, the Court focused on whether there is some social or legal relationship—beyond the genetic relationship—between Indian parent and Indian child that could alone establish the "effective entity" or family unit. One can understand the Court's reading of § 1912(d) as requiring that an Indian parent have some familial relationship with the Indian child to have a parental right protectable against termination.

The Court explained that its interpretation of these provisions accorded with ICWA's legislative history and intended aims. According to the Court, Congress's primary aim in designing ICWA was "to stem the unwarranted removal of Indian children from intact Indian families."[79]

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72. 25 U.S.C. § 1912(f).

73. *Adoptive Couple*, 133 S. Ct. at 2560.

74. Id.

75. Id. at 2562.

76. 25 U.S.C. § 1912(d).

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

78. Biological Father's lack of custody also played a role in the Court's decision regarding § 1912(d). See id. at 2563 (finding, based on adjacency of § 1912(d), (e), and (f), "strong[] suggest[ion] that the phrase 'breakup of the Indian family' should be read in harmony with the 'continued custody' requirement").

79. Id. at 2561.

But here, Biological Mother, a non-Indian parent who had sole custody of Baby Girl, had initiated the adoption process.[80] This set of facts did not implicate ICWA's central aim of preventing removal of Indian children to stop the dissolution of Indian families, as there had been at no point an intact Indian family to preserve.[81]

The Court found that if the lower court's reading of ICWA's provisions were adopted, the Act would apply even to those children who had only distant Indian ancestry.[82] Under the South Carolina courts' reading, the Court continued, "a biological Indian father could abandon his child *in utero* . . . and then could play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests," even when the father had only limited Indian ancestry.[83] In other words, a father who never had custody and had never expressed interest in his child could invoke even a "remote" tie to Indian ancestry to acquire custody of the child, without regard to the child's best interests.[84] Thus the Court justified its rejection of Biological Father's arguments.[85]

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80. Id.

81. Id. One should be careful not to read the Court's use of the term "intact Indian family" as indicating that the Court applied the existing-Indian-family exception (which Part II.B.2 discusses in further detail). See infra notes 135–140 and accompanying text (explaining why one should not interpret Court's decision as application of existing-Indian-family exception).

82. *Adoptive Couple*, 133 S. Ct. at 2565 ("[T]he Act would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian.").

83. Id.

84. Id. The Court stressed the "minimal" nature of Baby Girl's Cherokee heritage. See, e.g., id. at 2556 ("This case is about a little girl . . . who is classified as an Indian because she is 1.2% (3/256) Cherokee."). The Court's emphasis of this point suggests its discomfort with the idea of "Indian" as rooted in biology or race. Cf. infra note 188 (discussing Supreme Court's view of "Indian" as political, not racial, status as offered in Morton v. Mancari, 417 U.S. 535 (1974)). One could argue that the Court's discomfort may have somehow swayed its ultimate decision—what the Court might have decided had this been a case involving a child who was, for instance, 50% or 90% Cherokee is unclear. But despite this apparent discomfort, the Court's decision was nevertheless premised on its acceptance of Baby Girl's meeting the definition of "Indian child" under ICWA. See *Adoptive Couple*, 133 S. Ct. at 2557 n.1 ("It is undisputed that Baby Girl is an 'Indian child' as defined by the ICWA because she is an unmarried minor who 'is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.'" (quoting 25 U.S.C. § 1903(4)(b) (2012))); id. ("'Baby Girl's eligibility for membership in the Cherokee Nation depends solely upon a lineal blood relationship with a tribal ancestor.'" (quoting Brief for Petitioners at 44, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12-339), 2013 WL 633597)); cf. id. at 2559 ("It is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law."). The Court's recognition of Baby Girl's eligibility for membership and ICWA's applicability to the case indicates that its discomfort did not determine its decision. The Court's decision—that Biological Father could not invoke the protections of § 1912(d) and (f), see id. at 2560—was not based on the "amount" of Baby

II. THE PUZZLE PRESENTED BY *ADOPTIVE COUPLE*

Adoptive Couple at first may seem like a straightforward and unremarkable application of ICWA's provisions. However, when read in the context of previous understandings of the Act, the novelty of the Court's interpretation becomes apparent. Part II examines this innovation, arguing that the Court seems to have recast the aims of ICWA and departed from previous understandings of biology's role in the Act, so that *Adoptive Couple* appears irreconcilable with prior interpretations, including that of the *Holyfield* Court.

Part II.A first discusses the Court's novel understanding of ICWA's intended aims. The *Adoptive Couple* Court characterized ICWA as having a *primary* goal. But until now, courts and scholars have treated ICWA as a careful balancing act of multiple, equally important goals. Part II.B then explores the Court's reconsideration of biology's role in ICWA, suggesting that the Court read biology as playing a much smaller role in ICWA's provisions than several other courts have understood it to play. Part II.C then points to the need for a resolution of the apparent tension created by *Adoptive Couple*.

A. *Reexamining ICWA's Intended Purposes*

The Court's reading of Congress's purposes in enacting ICWA is at odds with previous interpretations. In *Adoptive Couple*, the Court read ICWA as intended primarily to preserve the intact Indian family.[86] But the *Holyfield* Court, as well as lower courts and scholars, previously read the Act as advancing multiple aims, none of which subordinates the others. *Adoptive Couple* thus creates a tension within the Court's own jurisprudence. Part II.A.1 explores the Court's reading of ICWA's aims. Part II.A.2 then outlines previous understandings of ICWA's purposes, including that of the *Holyfield* Court.

1. Adoptive Couple*'s Reading*. — The Court justified its interpretation of the provisions at issue in *Adoptive Couple* in part by arguing that its reading comports with Congress's purposes in enacting ICWA. In doing so, the Court explicitly held that Congress had a *primary* aim when it passed the Act. The Court wrote, "[T]he primary mischief the ICWA was designed to counteract was the unwarranted removal of Indian children from Indian families."[87] According to the Court, the statute's text itself "expressly highlights the primary problem that the statute was intended

Girl's Cherokee heritage, see id. at 2565 ("[T]he plain text of §§ 1912(f) and (d) makes clear that neither provision applies in the present context.").

85. *Adoptive Couple*, 133 S. Ct. at 2565 (suggesting offered interpretation avoids undesirable outcome for child and thus further justifies Court's interpretation).

86. See supra notes 76–81 and accompanying text (discussing Court's finding that § 1912(d) requires intact Indian family).

87. *Adoptive Couple*, 133 S. Ct. at 2561 (emphasis omitted).

to solve: 'an alarmingly high percentage of Indian families [were being] broken up by the removal, often unwarranted, of their children by non-tribal public and private agencies.'"[88] Pointing to the Act's legislative history, the Court wrote, "[I]f the legislative history of the ICWA is thought to be relevant, it further underscores that the Act was primarily motivated to stem the unwarranted removal of Indian children from intact Indian families."[89] As the Court understood ICWA, preventing removal of Indian children from their families is not ICWA's main goal, but rather the *means* by which to achieve the broader aim of preserving the intact Indian family.[90]

2. *Prior Readings of ICWA's Aims.* — A comparison of the Court's reading of ICWA and its legislative history to earlier judicial interpretations of ICWA reveals a slight but significant shift in focus in *Adoptive Couple*. The reading the *Adoptive Couple* Court offered seemingly treats one interest—preserving the intact Indian family—as the most important. In contrast, previous interpretations offer a conception of ICWA as a careful balancing act of multiple interests—no single interest received a presumptive preference.

The Supreme Court itself presented a contrary reading to *Adoptive Couple* in the only other case in which it examined ICWA: *Holyfield*.[91] The Court's reading of ICWA's aims played a significant role in its ultimate decision in *Holyfield*.

Central to *Holyfield* was 25 U.S.C. § 1911(a)—the exclusive-jurisdiction provision[92]—and the question of whether the twin Indian

88. Id. (emphasis omitted).

89. Id.

90. One might argue, however, that the Court in fact understood ICWA's primary aim to be preventing *removal of children* from their families—and not preserving Indian families. In particular, one could point to the Court's repeatedly stressing the former during the course of its discussion of ICWA's purposes. But examining the Court's decision as a whole suggests otherwise. The Court framed the prevention of the breakup of Indian families as the primary problem that ICWA was meant to solve. Id. at 2561; see supra notes 76–81 and accompanying text (describing Court's characterization of ICWA's aims). Moreover, the Court interpreted the applicability of the provisions at issue in *Adoptive Couple* as centering on a determination of whether or not there was any family relationship to protect, or, in other words, an intact Indian family to preserve. See *Adoptive Couple*, 133 S. Ct. at 2561–62. Where an Indian parent never had custody of the Indian child, there is no Indian family to preserve. Id. at 2562. And where the breakup of the Indian family is not threatened, § 1912(d) is inapplicable. Id. Indeed, even the dissent in *Adoptive Couple* understood the majority as framing preserving Indian families as ICWA's primary aim: "The majority . . . claims that its reading is consistent with the 'primary' purpose of the Act, which in the majority's view [is] to prevent the dissolution of 'intact' Indian families." Id. at 2583 (Sotomayor, J., dissenting).

91. 490 U.S. 30 (1989).

92. Id. at 36. Section 1911(a) provides:

> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within

children involved in the case were domiciled in the Choctaw reservation.[93] Finding that the children were domiciled in the reservation would give the tribe exclusive jurisdiction over the proceeding.[94]

In making its decision, the Court borrowed in part from the common law's treatment of domicile.[95] Under common law, the parents' domicile determines that of the minor.[96] For illegitimate children, one would usually look to the mother's domicile.[97] The Court noted that "[i]t is entirely logical that '[o]n occasion, a child's domicil[e] of origin will be in a place where the child has never been.'"[98]

This situation occurred in *Holyfield*. The twins involved in *Holyfield* had never resided on the Choctaw reservation because their mother had given birth off of the reservation and arranged for the twins' adoption by a non-Indian family.[99] But the twins' unwed mother, a Choctaw member, resided on the Choctaw reservation and was domiciled there.[100] Based on the common-law approach to domicile, the twins' domicile was the same as that of their mother.[101] Thus, the tribe had exclusive jurisdiction over the custody proceeding, since both children were domiciled within the reservation.[102]

The *Holyfield* Court pointed to ICWA's legislative history in justifying the result it reached. In particular, the Court cited Chief Isaac's testimony from the legislative hearings prior to ICWA's passage, emphasizing the tribal interests at stake in adoption proceedings involving Indian children.[103] ICWA was meant, in part, to counteract the harmful effects pre-ICWA adoption policies had on Indian tribes, not just on Indian children and families.[104] Congress intended to further these interests through the exclusive-jurisdiction provision.[105] A mother's decision to give birth outside of the reservation and put her children up for adoption could not deprive a tribe of its exclusive jurisdiction in an adoption

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> the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

25 U.S.C. § 1911(a) (2012).

93. *Holyfield*, 490 U.S. at 42.

94. 25 U.S.C. § 1911(a).

95. *Holyfield*, 490 U.S. at 47–48.

96. Id. at 48.

97. Id.

98. Id. (quoting Restatement (Second) of Conflict of Laws § 14 cmt. b (1971)).

99. Id. at 37–38.

100. Id. at 37.

101. Id. at 48.

102. Id. at 42, 48–49.

103. Id. at 34–35.

104. Id. at 34.

105. Id. at 44–45, 49.

proceeding, as allowing a single Indian parent to "defeat . . . ICWA's jurisdictional scheme" would hamper Congress's intent to further tribal interests.[106]

Though the Court read the exclusive-jurisdiction provision and concomitant congressional aim in protecting tribal interests as playing an important role in ICWA, the Court did not frame tribal interests, or any other interest, as more important than others. The Court explicitly recognized the multiple interests at stake in ICWA proceedings—the tribe's interests, the children's interests, *and* the family's interests.[107]

Numerous courts have also followed the *Holyfield* approach.[108] For instance, the Illinois Supreme Court pointed to discussions that took place at legislative hearings concerning the effects pre-ICWA adoption policies had on Native American tribes and individuals.[109] Even before ICWA's enactment, courts recognized that Indian tribes had a significant stake in adoption proceedings, particularly because of their concern with preserving tribal identity.[110] And scholars, in their discussions of ICWA and its legislative history, have long recognized the multiple goals Congress envi-

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106. Id. at 51; see also id. at 53 ("[T]he law of domicile Congress used in the ICWA cannot be one that permits individual reservation-domiciled tribal members to defeat the tribe's exclusive jurisdiction by the simple expedient of giving birth and placing the child for adoption off the reservation.").

107. See id. at 49 (acknowledging multiple interests advanced by ICWA's provisions). This is not to suggest that, in a specific case, one interest might not ultimately take precedence over others. The key difference between the *Holyfield* approach and the *Adoptive Couple* approach can also be described as a difference in timing. Under *Adoptive Couple*, at the outset, preventing the breakup of the Indian family is the most important interest at stake in an ICWA proceeding. But under *Holyfield*, while family cohesion may eventually be found to be the most important interest, at the outset, all interests are on potentially equal footing.

108. See, e.g., A.B.M. v. M.H., 651 P.2d 1170, 1172 (Alaska 1982) ("Congress was concerned with two major social goals: protecting the best interests of Indian children and promoting the stability and security of Indian tribes and families."); Navajo Nation v. Ariz. Dep't of Econ. Sec., 284 P.3d 29, 34 (Ariz. Ct. App. 2012) ("ICWA 'seeks to protect the rights of the Indian child . . . and the rights of the Indian community and tribe in retaining its children in its society.'" (quoting *Holyfield*, 490 U.S. at 37)); In re N.B., 199 P.3d 16, 18 (Colo. App. 2007) (recognizing multiple interests at stake at ICWA proceedings, particularly those of child, parents, and tribe); In re C.H., 997 P.2d 776, 779–80 (Mont. 2000) (same).

109. In re Adoption of S.S., 657 N.E.2d 935, 939 (Ill. 1995). The court observed that during the hearings "[t]here was . . . considerable emphasis . . . on how placements of Indian children into non-Indian families adversely affected the tribes' ability to function as self-governing communities." Id. The court mentioned also that "[s]ponsors of the ICWA noted that Indian tribes . . . were being drained of their children and . . . the future of the tribes and Indian people was . . . in jeopardy." Id.

110. See, e.g., Wakefield v. Little Light, 347 A.2d 228, 238 (Md. 1975) ("By using the Indian child's domicile as the state's jurisdictional basis, the Indian tribe is afforded significant protection from losing its essential rights of child-rearing and maintenance of tribal identity.").

sioned ICWA could achieve.[111] These earlier readings of ICWA do not privilege any one interest or goal over the others, but rather recognize the complex and intermingled nature of all of the Act's aims.

Adoptive Couple's novel reading of ICWA's legislative history represents an apparent departure from these existing interpretations. However, the Court gave no indication that its decision alters the continued applicability of its own decision in *Holyfield* or of lower courts' decisions. Two conflicting readings of ICWA within the Court's own jurisprudence both apparently remain valid law.[112] How this tension can be resolved is initially unclear.[113]

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111. See, e.g., Debra DuMontier-Pierre, The Indian Child Welfare Act of 1978: A Montana Analysis, 56 Mont. L. Rev. 505, 505 (1995) ("Through ICWA, Congress declared a national policy to keep Indian children with their families, to defer to tribal jurisdiction in child custody proceedings, and to place Indian children who have been removed from their homes with extended family members or within their own Indian tribe."); Heather Kendall-Miller, *State of Alaska v. Native Village of Tanana*: Enhancing Tribal Power by Affirming Concurrent Tribal Jurisdiction to Initiate ICWA-Defined Child Custody Proceedings, Both Inside and Outside of Indian Country, 28 Alaska L. Rev. 217, 229 (2011) ("ICWA's goal was to increase tribal control over custody decisions . . . . [Congress recognized] that there can be no greater threat to essential tribal relations, and no greater infringement on the right of the . . . tribe to govern themselves than to interfere with tribal control over the custody of their children." (quoting John v. Baker, 982 P.2d 738, 753–54 (Alaska 1999)) (internal quotation marks omitted)); Patrice H. Kunesh, Borders Beyond Borders—Protecting Essential Tribal Relations off Reservation Under the Indian Child Welfare Act, 42 New Eng. L. Rev. 15, 16 (2007) ("The welfare of Indian children lies at the heart of tribal sovereignty. Thus, there are no real boundaries to protecting these essential tribal relations where the exercise of tribal authority is vital to the maintenance of its identity and self-determination.").

112. That *Holyfield* involved a different provision than those at issue in *Adoptive Couple* could possibly resolve the tension between the two opinions. One could point, for instance, to the presence of the phrase "breakup of the Indian family" within 25 U.S.C. § 1912(d) (2012) as the basis of the Court's reading in *Adoptive Couple* of ICWA's purposes. In *Holyfield*, conversely, the provision at issue was one concerning the tribe's jurisdiction. 490 U.S. at 36. That the Court might thus place the tribe's interests at the forefront of its analysis is unsurprising.

However, this proves to be an unsatisfying resolution. The Court in *Adoptive Couple* was explicit in its characterization of ICWA as having a *primary* aim. Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2561 (2013); see supra Part II.A.1 (discussing how Court framed ICWA as having primary aim). This is not the same as recognizing that, on some occasions, some interests might take priority. The Court's conflicting readings of ICWA in the two decisions are *not* tied to the separate provisions at stake in the cases, but are rather characterizations of ICWA more broadly.

113. But see infra Part III (offering reading of *Adoptive Couple* that resolves apparent tension). However, some might argue that the Court's reading is in fact at odds with ICWA itself—and thus incorrect. Though ICWA contains a provision that indicates a congressional aim to preserve Indian families, 25 U.S.C. § 1902, this goal is not framed as the primary aim, but just one of them. Congress was also concerned with protecting Indian tribes and their rights, as well as the preservation of Indian culture. See id. § 1901(4)–(5) (describing congressional findings). Congress thus, in the statute's text itself, announced its adoption of a policy "to protect the best interests of Indian children

B. *Reconsidering Biology's Role*

In addition to the apparently novel reading of ICWA's purposes, the Court offered a new reading of biology's place in the Act. As Part II.B.1 discusses, the Court ultimately found that the biological relationship between Biological Father and Baby Girl could not alone create a protectable parental right under ICWA.[114] Something more was needed. The Court's reading is at odds with prior interpretations of ICWA's applicability as premised on biology, a view adopted in particular by lower courts applying the existing-Indian-family exception. These courts created this exception based on an understanding of ICWA as fundamentally about biology. This exception is explored briefly in Part II.B.2.

1. Adoptive Couple*'s Minimization of Biology.* — *Adoptive Couple* represents a shift in ICWA jurisprudence from a notion of parenthood as rooted in biology to one requiring physical or legal custody, or, alternately, a social relationship beyond mere genetic relatedness. The Court's interpretations of § 1912(d) and (f) epitomize its view of biology's limited role.

As discussed in Part I.B.2, the Court found that in order for an unwed father to invoke ICWA's protections under § 1912(f), he must have, or have had, custody of the child.[115] Thus for the purposes of this provision, a father has a parental right protectable against termination only if he had custody of the child at some prior point. Since Biological Father had never had legal or physical custody of Baby Girl, he could not invoke § 1912(f).[116] In other words, § 1912(f) envisions parenthood as requiring custody. Biological Father did not meet this bar and therefore did not have a parental right protectable by § 1912(f).

The Court's reading of § 1912(d) similarly sets a bar for parenthood that Biological Father was unable to meet. Since Biological Father did not have some social or legal, nonbiological relationship with Baby Girl, he did not have a parental right protectable against termination.[117]

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and to promote the stability and security of Indian tribes and families." Id. § 1902. That the Court's characterization of ICWA conflicts with the statutory text may well be a valid critique of the Court's decision. But this Note argues that one can view the Court's decision as only reframing congressional aims and offering a new way to pursue them. See infra Part III (suggesting alternative way to interpret Court's decision). It does not suggest that the Court's reading is incorrect.

114. See supra notes 72–78 and accompanying text (detailing Court's reading of § 1912(f) as requiring custody and § 1912(d) as requiring some familial relationship based on something more than biology).

115. See *Adoptive Couple*, 133 S. Ct. at 2560 ("[Section] 1912(f) does not apply in cases where the Indian parent *never* had custody of the Indian child."); id at 2562 ("[W]hen . . . an Indian child . . . has never been in the Indian parent's legal or physical custody, there is no 'relationship' that would be 'discontinu[ed]' . . . . [Thus] § 1912(d) is inapplicable." (fourth alteration in original)).

116. Id. at 2562.

117. Id.

Under § 1912(d)'s framing of parenthood, as under § 1912(f), biology alone is insufficient to establish a protectable parental right. Something more than biology is needed, namely some established familial relationship.[118]

The Court suggested that custody or social relationships create parental rights—the right to invoke ICWA's protections, as well as rights encompassed by ICWA itself—that the status of biological parent does not itself confer. It is worth noting that the Court did not state that Biological Father failed to meet the definition of "parent" under ICWA.[119] The Court in fact assumed arguendo that Biological Father satisfied the definition of "parent" under § 1903(9).[120] Indeed, the Court referred to him as the biological *father* throughout the opinion.[121] The Court's apparent concession is not a concession, however. Instead, the Court only acknowledged that Biological Father had a *biological* relationship with Baby Girl, a fact that could not give him access to ICWA's substantive protections. *Adoptive Couple* thus presents a bifurcation of the *status* of parent (conferred by a biological relationship) and the *rights* of parents (conferred by custody or a social relationship).

Notably, the Court found that ICWA itself posits a view of parenthood as requiring more than biology. The statute's very text mandates this reading, according to the Court.[122] This view differs from numerous other readings of ICWA as privileging biology[123] in establishing relation-

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118. See id. (suggesting § 1912(d)'s applicability is based on threatened breakup of Indian family and, where no familial ties exist, no family unit would be broken, so § 1912(d) would not apply); supra notes 76–78 and accompanying text (characterizing § 1912(d) as requiring familial relationship).

119. See *Adoptive Couple*, 133 S. Ct. at 2560 ("We need not—and therefore do not—decide whether Biological Father is a 'parent.'"). Section 1903(9) presents a view of parenthood as potentially based on biology alone (though it recognizes that an adoptive parent can also satisfy the definition). See 25 U.S.C. § 1903(9) (2012) (defining "parent" as including "any biological parent . . . of an Indian child").

120. *Adoptive Couple*, 133 S. Ct. at 2560.

121. E.g., id. at 2558 (referring to Baby Girl's biological father as "Biological Father").

122. See id. at 2565 ("[T]he plain text of §§ 1912(f) and (d) makes clear that neither provision applies in the present context."); see also id. at 2561 (suggesting offered reading of § 1912(f) "comports with the statutory text" and "statutory text expressly highlights the primary problem"); id. at 2562 (claiming reading of § 1912(d) is "[c]onsistent with the statutory text"). The dissenting Justices, too, found the majority at least understood itself to be offering a reading of the provisions compelled by ICWA's text. See id. at 2572 (Sotomayor, J., dissenting) (describing majority as focusing on ICWA's text—though characterizing this reading as "textually backward" and as misunderstanding the statute).

123. One can argue that the Court's reading is at odds with several of ICWA's other provisions, particularly §§ 1903 and 1915, whose applicability is premised on biology. For instance, an "Indian child" is defined in part as a "*biological* child of a member of an Indian tribe." 25 U.S.C. § 1903(4) (emphasis added). Section 1903(4) thus expressly refers to biology as sufficient to establish that a child is Indian. Further, as one scholar argues, this provision also contemplates biology through the other criteria—"'a member of an

ships or conferring rights and protections. An examination of these previous interpretations sheds light on this disparity.

2. *The Existing-Indian-Family Exception.* — Several state courts have read biology as the linchpin of ICWA, an interpretation manifested by these courts' adoption of the existing-Indian-family exception.[124] The existing-Indian-family exception[125] is a judicially created exception that restricts ICWA's applicability to existing Indian families.[126] Courts created

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Indian tribe' or 'is eligible for membership'"—because tribal rules frequently require tribal "blood" (i.e., a biological relationship) for membership. Solangel Maldonado, Race, Culture, and Adoption: Lessons from *Mississippi Band of Choctaw Indians v. Holyfield*, 17 Colum. J. Gender & L. 1, 27 (2008) (quoting 25 U.S.C. § 1903(4)). Section 1915(a) gives preference in the adoption context (absent good cause to the contrary) to placement of a child with a member of the child's extended family, another member of the tribe, or another Indian family. 25 U.S.C. § 1915(a). Under one interpretation of this provision, biology—through a blood relationship, or on the basis of being Indian (in other words, having "Indian blood")—can give rise to a future parental right.

According to Professor Maldonado, "By preferring an 'Indian family' of any tribe over all non-Indian families, cognizant that tribal blood is a prerequisite to becoming an 'Indian family,' ICWA suggests that biology, rather than social, legal, or political identification, makes a person Native American." Maldonado, supra, at 27; see Carole Goldberg, Descent into Race, 49 UCLA L. Rev. 1373, 1381–82 (2002) (discussing ICWA's definition of "Indian child," as well as § 1915 "all-Indian" placement preference). Professor Maldonado's primary claim is that ICWA bolsters a biological conception of *race*, but one could take her argument a step further and read some of ICWA's provisions as offering a conception of familial rights as derived from biology by way of race. However, that *some* of ICWA's provisions are applicable on the basis of biology alone does not undermine the Court's claim that two separate provisions are not. The Court did not purport to offer a reading of *all* of ICWA's provisions as requiring something more than biology, but instead suggested that in one particular context (i.e., that of establishing that an unwed father has a protectable parental right), Congress saw fit to require something beyond biology.

124. Courts disagree about the continued applicability of this exception. Numerous courts have rejected the exception, e.g., In re A.J.S., 204 P.3d 543, 548–49 (Kan. 2009), but some continue to apply it, e.g., In re Santos Y., 112 Cal. Rptr. 2d 692, 726–27 (Ct. App. 2001); In re K.L.D.R., No. M2008-00897-COA-R3-PT, 2009 WL 1138130, at *3–*4 (Tenn. Ct. App. Apr. 27, 2009). For criticism of this exception, see Barbara Ann Atwood, Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance, 51 Emory L.J. 587, 625–42 (2002) (detailing arguments provided against existing-Indian-family exception); Toni Hahn Davis, The Existing Indian Family Exception to the Indian Child Welfare Act, 69 N.D. L. Rev. 465 (1993) (examining exception and suggesting courts should stop applying it); Wendy Therese Parnell, Comment, The Existing Indian Family Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act, 34 San Diego L. Rev. 381 (1997) (providing overview and critique of existing-Indian-family exception); Samuel Prim, Note, The Indian Child Welfare Act and the Existing Indian Family Exception: Rerouting the Trail of Tears?, 24 Law & Psychol. Rev. 115 (2000) (urging federal intervention against courts' use of exception).

125. The present discussion of the exception is not intended to suggest that courts have uniformly adopted it. See supra note 124 (indicating there is disagreement among courts as to propriety of applying exception). Rather, this section offers a reading of ICWA that some courts have accepted and that is at odds with the reading offered by the *Adoptive Couple* Court.

126. Davis, supra note 124, at 476.

the exception in part because of their concerns about ICWA's constitutionality.[127] These concerns stemmed from a reading of the statute's text as indicating ICWA could potentially apply on the basis of genetic heritage—i.e., biology—alone.[128]

Under the exception, ICWA is inapplicable if a biologically Indian child is born into a socially or culturally non-Indian family.[129] Thus, in a case in which a child is "5/16ths . . . Indian, [but] ha[d] never been removed from an Indian family and . . . would probably never become a part of . . . any . . . Indian family," ICWA would not govern.[130] Similarly, if an Indian child were raised solely by her non-Indian mother and had no or minimal interaction with an Indian tribe, a court applying the exception would likely find the child ineligible for ICWA's protections.[131] In jurisdictions that continue to apply the existing-Indian-family exception, before courts will apply ICWA, they require that the child have some social or cultural ties to a tribe, or be part of an Indian family with such ties.[132]

This requirement seems at first to be the same as that required under *Adoptive Couple*, but there is a key difference between the two. Specifically, the Court in *Adoptive Couple* found that ICWA itself, at least for

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127. See, e.g., *Santos Y.*, 112 Cal. Rptr. 2d at 727 (finding violation of Equal Protection Clause where ICWA's application is based only on "child's genetic heritage" and when child has no "social, cultural, [or] political relationship[]" with tribe); In re Bridget R., 49 Cal. Rptr. 2d 507, 522–30 (Ct. App. 1996) (finding ICWA's application under certain circumstances could pose constitutional problems under Due Process and Equal Protection Clauses and thus narrowing scope of its potential applicability is necessary); see also infra notes 142–145 and accompanying text (exploring courts' concerns about ICWA's constitutionality and adoption of existing-Indian-family exception to resolve these concerns).

128. E.g., *Bridget R.*, 49 Cal. Rptr. 2d at 527–28.

129. Davis, supra note 124, at 476.

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

131. See Davis, supra note 124, at 479–81 (describing scenario resembling one in *Adoptive Couple* as typical set of facts on which courts applying existing-Indian-family exception have denied ICWA's applicability, in part because children in these scenarios "[have] few ties to [their] Indian heritage" (internal quotation mark omitted)); see also, e.g., Claymore v. Serr, 405 N.W.2d 650, 654 (S.D. 1987) (finding ICWA inapplicable in such situation).

132. See, e.g., S.A. v. E.J.P., 571 So. 2d 1187, 1188–90 (Ala. Civ. App. 1990) (holding ICWA inapplicable where illegitimate child had minimal contact with Indian father and reservation, "was never a part of an Indian family environment[,] . . . ha[d] never been a member of an Indian family, ha[d] never lived in an Indian home, and ha[d] never experienced the Indian social and cultural world"); In re Adoption of Crews, 825 P.2d 305, 310 (Wash. 1992) (finding ICWA inapplicable because no Indian family unit existed since child had never lived on Choctaw reservation, father had no ties to Indian tribe or community, and there was no indication child would grow up acquainted with her "Indian heritage"); see also supra note 127 (describing several other courts' application of existing-Indian-family exception).

the purposes of § 1912(d) and (f), demands something beyond biology.[133] ICWA, under the Supreme Court's reading, does not privilege biology. Courts applying the existing-Indian-family exception, in contrast, read ICWA as potentially premised only on biology and thus have created a judicial mechanism for limiting ICWA's scope. Under these other courts' view, ICWA, *as the statute is written*, is sometimes applicable solely on the basis of a biological relationship.[134] This reading of ICWA's text is fundamentally at odds with that of the Supreme Court in *Adoptive Couple*.

One might argue that the two requirements are functionally equivalent. In *Adoptive Couple*, the Court found a provision inapplicable because there was no intact Indian family to preserve. Courts applying the existing-Indian-family exception find ICWA's provisions inapplicable when a child is not part of an existing Indian family. Further, under both readings, regardless of whether the statute's text or a court requires it, something more than biology is necessary for ICWA to apply.

But a close reading of state courts' application of this exception and the Court's recent decision reveals that the two approaches are not the same. State courts that adopt the existing-Indian-family exception suggest that ICWA is *entirely* inapplicable in instances in which there is no existing Indian family.[135] In situations like that presented in *Adoptive Couple*, courts applying the existing-Indian-family exception have found all of ICWA's provisions inapplicable without a showing of some other cultural or social tie.[136] The Supreme Court, on the other hand, did not find ICWA inapplicable in *Adoptive Couple*, but rather found that Biological Father could not invoke two of its provisions.[137] The Court noted that Baby Girl satisfied the statutory definition of "Indian child."[138] Baby Girl is the biological daughter of a member of the Cherokee Nation, and, based on this biological relationship, she too was eligible for membership in the Cherokee Nation.[139] A biological relationship was the

133. See supra Part II.B.2 (examining Court's interpretation of § 1912(d) and (f)).

134. See supra notes 124–132 and accompanying text (discussing lower courts' concerns regarding ICWA).

135. See, e.g., *S.A.*, 571 So. 2d at 1190 ("Congress did not intend to 'dictate that an illegitimate infant who has never been a member of an Indian home or culture . . . should be . . . placed in an Indian environment over the express objections of its non-Indian mother.' *The ICWA is not applicable* to [such] facts . . . ." (emphasis added) (quoting *Baby Boy L.*, 643 P.2d at 175)); *Claymore*, 405 N.W.2d at 654 ("[The child] may have been an 'Indian child' by virtue of her biological father . . . [but] it is clear the child was not removed from an existing Indian family . . . [and] under the policy of the Act, there is no reason to find exclusive tribal jurisdiction in this matter.").

136. See supra note 131 and accompanying text (describing typical approach under exception for such facts).

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

138. Id. at 2557 n.1 (citing 25 U.S.C. § 1903(4)(b) (2012)).

139. Id.

sole basis of this determination and of ICWA's resultant applicability,[140] under the Court's understanding. The Supreme Court's reading would still allow for Baby Girl to access ICWA's protections, while the lower courts' stricter understanding would not.

The existing-Indian-family exception has come under heavy criticism, in part because it narrows the scope of ICWA's potential applicability.[141] One rationale offered for courts' application of the existing-Indian-family exception, however, is "that applying ICWA to children of tribal members who maintain no significant . . . ties to a tribe would mean that the sole basis for applying ICWA 'is the child's genetic [i.e., biological] heritage—in other words, race'—which would trigger strict scrutiny under the Equal Protection Clause."[142] Through narrowing ICWA's scope by conditioning its application on a showing of social or cultural ties, these courts try to resolve the perceived constitutional infirmities of ICWA. But in doing so, they offer a reading of ICWA as being applicable (absent judicial narrowing) on a finding of biological ties alone, in part through a conception of race as based on biology.[143] Professor Solangel

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140. See id. (finding ICWA applicable since Baby Girl satisfied statutory definition of "Indian child"). The Court implied § 1915(a) might have applied had an eligible party come forward seeking adoption. (Biological Father did not invoke this provision, as he only sought to prevent termination of his parental rights; he did not want to adopt Baby Girl.) Id. at 2564. The Court did not condition applicability of ICWA on a showing of cultural, social, or political ties to the tribe, unlike courts that apply the judicial exception and that thus essentially create "a second litmus test for 'Indian-ness'" before finding ICWA applies, Davis, supra note 124, at 489.

141. See supra notes 124–126 and accompanying text (discussing existing-Indian-family exception and citing scholars who have criticized it).

142. Maldonado, supra note 123, at 30 (quoting In re Bridget R., 49 Cal. Rptr. 2d 507, 527 (Ct. App. 1996)); see Atwood, supra note 124, at 625–32 (discussing origins of existing-Indian-family exception, though ultimately disagreeing with concerns about ICWA's constitutionality); Goldberg, supra note 123, at 1382–83 ("Judicial critics have viewed ICWA as a whole as a racialized measure, focusing particularly on the fact that it applies to 'Indian children' regardless of whether they are born into an 'existing Indian family.' . . . To justify their defiance, these courts invoke, among other constitutional provisions, the equal protection doctrine."). This Note does not mean to suggest that courts' understanding of ICWA and their decision to narrow its applicability is justified, but rather identifies one possible explanation for why these courts have chosen to accept the exception.

143. Though this section indicates that some courts understand race as based on biology, this Note does not mean to suggest that this is the correct, most common, or best way to conceptualize race. Race is, after all, a complex and often contingent concept, and to understand it as only based on biology would oversimplify its complexities and the process of its construction. See, e.g., Addie C. Rolnick, The Promise of *Mancari*: Indian Political Rights as Racial Remedy, 86 N.Y.U. L. Rev. 958, 1006–15 (2011) (suggesting race is product of complex process of "racialization," not merely ancestry or biology). However, though modern scholarship has generally moved toward an understanding of race as a sociopolitical construct, instead of something derived from ancestry, id., some courts still understand race as potentially, or at least in part, based on biology. Their adoption of the existing-Indian-family exception stems from this view. See, e.g., *Bridget R.*, 49 Cal. Rptr. 2d

Maldonado suggests one could understand the courts as "reject[ing] a definition of Indian identity based purely on ancestry . . . and defin[ing] Indian identity as more than just genetic heritage."[144] According to Professor Maldonado, "[C]ourts applying the existing Indian family exception treat Indian identity as a social and political construct, rather than as a biologically determined issue of fact."[145] Central to this reading, however, is an understanding of ICWA as based on biology.

C. *The Puzzle Presented by the Court's Decision*

The Supreme Court's decision in *Adoptive Couple* seems to be in tension with prior cases and with existing interpretations of ICWA—including its own previous interpretation of the statute in *Holyfield*. How to reconcile *Adoptive Couple* with current Indian law is thus difficult to determine.

If the apparent discrepancy remains unresolved, the Court could be viewed as legislating from the bench, as the dissenting Justices in *Adoptive Couple* suggest.[146] Further, the Supreme Court may be jeopardizing its own integrity. *Holyfield*, as already noted, is the only other case in which the Court has examined ICWA, but the reading of ICWA it offers appears to be irreconcilable with that suggested in *Adoptive Couple*.[147] These discrepancies could prove challenging for lower courts going forward, as how the two decisions can both be implemented is unclear. Should tribal interests always be subordinated to familial interests, as *Adoptive Couple* indicates, or may they sometimes be protected even if at the expense of familial interests, as *Holyfield* suggests?

Further, what effect, if any, does the Court's decision have on the existing-Indian-family exception? The two readings, as argued above, appear to be at odds with one another.[148] Yet the Court in *Adoptive Couple* at no point explicitly addresses the exception. The status of the exception thus remains uncertain.

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at 527–28 (finding, without judicial narrowing of ICWA's applicability, ICWA might apply on basis of "*child's genetic heritage—in other words, race*" alone (emphasis added)); see also Maldonado, supra note 123, at 18–27 (examining issue of whether Indian race is biological reality or socio-political construct and arguing ICWA promotes former view).

144. Maldonado, supra note 123, at 31.

145. Id. But Professor Maldonado also points to the issue of state courts essentially deciding what should fulfill tribal-membership criteria. See id. ("One has to question . . . whether state courts are better suited than the tribes to determine an individual's racial or ethnic identity, even if the tribe's determination is based on biological notions of race.").

146. See Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2583–86 (2013) (Sotomayor, J., dissenting) ("We may not, however, give effect only to congressional goals we designate 'primary' while casting aside others classed as 'secondary' . . . .").

147. See supra Part II.A (describing this apparent irreconcilability).

148. See supra Part II.B (laying out tension between Court's reading and existing-Indian-family exception).

Part III suggests a way of reading *Adoptive Couple* that potentially resolves these discrepancies and offers some clarity for courts going forward. It does so by looking to an area of law outside of the context of federal Indian law: immigration law.

III. READING *ADOPTIVE COUPLE* AS ADOPTING BIOLOGY PLUS

Part II identifies an apparent tension in ICWA jurisprudence resulting from the Supreme Court's decision in *Adoptive Couple* and argues that a resolution of this tension is necessary. This Part contends that looking outside of the context of federal Indian law to an apparently unrelated area—immigration law—resolves the tension. But more significantly, this reading leads to broader insights about the potential role of the Indian family, specifically by suggesting that the Indian family serves the important function of transmitting tribal membership, in its cultural, social, and political sense.

Part III argues that the Court's decision in *Adoptive Couple* is in keeping with the Court's broader unwed-father jurisprudence, particularly as it developed in the citizenship-transmission cases—those cases involving challenges brought by unwed fathers against the INA. Reading through this lens reveals that the Court in *Adoptive Couple* embraces a standard that it had already endorsed outside of the context of Indian law: "biology plus."[149] This standard in the citizenship-transmission cases was based in part on an understanding of family as a means of transmitting the social and political aspects of citizenship. Injecting this standard into the context of ICWA and federal Indian law reveals new insights about the role of the Indian family in transmitting tribal membership.

Part III.A begins by briefly outlining what the biology-plus standard is. It focuses in particular on the standard's role in the citizenship-transmission cases and the resultant reconceptualization of the family's role in the context of immigration law. Part III.B then explains that *Adoptive Couple* can be understood as importing the biology-plus standard into the context of ICWA and argues that this application resolves the tension identified in Part II.

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149. See infra Part III.A (detailing biology-plus standard). As a note, the Court does not *explicitly* articulate this standard. See, e.g., Mark Strasser, The Often Illusory Protections of "Biology Plus:" On the Supreme Court's Parental Rights Jurisprudence, 13 Tex. J. C.L. & C.R. 31, 81–82 (2007) (finding Court has implied use of biology-plus standard). Instead, scholars have adopted this term in describing the set of requirements that unwed fathers are asked to satisfy in the unwed-father cases (or the requirements imposed by the laws being challenged in the unwed-father cases)—biology *plus* something more. See, e.g., Laura Oren, The Paradox of Unmarried Fathers and the Constitution: Biology "Plus" Defines Relationships; Biology Alone Safeguards the Public Fisc, 11 Wm. & Mary J. Women & L. 47, 48 (2004) (using term biology plus to describe requirement of something more than biology).

A. *Biology Plus and the Citizenship-Transmission Cases*

This Note argues that *Adoptive Couple* signifies an injection of the biology-plus standard into the context of ICWA and federal Indian law. *Adoptive Couple* is therefore in keeping with the Court's broader unwed-father jurisprudence, in which the biology-plus standard has already been adopted. However, to understand the possible implications of importing biology plus into the context of Indian law, it proves useful to first examine the role of biology plus in the citizenship-transmission cases.

Under the biology-plus standard, a parent must show a biological relationship—the "biology" component of the standard—as well as a social or legal, nonbiological relationship—the "plus" component—to establish a protectable parental right. Early cases addressing this standard involved constitutional challenges brought against state laws by unwed fathers.[150] The success of these challenges depended on the father's ability to establish a constitutionally protectable right.[151] In order for an unwed

150. The basic model for the unwed-father cases is that an unwed father argues that a state law violates the Fourteenth Amendment in part because it treats unwed fathers differently from unwed mothers or married fathers, usually by requiring that the unwed father take some extra step to legitimate the parent-child relationship. See, e.g., Caban v. Mohammed, 441 U.S. 380, 385–87, 389–92 (1979) (finding New York statute allowing unwed father—even "when his parental relationship is substantial"—to prevent termination of parental rights only if he showed adoption not in best interests of child was unconstitutional because it was gender-based distinction based on stereotypical presumption); Quilloin v. Walcott, 434 U.S. 246, 248–49, 253 (1978) (addressing equal-protection challenge to Georgia adoption law precluding unwed father from vetoing adoption of illegitimate child unless he legitimated their relationship, but not imposing similar requirement on married fathers or on mothers); Stanley v. Illinois, 405 U.S. 645, 646 (1972) (detailing equal-protection challenge to Illinois law under which children of unwed fathers, but not married fathers, became wards of state if mother died, even if father not shown to be unfit parent).

151. Deborah L. Forman, Unwed Fathers and Adoption: A Theoretical Analysis in Context, 72 Tex. L. Rev. 967, 975 (1994) (describing equal-protection challenge in which Court treated biological relationship as only providing father with opportunity to develop relationship with child and as only constitutionally protected if "grasp[ed]"). The basis for this requirement, according to the Court, is that there is a "clear distinction between a mere biological relationship and an actual relationship of parental responsibility." Lehr v. Robertson, 463 U.S. 248, 259–60 (1983). A biological familial relationship alone is not protected because

> the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children . . . as well as from the fact of blood relationship.

Id. at 261 (alterations in original) (quoting Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816, 844 (1977)) (internal quotation marks omitted). While biology plays a role in establishing familial relationships, something *beyond* biology, such as a social bond, is necessary for the relationship to deserve protection against infringement, in society's estimation. Without this "something more"—the "plus" component of the

father to establish this protectable parental right,[152] he must demonstrate both a biological relationship with his child (i.e., paternity) *and* a meaningful parent–child relationship based on something beyond mere blood relation.[153]

The standard has also emerged in the context of the INA in the set of cases related to the acquisition of American citizenship by children born abroad out of wedlock. The applicability of biology plus to immigration law is based on an understanding of the family as playing a key role in citizenship acquisition—the family forges important cultural, social, and political ties between the state and potential citizen. Part III.A.1 examines the role biology plus plays in the citizenship-transmission cases. Part III.A.2 then explores the basis of the standard's applicability in immigration law, namely a view of family as transmitting citizenship.

1. *The Citizenship-Transmission Cases.* — The citizenship-transmission cases are those cases involving challenges brought against the INA[154] by

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biology-plus standard—a relationship is not of the kind deserving constitutional protection.

152. Michael H. v. Gerald D., 491 U.S. 110 (1989), offers some discussion of *which* parental rights might qualify for protection once one establishes a relationship beyond biology:

> [I]f [one] were successful in being declared the father, other rights would follow—most importantly, the right to be considered as the parent who should have custody, a status which 'embrace[s] the sum of parental rights with respect to the rearing of a child, including the child's care; the right to the child's services and earnings; the right to direct the child's activities; the right to make decisions regarding the control, education, and health of the child; and the right, as well as the duty, to prepare the child for additional obligations, which includes the teaching of moral standards, religious beliefs, and elements of good citizenship.' All parental rights, including visitation, [are] automatically denied by denying [one's] status as the father.

Id. at 118–19 (citations omitted). The Court in *Michael H.*, as indicated by this passage, identified custody as the most important parental right and even suggested that it may be the means through which one can gain numerous other parental rights—and obligations.

153. See Forman, supra note 151, at 975 ("The biological connection merely provides the man with a unique 'opportunity' to develop a relationship with his child. This opportunity interest becomes a fully protected constitutional interest only if the father grasps it by developing an actual relationship with the child."). The *Lehr* Court suggested one mechanism for establishing the "plus" component is behaving like a parent. "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection . . . ." *Lehr*, 463 U.S. at 261 (quoting *Caban*, 441 U.S. at 392). It is at this point that a father can be described as truly acting like a father because this is when the father accepts the obligations accompanying the status of parent. Id. When this occurs, an unwed father has parental rights protectable against arbitrary infringement by the state. Id. at 260. Behaving as a parent may include having a custodial, personal, or financial relationship with the child, so long as it involves something beyond the biological relationship alone. Id. at 267–68.

154. Since these cases involve challenges to the INA, they are decided under "judicial deference required by immigration legislation," Antognini, supra note 17, at 414, as

unwed fathers. In these cases,[155] the Court explored how children acquire citizenship, both in its legal and social sense, and suggested that family relationships that satisfy the biology-plus standard play a key role in this process.

At issue in the citizenship-transmission cases was the asymmetrical treatment of unwed citizen mothers and unwed citizen fathers under the INA. A child born in the United States (and subject to its jurisdiction) is automatically a citizen.[156] However, different rules apply when the child of an unwed citizen parent is born abroad.[157] For the latter situation, the INA sets forth particular requirements the unwed parent must satisfy

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Congress has plenary power in this area, see, e.g., Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("[I]t is important to underscore the limited scope of judicial inquiry into immigration legislation. This Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." (quoting Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909))); Kleindienst v. Mandel, 408 U.S. 753, 765–66 (1972) ("The Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'" (quoting Boutilier v. INS, 387 U.S. 118, 123 (1967))); cf. Stephen H. Legomsky, Immigration Law and the Principle of Plenary Congressional Power, 1984 Sup. Ct. Rev. 255, 303–07 (predicting Supreme Court will reconsider its deferential stance in matters related to immigration law).

155. Miller v. Albright, 523 U.S. 420 (1998), and Nguyen v. INS, 533 U.S. 53 (2001), are two key decisions in this line of cases, both involving challenges to 8 U.S.C. § 1409(a). *Nguyen*, 533 U.S. at 58. *Miller*, the earlier decision, did not generate a majority opinion. See *Miller*, 523 U.S. at 423.

In another case within this line of decisions, *Fiallo v. Bell*, the Court upheld § 101(b)(2) of the INA as constitutional. 430 U.S. at 799–800. Section 101(b)(2) excluded the unwed biological citizen-father from the definition of parent; thus, the preferential immigration status given to those who satisfied the parent–child relationship was not extended to unwed fathers, as they could not meet the statutory definition of parent. Id. at 789. The Court deferred to the legislature in upholding the provision, finding Congress may have found that the disparate treatment was warranted, "perhaps because of a perceived absence in most cases of close family ties as well as a concern with the serious problems of proof that usually lurk in paternity determinations." Id. at 799.

In *United States v. Flores-Villar*, the Ninth Circuit found that 8 U.S.C. § 1409 was constitutional. 536 F.3d 990, 993 (9th Cir. 2008). The court suggested that there might be a further possible governmental objective behind the INA, namely "avoiding statelessness," which the court described as "a deplored condition with potentially 'disastrous consequences.'" Id. at 996 (quoting Trop v. Dulles, 356 U.S. 86, 102 (1958)). The court explained, "[I]llegitimate children are more likely to be 'stateless' at birth . . . . [I]f the U.S. citizen mother is not a dual national, and the illegitimate child is born in a country that does not recognize citizenship by . . . place of birth[] alone, the child can acquire no citizenship other than his mother's . . . ." Id. (quoting Runnett v. Shultz, 901 F.2d 782, 787 (9th Cir. 1990)).

156. U.S. Const. amend. XIV, § 1 ("All persons born . . . in the United States . . . and subject to the jurisdiction thereof, are citizens of the United States . . . ."); 8 U.S.C. § 1401(a) (2012).

157. See 8 U.S.C. § 1409 (setting forth requirements when child is born abroad and out of wedlock).

before the child can acquire United States citizenship. Under the INA, in addition to fulfilling several other requirements, an unwed citizen father must provide formal proof of paternity before the child reaches the age of eighteen.[158] In contrast, an unwed citizen mother need only "[have] previously been physically present in the United States or one of its outlying possessions for a continuous period of one year,"[159] a substantially lighter burden than that of an unwed citizen father.[160]

In *Nguyen*, the Court upheld § 1409(a) of the INA as constitutional.[161] The Court found that Congress hoped to achieve two

158. Id. § 1409(a)(4). An unwed father can satisfy this proof requirement through legitimation; through his sworn, written acknowledgement of the relationship; or through adjudication before a competent court. Id.

159. Id. § 1409(c).

160. Laura Weinrib, Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in *Nguyen v. INS*, 12 Colum. J. Gender & L. 222, 223 (2003). According to Justice Stevens, joined by Chief Justice Rehnquist, in *Miller*, the conduct required of an unwed father to transmit citizenship is unlike that required of an unwed mother because of differences based on gender and sex. Justice Stevens found that "[t]he substantive conduct of the unmarried citizen mother that qualifies her child for citizenship is completed at the moment of birth; the relevant conduct of the unmarried citizen father or his child may occur at any time within 18 years thereafter." 523 U.S. at 435 (opinion of Stevens, J.). The proof requirement furthers the important governmental objective of ensuring that there is a blood relationship between the citizen parent and potential citizen. Id. at 436. Since the mother gives birth, the blood relationship between mother and child is "immediately obvious and is typically established by hospital records and birth certificates." Id. Because maternity is "obvious," id., there is no formal proof requirement for unwed mothers, but merely a residency requirement. See 8 U.S.C. § 1409(c) (requiring unwed citizen mother demonstrate only one year of continuous U.S. residency prior to child's birth to transmit citizenship); see also Weinrib, supra, at 223 (finding unwed mother need only satisfy residency requirement under § 1409(c) while unwed fathers must satisfy "far more burdensome" requirements).

But the blood relationship to an unwed father is not as easy to establish, so the father must provide formal proof. See *Miller*, 523 U.S. at 436–38 (opinion of Stevens, J.) ("[T]he relationship to the unmarried father may often be undisclosed and unrecorded in any contemporary public record. Thus, the [proof] requirement [for unwed fathers] . . . produces the rough equivalent of the documentation that is already available to evidence the blood relationship between the mother and the child."); see also *Fiallo*, 430 U.S. at 799 (discussing "problems of proof" as one basis for Congress's policy). Moreover, the requirement serves the further purpose of "encouraging the development of a healthy [social] relationship between the citizen parent and the child while the child is a minor; and the related interest in fostering ties between the foreign-born child and the United States." *Miller*, 523 U.S. at 438 (opinion of Stevens, J.).

161. Nguyen v. INS, 533 U.S. 53, 58–59 (2001). *Nguyen* involved a challenge brought to the INA by petitioner Tuan Anh Nguyen. Id. at 57. Nguyen was born to unwed parents in Vietnam, but he moved to the United States when he was five years old. Id. His father was an American citizen, but his mother was a Vietnamese citizen. Id. When Nguyen was twenty-two years old, he was sentenced to prison by a Texas court after he pled guilty to two counts of sexual assault of a child. Id. The INS initiated deportation proceedings against Nguyen shortly thereafter. Id. At his deportation hearing, Nguyen testified that he was a Vietnamese citizen, though he later argued that he was a U.S. citizen. Id. He was eventually deported. Id. Nguyen appealed this decision to the Board of Immigration

aims through the INA provision: proving that the parent and child are biologically related and ensuring that the parent and child also have a nonbiological, social relationship. The first of these purposes—addressing the problem of proof of paternity[162]—essentially forms the "biology" component of the biology-plus standard that the Court itself looked for in earlier cases.[163] The "plus" component in the INA context stems from Congress's aim to ensure that there is a social relationship between parent and child—"some demonstrated opportunity or potential to develop not just a relationship that is recognized . . . by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States."[164] The Court found that the "very event of birth" provided the mother an opportunity to develop a meaningful relationship with her child, but, due to biological differences, the same was not true for biological fathers.[165] Congress was within its authority to require proof of an opportunity to develop a meaningful relationship between citizen parent and child before "commit[ting] this country to embracing a child as a citizen entitled as of birth to the full protection of the United States, to the absolute right to enter its borders, and to full participation in the political process."[166]

2. *Politicizing the Family.* — Under the view endorsed in the citizenship-transmission cases, in the immigration context, biology plus offers a conception of "the family" as serving a political role. Specifically, the family functions as an intermediary between the potential citizen (i.e., the child) and the state by transmitting cultural ties and national loyalty to the child. Since biology plus requires some social relationship

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Appeals, claiming that he was a U.S. citizen. Id. His appeal was dismissed, however, because he had not established compliance with 8 U.S.C. § 1409(a). Id. Nguyen and his father then appealed the Board's decision to the Fifth Circuit. Id. at 58. They claimed that § 1409 violated the Equal Protection Clause. Id.

162. See id. at 62–63 ("The mother's status is documented . . . by the birth certificate or hospital records and the witnesses who attest to her having given birth . . . . [But] the father . . . need not be present at the birth. If he is present . . . that circumstance is not incontrovertible proof of fatherhood.").

163. See supra notes 150–153 and accompanying text (discussing requirements needed to establish constitutionally protectable interest).

164. *Nguyen*, 533 U.S. at 64–65.

165. Id. at 65. The Court wrote:

> In the case of a citizen mother and a child born overseas, the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth, an event so often critical to our constitutional and statutory understandings of citizenship. The mother knows that the child is in being and is hers and has an initial point of contact with him. There is at least an opportunity for mother and child to develop a real, meaningful relationship.
>
> The same opportunity does not result from the event of birth, as a matter of biological inevitability, in the case of the unwed father.

Id.

166. Id. at 67.

between parent and child, the parent has an opportunity to impart to the child the values and traditions of American citizenship.[167] In other words, in addition to conferring legal citizenship, by way of the biology-plus standard, the INA ensures that a parent has a chance to transmit as well the substantive aspects of American citizenship to the child, preparing the child for eventual membership in the American polity.

For mothers and their children, the Court found, biology ensures social bonding,[168] and thus the INA does not impose a formal proof requirement on unwed mothers.[169] Transmission takes place at birth. The same is not true for fathers, however, who need not be present at birth and may not even know of the child's conception.[170] By requiring at least minimal contact between the unwed father and his child through the formal proof requirement, the INA guarantees that the two at least begin to form a relationship,[171] which is essential to cultivating political relationships between state and citizen.[172]

To bond with one's parent is in a way to bond with the state, as a child learns what it means to be a citizen of the state in part through familial relationships. The Court thus proposed a view of familial relationships as being a conduit for political relationships and to literal and symbolic membership in the broader political family.

B. *Solving the Puzzle of Adoptive Couple*

Though the Court's decision in *Adoptive Couple* appears to be at odds with previous interpretations of ICWA, the decision accords with the Court's cases outside of the context of federal Indian law. This is because

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167. See Anne C. Dailey, Federalism and Families, 143 U. Pa. L. Rev. 1787, 1834 (1995) (referring to view of parents as "provid[ing] . . . instruction in the art of political citizenship" and to "family's essential role in inculcating the civic virtue required of citizenship in a republican state"); Linda C. McClain, The Domain of Civic Virtue in a Good Society: Families, Schools, and Sex Equality, 69 Fordham L. Rev. 1617, 1621 (2001) ("[T]he idea of families as 'seedbeds of civic virtue' . . . helpfully connotes that families, in a good society, serve as places or sources of growth and development of capacities and virtues."). The Supreme Court itself has elsewhere suggested this understanding of family and its role sits at the very foundation of the American political and social system. See Moore v. City of East Cleveland, 431 U.S. 494, 503–04 (1977) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.").

168. See supra note 165 and accompanying text (describing Court's view of mother's giving birth as resulting in bonding between mother and child and thus alone ensuring social relationship).

169. See supra notes 165–166 and accompanying text (discussing Court's view regarding fathers in this context).

170. *Nguyen*, 533 U.S. at 66.

171. Id. at 66–67.

172. Id. at 65.

Adoptive Couple borrowed the Court's biology-plus standard, particularly as it was applied in the citizenship-transmission cases.

In its biology-plus cases, the Court emphasized the importance of a relationship beyond that of mere biological relatedness for the formation of protectable parental rights.[173] ICWA's protections, under the Court's reading in *Adoptive Couple*, are similar to constitutional protections as the Court understood them in its earlier cases. An unwed father's biological relationship to his child is not alone sufficient for his parental interests to gain the strong protections offered by 25 U.S.C. § 1912(d) or (f),[174] just as outside the context of ICWA a biological relationship is not alone enough for an unwed father to gain a parental right protectable by the Constitution. Only by showing biology *in addition to* something else does one have a protectable parental interest in the context of constitutional law.[175] As the Court read ICWA, the same is true to gain access to ICWA's protections—at least under two of its provisions.[176]

The Court's decision in *Adoptive Couple* particularly resembles that in *Nguyen*. In both, the applicability of a particular statutory provision depended on a showing of biology *and* some further relationship.[177] Though the constitutionality, and not the applicability, of the provision was the central issue in *Nguyen*,[178] the foundations of the Court's decisions in both *Nguyen* and *Adoptive Couple* share an underlying similarity: namely, the Court's understanding of family as an essential component of the statutory provisions at issue.[179] The biology-plus requirement, in

173. See supra notes 150–153 and accompanying text (summarizing biology-plus standard).

174. See supra Part II.B.1 (examining Court's reading these provisions as requiring more than biology).

175. See supra notes 150–153 and accompanying text (describing how to establish protectable right).

176. One might argue that this definition is implicit through the definition of "parent" under ICWA, since the definition excludes an "unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9) (2012). But the concern in this exclusion is about verification of *paternity*—the existence of a blood, or biological, relationship. In *Adoptive Couple*, paternity *had* been acknowledged and established. Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2559 (2013). The central issue was not whether Biological Father satisfied the § 1903(9) definition of parent, but rather whether he could invoke ICWA's substantive protections. See id. at 2560 ("[A]ssuming for the sake of argument that [Biological Father] is a 'parent,' we hold that neither § 1912(f) nor § 1912(d) bars the termination of his parental rights."). And biology alone does not suffice for one to gain access to these protections. See supra Part II.B.1 (discussing requirement of more than biology).

177. Compare *Nguyen*, 533 U.S. at 64–65 (detailing biology-plus requirement), with *Adoptive Couple*, 133 S. Ct. at 2562 (describing requirement of social or legal, nonbiological relationship).

178. *Nguyen*, 533 U.S. at 58–59.

179. Compare supra Part III.A.2 (describing Court's view of familial relationships as fostering political ties—the central aim of the provision at issue—and key role of biology plus in ensuring this), with supra Part II.A.1 (discussing Court's understanding of ICWA's

turn, plays a key role in establishing the familial relationship central to each provision.

This section explores the implications of these similarities. In particular, it contends that reading *Adoptive Couple* through the lens of *Nguyen* resolves the tensions identified in Part II. Part III.B.1 examines how this reading resolves the tension resulting from the Court's reading of ICWA's aims, and Part III.B.2 examines how it resolves the tension related to the existing-Indian-family exception.

1. *Reimagining the Indian Family.* — In *Adoptive Couple*, the Court characterized ICWA as having the *primary* aim of preventing the dissolution of the intact Indian family.[180] But this understanding is at odds with the *Holyfield* Court's previous characterization of ICWA as serving the interests of Indian tribes, individuals, *and* families.[181] No single interest is presumptively more important than the others.[182] The Court's previous decision in *Holyfield*, however, is seemingly unaffected by the Court's decision in *Adoptive Couple*. Yet the Court offered no explanation for this apparent divergence and provided no guidance for courts going forward, which are left to grapple with two inconsistent understandings of ICWA. What should courts make of this discrepancy? Reading *Adoptive Couple* alongside *Nguyen* supplies one possible answer.

Courts should interpret *Adoptive Couple* as an application of the *Nguyen* Court's understanding of family as fostering political and cultural ties between potential citizen and state. Under this reading of *Adoptive Couple*, the decision can be understood as both consistent with the Court's decision in *Holyfield* and explaining recent developments in the Court's jurisprudence outside of the context of ICWA.

Nguyen offers a view of family relationships as strengthening ties between citizen and state, and, through this, strengthening the state itself. Biology plus signifies an acknowledgment of the centrality of familial ties to the acquisition of citizenship and of the limits of biology alone in transmitting the social and cultural aspects of citizenship.[183] Further, it

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primary aim of preserving intact Indian family, an aim furthered by provisions at issue, as well as centrality of something beyond biology in establishing this family).

180. See supra Part II.A.1 (discussing *Adoptive Couple* Court's interpretation of ICWA's primary aim).

181. See supra Part II.A.2 (examining previous interpretations of ICWA's aims, including that of *Holyfield* Court).

182. See supra notes 103–107 and accompanying text (describing *Holyfield* as not creating hierarchy of interests).

183. Tracy Higgins and Rachel Fink have discussed the limits of consanguinity in state regulation of the acquisition of citizenship, pointing especially to the problem of ensuring "political, social, and economic attachment" to the state. Tracy E. Higgins & Rachel P. Fink, Gender and Nation-Building: Family Law as Legal Architecture, 60 Me. L. Rev. 375, 378 (2008). Higgins and Fink identify a concern at the heart of the citizenship-transmission cases; requiring biology plus in the context of the INA can, however, resolve

also secures in the potential citizen a stronger attachment to the nation, in part because the family functions as the "chief site of character-formation and civic education, [and thus] can facilitate . . . the demands of political life."[184] Strengthening these attachments arguably strengthens the state itself: These ties produce cohesion among citizens, preserving the long-term integrity of the nation.[185]

Biology plus can serve a similar function for Indian tribes by transmitting and securing "citizenship" to Indian tribe members. Many have pointed to the fundamental relationship between citizenship and tribal membership.[186] "'Citizenship' can be conceived of as a particular type of 'membership,' where membership is defined as the minimum set of rights and obligations extending between an individual and a membership-granting community . . . ."[187] And in other areas of Indian law, there has been a shift toward a conception of "Indian" as a political status, denoting membership in a political community.[188] Thus, to

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this concern. See supra Part III.A.1 (detailing expansion of biology-plus standard into immigration law in citizenship-transmission cases).

184. Nancy L. Rosenblum, Democratic Families: "The Logic of Congruence" and Political Identity, 32 Hofstra L. Rev. 145, 150 (2003).

185. See Higgins & Fink, supra note 183, at 378 n.5 ("The state's . . . goal is the creation of a unitary bond which transcends . . . difference, as the 'essence of a civic state lies in a . . . common identity shared by all . . . groups. This common denominator is citizenship[,]' . . . 'an articulation of an inclusive political association . . . that unites all inhabitants.'" (quoting Feliks Gross, Citizenship and Ethnicity: The Growth and Development of a Democratic Multiethnic Institution 13 (1999))).

186. See, e.g., Stephens v. Cherokee Nation, 174 U.S. 445, 476–92 (1899) (referring to membership and citizenship interchangeably in determining issue of who could determine tribal citizenship); Cal. Valley Miwok Tribe v. Jewell, No. 11-CV-00160 (BJR), 2013 WL 6524636, at *8 (D.D.C. Dec. 13, 2013) (conflating idea of tribal membership and citizenship and finding "BIA cannot compel the Tribe to expand its *membership*" and "Tribe's entire *citizenship* consisted of [five individuals]" (emphases added)).

187. Eric Reitman, Note, An Argument for the Partial Abrogation of Federally Recognized Indian Tribes' Sovereign Power over Membership, 92 Va. L. Rev. 793, 836–37 (2006).

188. Morton v. Mancari, 417 U.S. 535 (1974), offers a conception of "Indian" as a political status. The case involved a directive by the Bureau of Indian Affairs (BIA) announcing the adoption of an employment policy that gave preference to qualified Indians in initial hiring and promotional decisions. Id. at 538. Non-Indian employees challenged the directive, claiming it violated the Fifth Amendment and was racially discriminatory. Id. at 539. The Court, however, found that the preference was constitutional, pointing to "the unique legal status of Indian tribes under federal law" and Congress's plenary power over Indian affairs as supporting the directive's constitutionality. Id. at 551, 555. According to the Court, all legislation dealing with Indians and Indian tribes confers special treatment on Indians, so "[i]f these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U. S. C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." Id. at 552. The BIA preference is not a racial preference because "[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of *quasi-sovereign tribal entities*." Id. at 553–54 (emphasis added).

understand tribal membership as resembling citizenship would not be unprecedented.

An understanding of tribal membership as akin to citizenship brings with it the set of insights offered by *Nguyen*, in particular an understanding of family ties as transmitting the social, cultural, and political aspects of citizenship. After *Adoptive Couple*, the same can apply to tribal membership. Just as biology plus provides an opportunity to transmit the nonliteral aspects of citizenship in the context of immigration law, so § 1912(d) and (f) provide an opportunity for the formation of a parent–child relationship and the transmission of the substantive aspects of tribal membership.

Reading *Adoptive Couple* through the lens of *Nguyen* presents a view of the Indian family as providing a route to membership in the tribal nation by ensuring political, social, and economic attachment to the tribe. By characterizing the preservation of the intact Indian family as ICWA's primary aim, the Court simply applied the *Nguyen* view of families as strengthening the nation. But in the context of ICWA, biology plus and the intact Indian family strengthen *tribes*. This, in turn, furthers one of the stated purposes of ICWA, to preserve the integrity of Indian tribes and advance tribal interests.[189]

Morton thus offers a view of Indian as a political, not racial, classification and marks a turning point in the federal conception of what it means to be Indian. See, e.g., United States v. Antelope, 430 U.S. 641, 646 (1977) ("[S]uch regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a '"racial" group consisting of "Indians."'" (quoting *Morton*, 417 U.S. at 533 n.24)); Brian L. Lewis, Do You Know What You Are? You Are What You Is; You Is What You Am: Indian Status for the Purpose of Federal Criminal Jurisdiction and the Current Split in the Courts of Appeals, 26 Harv. J. on Racial & Ethnic Just. 241, 252 (2010) ("With *Morton*, the Court changed Indian status in the federal common law from the racial classification it had always been to a pure political classification."); Margo S. Brownell, Note, Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law, 34 U. Mich. J.L. Reform 275, 298–301 (2001) ("Congress has moved away from blood quantum and descent requirements and moved to a 'political' definition."); cf. Sarah Krakoff, Inextricably Political: Race, Membership, and Tribal Sovereignty, 87 Wash. L. Rev. 1041, 1131–32 (2012) (acknowledging challenges posed by federal view of Indian as political, but, in light of unique status of Indians, arguing this approach at least prevents "entrench[ment] [of] historical discrimination against indigenous peoples" and furthers "unique government-to-government relationship between tribes and the federal government").

189. 25 U.S.C. § 1902 (2012). This section does not suggest that the reading offered under *Adoptive Couple* is wholly without issues. For criticism of the Court's biology-plus jurisprudence, see Nancy E. Dowd, Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers, 54 Emory L.J. 1271 (2005) (examining Supreme Court cases involving fathers and criticizing Court's "negative, stereotypic views of fatherhood, especially unmarried fatherhood"); Weinrib, supra note 160 (examining *Nguyen* and offering critique of Court's decision). The challenges posed by this doctrine may well carry over into the Indian-law context. Further, one could argue that *Adoptive Couple* appears to raise

If one accepts a reading of the intact Indian family as planting the seeds of tribal membership, the Supreme Court's apparent inconsistent reading of ICWA's aims is not so different from previous understandings of ICWA and its aims. By pointing to the centrality of family to ICWA and family's fundamental ties to the stability and long-term survival of tribes, the Court reimagined family's place in ICWA's legislative scheme. Yet the core insight of this reframing is a familiar one: The welfare and future of Indian tribes, Indian families, and Indian children are all inextricably intertwined.[190]

2. *Putting an Exception to Rest.* — One result of the suggested interpretation of *Adoptive Couple* is the resolution of the tension resulting from the decision's apparent irreconcilability with the existing-Indian-family exception. But rather than reconciling the differences between the two, biology plus in the context of ICWA instead challenges the continued application of the exception. Though the Court did not expressly discuss the existing-Indian-family exception, the decision arguably assuages state courts' concerns about possible unconstitutional applications of ICWA.[191] Importantly, it does so without affirming the existing-Indian-family exception,[192] a doctrine that many courts and scholars find deeply problematic.[193]

The Court in *Adoptive Couple* effectively held that biology plus is a threshold requirement for an unwed father to qualify for protections under § 1912(d) and (f). Under the Court's reading of these provisions,

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the bar for who can invoke some of ICWA's protections. The case thus might undermine tribes' interests: *Adoptive Couple* resulted in placement of the child *outside* of the tribe (an apparent "loss" of a tribe member) and preclusion of a tribe member from invoking ICWA's protections. See Adoptive Couple v. Baby Girl, 746 S.E.2d 346, 347 (S.C.), rev'd, 133 S. Ct. 2552 (2013) (finding "adoption of Baby Girl by the Adoptive Couple is in the best interests of Baby Girl" and Biological Father's parental rights had been terminated).

Of course, Baby Girl's adoption outside of the tribe will not preclude a continued connection to her tribal heritage—off-reservation adoption is not equivalent to a literal loss of a tribe member. See, e.g., id. (noting Adoptive Couple had "throughout this litigation confirmed their intent to rear Baby Girl in a manner that maintains a meaningful connectedness to her Native American heritage"). But the welfare of the child, the family, and the tribe must all be carefully considered in ICWA proceedings. Sometimes, the facts might result in a ruling more favorable to the tribe; on other occasions, the child's interests will trump those of the tribe.

190. See supra Part I.A.1 (discussing ICWA's legislative history as indicating congressional intent to further these aims); supra Part II.A.2 (examining *Holyfield* Court's as well as other courts' interpretations of ICWA as intended to further all three aims).

191. See supra Part II.B.2 (suggesting lower courts may have attempted to address possible constitutional infirmity by creating existing-Indian-family exception).

192. See Marcia A. Zug, The Real Impact of *Adoptive Couple v. Baby Girl*: The Existing Indian Family Doctrine Is Not Affirmed but the Future of the ICWA's Placement Preferences Is Jeopardized, 42 Cap. U. L. Rev. 327, 338–48 (2014) (explaining *Adoptive Couple* does not affirm existing-Indian-family exception).

193. See supra note 124 (citing courts and scholars who have criticized the exception).

race (as manifested by biology) is insufficient to grant a parent access to ICWA's protections. Thus, the concern that race is the sole basis for ICWA's applicability—which would trigger equal protection analysis[194]—would no longer endure. The Court's interpretation thus dismantles (at least partially) the foundation of courts' application of the exception.[195]

Interpreting the Court's decision as consistent with *Nguyen* in particular further underscores ICWA's constitutionality as it has been applied. As in *Nguyen*, in *Adoptive Couple* biology plus exists within the framework of the statute itself.[196] Under the Court's reading in both decisions, the standard furthers important aims, including ensuring the transmission of social and cultural values to children.[197] Reading *Adoptive Couple* as resembling *Nguyen* brings the statute's broader aims—aims fundamentally woven into the very text of the Act itself—into sharper focus. This further emphasizes the statute's legitimacy as it is already written, removing the need for courts to narrow its applicability with the existing-Indian-family exception. Understanding citizenship and tribal membership as fundamentally related to each other and serving similar, valid aims could encourage a court otherwise dubious of ICWA's constitutionality as it has been applied to reconsider. The constitutionality of one statutory scheme might lend legitimacy to the other.

This section does not mean to suggest that those courts that adopted the existing-Indian-family exception were justified in their concerns about possible unconstitutional applications of ICWA. There is, however, a benefit to allaying concerns that some have about how ICWA (and federal Indian law more broadly) accords with other areas of American law,[198] even if only in this limited context. In particular, concerns about the potential unconstitutionality of ICWA fail to justify the existing-Indian-family exception. This recognition has the potential to lead to greater uniformity among courts, as fewer courts will feel the need to apply the exception.

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194. See supra notes 142–145 and accompanying text (pointing to lower courts' concerns about constitutionality).

195. While the suggested interpretation may dispel concerns arising from a view of "Indian" as a racial classification, at the same time, it may lead some to question the validity of the provisions at issue on a different basis: gender. The Court's biology-plus jurisprudence has been the object of much criticism, in part because some believe it to be based on stereotypes of men and women. See supra note 189 (citing scholars who have criticized biology-plus standard). This Note does not take up this problem, though it does acknowledge the potential concern.

196. See supra note 122 and accompanying text (highlighting how Court's adopted approach is mandated by ICWA's text).

197. See supra Part III.B.1 (discussing resemblance between two decisions' views on value transmission).

198. See, e.g., Clinton, supra note 26, at 1018–20 (describing several arguments raised by critics of federal Indian law).

But one should note that *Adoptive Couple* leaves unaffected the placement preferences under § 1915 and the definitions under § 1903—provisions whose applicability is based on biology. The decision thus may not resolve all concerns.[199] Nevertheless, that some of its provisions fit within the framework of existing constitutional law could mitigate lingering qualms. *Adoptive Couple* can function, in a sense, as a stamp of approval.

CONCLUSION

Reading *Adoptive Couple* as an application of the Supreme Court's biology-plus standard has many positive ramifications. In particular, it provides an additional means of furthering tribal, familial, and individual interests while working within the existing framework of ICWA and federal Indian law. Nevertheless, going forward, courts and policymakers still must be careful to recognize the complex status of Indians and Indian tribes. In particular, they must avoid improperly importing non-Indian political, cultural, and social norms when addressing adoption and other placement proceedings under ICWA—a tempting consequence of the introduction of standards from other areas of American jurisprudence into the context of federal Indian law. Reading the Court's decision as in keeping with its broader jurisprudence introduces parallelism between federal Indian and non-Indian law, which has the potential to lead to a more nuanced understanding of both areas of law and the dynamic relationship between the two. But even in looking at the similarities, one must remember the reasons why Congress enacted ICWA in the first place: in part, to prevent suppression of Native American societal and cultural values and norms.[200] Though this Note suggests reading *Adoptive Couple* as part of the Court's unwed-father jurisprudence, the decision is still one about federal *Indian* law, fundamentally grappling with the complex and unique challenges that accompany this label.

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199. However, there are two potential resolutions to this concern: treating "Indian" as a political status, a view adopted in *Morton v. Mancari*, or, alternately, as a "constitutionally sanctioned use of race." See Rolnick, supra note 143, at 995–96 (suggesting either solution could address constitutional concerns related to classification of Native Americans).

200. See supra notes 28–36 and accompanying text (pointing to state welfare workers improperly removing Indian children from their families as one impetus for ICWA's enactment).