NOTES

ARE YOU MY FATHER? ADOPTING A FEDERAL STANDARD FOR ACKNOWLEDGING OR ESTABLISHING PATERNITY IN STATE COURT ICWA PROCEEDINGS

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This Note analyzes the difficulty that courts have in determining whether nonmarital fathers of Native American children are "parents" within the meaning of the Indian Child Welfare Act of 1978 (ICWA). Part I recounts the history leading to the enactment of ICWA and provides an overview of the subsequent interpretation of ICWA by the Supreme Court, state courts, and the Bureau of Indian Affairs (BIA). Part II presents the difficulties that have arisen for both the courts and nonmarital fathers involved in state court ICWA proceedings. Part III suggests that Congress, the BIA, or the Supreme Court should address the issue of nonmarital fathers as "parents" under ICWA and proposes a definition that clearly outlines what a nonmarital father can do to acknowledge or establish his paternity.

INTRODUCTION

Picture two nonmarital[1] biological fathers of two different Native American[2] children. Assume that, for one reason or another, both nonmarital fathers are not named on their respective child's birth certificates despite their willingness to be involved in the child's life. Also imagine that, because the birth certificates do not name the nonmarital fathers, the birth mothers have been allowed to place the children for adoption. Lastly, assume that the circumstances surrounding both of these fathers and their children are identical with one exception: the place of the child's birth. Perhaps surprisingly, the place of the child's birth can make all the difference for the nonmarital father and his child. Without a federal definition of "acknowledged or established" paternity, each nonmarital father's parental rights under the Indian Child Welfare Act of

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1. This Note generally uses "nonmarital father" to describe a biological father who was never married to the biological mother of the child involved in the litigation. Various statutes and cases mentioned throughout this Note use the term "unwed father," and the two should be thought of as synonymous in this context.

2. This Note generally uses the term "Native American" unless quoting language from statutes, case law, or other sources.

1978 (ICWA)[3] can vary substantially depending on the state in which the child is born and placed for adoption. The place of birth can be the difference between a nonmarital father being able to assert his parental rights and obtain custody of his child and a nonmarital father being unable to assert any parental rights, embroiling both the father—and, more importantly, the child—in years of prolonged litigation.

In 1978, Congress adopted ICWA amidst rising awareness of "abusive child welfare practices" that led to the breakup of Native American families through adoption and foster care placement.[4] ICWA sets forth procedural and substantive standards for child custody proceedings.[5] Among these standards are various protections afforded to parents of Native American children.[6] Unfortunately for nonmarital fathers, there is uncertainty as to whether they may enjoy the protections afforded by ICWA.[7] To qualify as a "parent" under ICWA, a nonmarital father must have "acknowledged or established" his paternity of the Native American child.[8] While ICWA excludes nonmarital fathers who have not acknowledged or established paternity, it does not specify what a nonmarital father must do to acknowledge or establish his paternity.[9]

This uncertainty has led to a divergence among state courts deciding whether a nonmarital father has acknowledged or established his paternity in ICWA proceedings.[10] Functionally, the same nonmarital father's

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3. 25 U.S.C. §§ 1901–1963 (2012).

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

5. Id. at 36 ("Various other provisions of ICWA Title I set procedural and substantive standards for those child custody proceedings that do take place in state court.").

6. See, e.g., 25 U.S.C. § 1912(a) ("[W]here the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent . . . of the pending proceedings and of their right of intervention."); id. § 1912(f) ("No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt . . . that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child.").

7. See, e.g., Christopher Deluzio, Tribes and Race: The Court's Missed Opportunity in *Adoptive Couple v. Baby Girl*, 34 Pace L. Rev. 509, 512 (2014) ("[T]he ICWA has caused uncertainty about both the applicability of its provisions to non-custodial Indian parents . . . and the steps unwed Indian fathers must take in order to enjoy the preferential treatment afforded by the ICWA.").

8. 25 U.S.C. § 1903(9).

9. See Deluzio, supra note 7, at 521.

10. See id. at 521–22. Currently, "[f]ive states have held that a determination of parental rights for putative fathers under the ICWA requires a determination under state paternity laws. Those states—California, Missouri, New Jersey, Oklahoma, and Texas—include three of the four states with the largest Indian populations in the United States . . . ." Id. (footnotes omitted). Meanwhile, "Alaska, Arizona (the state with the third largest Indian population), and South Carolina do not look to their state laws when determining whether paternity has been 'acknowledged' or 'established' under the ICWA." Id. at 522 (footnotes omitted). Utah has also declined to base its determination of paternity on state law, although the Utah Supreme Court noted that state law could

status as a "parent," and the rights attached to that status under ICWA, could turn on the state in which the proceeding is brought—a decision over which a nonmarital father often has no control. This is especially curious given the general assumption that "in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law."[11]

Nonetheless, neither Congress, nor the Department of the Interior (DOI), nor the Supreme Court has taken steps to adopt a federal definition of what it means for a nonmarital father to have "acknowledged or established" paternity within the meaning of ICWA. The Supreme Court had a chance to address this issue in 2013 in *Adoptive Couple v. Baby Girl* but instead resolved the case on other grounds.[12] In 2015, the Bureau of Indian Affairs (BIA) issued nonbinding guidelines for state courts and agencies that suggested that a nonmarital father "need only take reasonable steps to establish or acknowledge paternity" to qualify as a parent under ICWA.[13] In 2016, however, the BIA issued a final rule addressing requirements for state courts in ICWA proceedings that retains the definition of "parent" as it appears in ICWA,[14] doing nothing to resolve the ambiguity that it seemed primed to address in the 2015 guidelines.

This Note argues that Congress, the BIA, or the Supreme Court must introduce a federal definition of "acknowledged or established" to promote consistent results for nonmarital fathers in ICWA proceedings in state courts across the nation. Part I recounts the history and treatment of ICWA, including its interpretation by the Supreme Court, state courts, and the BIA. Part II discusses the difficulties that have arisen as a result of the failure to introduce a federal definition. Part III proposes a recommended federal definition of "acknowledged or established."

I. HISTORY AND SUBSEQUENT TREATMENT OF ICWA

This Part provides an overview of the history of ICWA and its interpretation by courts and agencies since its adoption. Section I.A outlines

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theoretically apply in cases in which the relevant state law is more protective of nonmarital fathers than a federal standard of reasonableness. See infra notes 123–125 and accompanying text.

11. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 43 (1989) (internal quotation marks omitted) (quoting Jerome v. United States, 318 U.S. 101, 104 (1943)).

12. 133 S. Ct. 2552, 2560 (2013) (holding that section 1912(f) of ICWA contemplates "*continued* custody of the child by the parent" and it was therefore unnecessary to determine whether or not the biological father was a "parent" given that he had never had custody of the child (internal quotation marks omitted) (quoting 25 U.S.C. § 1912(f))).

13. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146, 10,151 (Feb. 25, 2015).

14. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,795 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23).

the history of ICWA from the cultural climate that catalyzed its adoption to the rights that it created upon its enactment. Section I.B discusses the Supreme Court's treatment of ICWA since it became law in 1978. Section I.C surveys state courts' treatment of ICWA. Finally, section I.D summarizes the DOI and BIA's treatment of ICWA, specifically since the Supreme Court's ruling in *Adoptive Couple*.

A. *The Enactment of ICWA*

Prior to the enactment of ICWA, state authorities engaged in abusive child welfare practices, such as removing Native American children and placing them with white families, with increasing frequency.[15] Congress responded to these practices by passing ICWA, the purpose of which was to "promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards" for child welfare proceedings involving Native American children.[16] Section I.A.1 describes the historical climate that culminated in the adoption of ICWA. Section I.A.2 describes Congress's stated purpose for enacting ICWA. Finally, section I.A.3 outlines the specific rights that ICWA created, especially as they pertain to nonmarital fathers.

1. *Historical Climate.* — The federal government has an extensive and well-documented history of enacting various policies aimed at devaluing Native American society compared to mainstream American culture.[17] Perhaps the most well-known example is the Native American reservation, which was the byproduct of treaties entered into between the federal government and Native American tribes in the nineteenth and twentieth centuries in which Native American tribes ceded their land and moved to designated reservations in exchange for promises from the federal government to protect their remaining land and provide them with necessities such as clothing and shelter.[18] Another example is the compulsory school-attendance laws passed in the 1890s, which forced thousands of Native American children to attend off-reservation board-

15. See Kathleena Kruck, Note, The Indian Child Welfare Act's Waning Power After *Adoptive Couple v. Baby Girl*, 109 Nw. U. L. Rev. 445, 446 (2015).

16. 25 U.S.C. § 1902; see also Kruck, supra note 15, at 446 ("Congress recognized this forced assimilation trend and sought to counteract it by passing the Indian Child Welfare Act (ICWA) in 1978.").

17. See Courtney Hodge, Note, Is the Indian Child Welfare Act Losing Steam?: Narrowing Non-Custodial Parental Rights After *Adoptive Couple v. Baby Girl*, 7 Colum. J. Race & L. 191, 198 (2016) (noting that land use laws and educational policies have been the federal government's primary means of promoting assimilation).

18. See, e.g., Patrice H. Kunesh, Transcending Frontiers: Indian Child Welfare in the United States, 16 B.C. Third World L.J. 17, 20 & n.14 (1996) (detailing the Great Sioux Nation's experience with these treaties).

ing schools.[19] It is estimated that 100,000 Native American children passed through boarding schools between 1879 and the 1960s.[20]

The third example—and most relevant for the purposes of this Note—is the removal of Native American children from their families by government welfare services. While the removal of Native American children from their families was not unique to the mid-twentieth century, it became significantly more prevalent in 1958 when the Child Welfare League of America and the BIA began working with social workers across the country to place Native American children in non–Native American families.[21] As a result, concerns arose within Congress that these practices could endanger the long-term survival of Native American tribes and the well-being of Native American children.[22] Surveys conducted in 1969 and 1974 estimated that the policies separated twenty-five to thirty-five percent of all Native American children from their families and placed them in adoptive or foster care.[23] The same surveys concluded that in some states a Native American child faced a risk of separation from her family as high as sixteen times greater than that faced by a non–Native American child.[24] Congressional testimony from Calvin Isaac, the tribal chief of the Mississippi Band of Choctaw Indians, underscored the notion that the long-term survival of Native American tribes was inevitably tied to the welfare of Native American children.[25] Congress's response to these concerns came in the form of ICWA. The congressional findings of ICWA memorialize these concerns and state in relevant part "that there is no resource . . . more vital to the continued existence and integrity of Indian tribes than their children";[26] that "an alarmingly high percentage of Indian families are broken up by the removal . . . of their children" by nontribal agencies and placement in non–Native American

19. See, e.g., Denise K. Lajimodiere, American Indian Boarding Schools in the United States: A Brief History and Their Current Legacy, *in* Indigenous Peoples' Access to Justice, Including Truth and Reconciliation Processes 255, 256 (Wilton Littlechild & Elsa Stamatopoulou eds., 2014) ("Rations, annuities, and other goods were withheld from parents and guardians who refused to send children to school after a compulsory attendance law for American Indians was passed by Congress in 1891.").

20. Id. at 257.

21. See Barbara Ann Atwood, Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance, 51 Emory L.J. 587, 602–03 (2002) [hereinafter Atwood, Flashpoints] (describing the "Indian Adoption Project," which stemmed from studies showing that many Native American children were legally available for adoption at a time when the number of white infants available for adoption was declining).

22. See Shreya A. Fadia, Note, Adopting "Biology Plus" in Federal Indian Law: *Adoptive Couple v. Baby Girl*'s Refashioning of ICWA's Framework, 114 Colum. L. Rev. 2007, 2011 (2014) (discussing the "why" of ICWA).

23. H.R. Rep. No. 95-1386, at 9 (1978).

24. Id.

25. See Fadia, supra note 22, at 2012.

26. 25 U.S.C. § 1901(3) (2012).

homes and institutions;[27] and that the states "have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."[28]

2. *Purpose of ICWA.* — Based on these findings, Congress declared:

> [I]t is the policy of this Nation *to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families* by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.[29]

ICWA "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society."[30] For the benefit of both Native American tribes and parents of Native American children, it sets forth procedural and substantive standards for child custody proceedings that take place in state court.[31] Congress's clear intent when it enacted ICWA was to achieve a consistent application of these laws nationwide.[32] To achieve a consistent application, ICWA presupposes that state courts will "heed the federal mandate and an uniform interstate application of the statute will be realized."[33]

3. *Rights Created by ICWA.* — To effectuate its purpose, ICWA established both procedural and substantive safeguards for parents of Native American children. Specifically, ICWA created safeguards that preserve the parent's right to notice of termination of his or her parental rights and protect the parent's right to continued custody of his or her child.[34]

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27. Id. § 1901(4).

28. Id. § 1901(5).

29. Id. § 1902 (emphasis added).

30. H.R. Rep. No. 95-1386, at 23 (1978).

31. See Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989); see also Fadia, supra note 22, at 2013–14 (detailing how ICWA's provisions protect both the rights of Native American tribes and the rights of Native American parents).

32. See B. J. Jones, The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts, 73 N.D. L. Rev. 395, 396 (1997).

33. Id.

34. See 25 U.S.C. § 1912(a) ("[W]here the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent . . . of the pending proceedings and of their right of intervention."); id. § 1912(d) ("Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts . . . to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family . . . have proved unsuccessful."); id. § 1912(f) ("No termination of parental rights may be ordered in such

However, to qualify as a "parent" under ICWA and therefore qualify for the protections afforded by ICWA, a nonmarital father must have "acknowledged or established" his paternity of the child.[35] While ICWA provides the possibility for a nonmarital father to qualify as a parent, it offers no guidance on how he can acknowledge or establish his paternity.[36] This uncertainty was a source of contention between the parties in *Adoptive Couple*, but the Court ultimately sidestepped the question of how a nonmarital father can acknowledge or establish paternity.[37]

B. *The Supreme Court's ICWA Precedent*

The Supreme Court has heard only two cases involving ICWA since its enactment in 1978.[38] Section I.B.1 discusses the 1989 case, *Mississippi Band of Choctaw Indians v. Holyfield*.[39] Section I.B.2 discusses the 2013 case, *Adoptive Couple v. Baby Girl*.[40]

1. Mississippi Band of Choctaw Indians v. Holyfield. — In *Mississippi Band of Choctaw Indians v. Holyfield*, twin babies were born out of wedlock to two enrolled members of the Mississippi Band of Choctaw Indians (the "Tribe").[41] Both parents were residents and domiciliaries of the Choctaw Reservation.[42] However, in a deliberate move by the parents, the mother gave birth to the twins nearly 200 miles away from the reservation.[43] Both parents executed consents to adoption, the adoptive parents filed a petition for adoption, and the parties entered into a final decree of adoption within a month of the twins' births.[44] The adoption decree con-

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proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt . . . that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child.").

35. Id. § 1903(9).

36. See Fadia, supra note 22, at 2013 (explaining that ICWA offers "strict definitions" of who qualifies as a parent but leaves the question of how to acknowledge or establish paternity unresolved); see also infra Part II.

37. See Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2560 (2013) ("We need not—and therefore do not—decide whether Biological Father is a 'parent.' Rather, assuming for the sake of argument that he is a 'parent,' we hold that neither § 1912(f) nor § 1912(d) bars the termination of his parental rights." (citation omitted)); Deluzio, supra note 7, at 557 ("The Court's decision not to resolve this question of what 'parent' means is all the more remarkable in light of the fact that this exact issue was one of the two questions presented in the case, and it was a source of disagreement among the parties."); infra section I.B.2.

38. See Fadia, supra note 22, at 2010 ("*Adoptive Couple* marked only the second occasion on which the Supreme Court has examined ICWA.").

39. 490 U.S. 30 (1989).

40. 133 S. Ct. 2552.

41. 490 U.S. at 37.

42. Id.

43. Id. at 37–39 (noting the trial court found that the mother went to some efforts to see that the twins were born outside the confines of the Choctaw Indian Reservation).

44. Id. at 37–38.

tained neither a reference to the twins' Native American background nor a reference to ICWA.[45] Two months later, the Tribe moved to vacate the adoption decree on the ground that its tribal court had exclusive jurisdiction over the adoption under ICWA.[46] The lower court denied the motion, and the Supreme Court of Mississippi affirmed, holding that, under Mississippi state law, the twins' domicile was their place of birth and not the reservation.[47] Therefore, the tribal court did not have exclusive jurisdiction under ICWA.[48]

The Supreme Court reversed the Mississippi Supreme Court's ruling, holding that Congress intended a uniform federal law of domicile for ICWA and, therefore, it was inappropriate for the Mississippi courts to apply Mississippi state law to determine the domicile of the twins.[49] While the Supreme Court conceded that Congress sometimes intends for state law to give effect to a term in a federal statute, it noted that the general assumption is that "in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law."[50] Because of this, the Court stated that it is crucial that courts look to the purpose of the statute to ascertain its intentions when making a determination of whether state law is controlling.[51] The Supreme Court held that there were two reasons why the term "domicile" should not be defined by state law.

First, and "most fundamentally," the Court held that "the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term; quite the contrary."[52] The congressional findings of ICWA reflect this sentiment and state, in part, "that the States . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."[53] In fact, the Supreme Court noted that it is "inescapable from a reading of [ICWA], [that] the main effect of [ICWA] is to curtail state authority."[54] Given the overall purpose of the statute, the Supreme Court concluded that it would be "most improbable" that Congress would have intended to leave the definition of a critical term such as "domicile" to state law.[55]

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45. Id. at 38.

46. Id.

47. Id. at 38–40.

48. Id.

49. Id. at 41–47.

50. Id. at 43 (internal quotation marks omitted) (quoting Jerome v. United States, 318 U.S. 101, 104 (1943)).

51. Id. at 44.

52. Id.

53. 25 U.S.C. § 1901(5) (2012).

54. *Holyfield*, 490 U.S. at 45 n.17.

55. Id. at 45.

Second, the Supreme Court found it hard to believe that Congress intended the lack of nationwide uniformity that would result if state law provided the definition of "domicile."[56] While conceding that the general rule is that courts determine domicile according to the law of forum, the Supreme Court concluded that this general rule was not applicable in the context of ICWA.[57] Under a regime in which the definition of "domicile" in a federal statute differed by state, the same child could be subjected to fifty different definitions of domicile depending on where the mother gave birth.[58] While the Supreme Court could conceive of a federal statute in which different rules applied to different Native American children, it could not envision a federal statute under which the same child would be subjected to different rules simply as a result of her transport from one state to another.[59]

2. Adoptive Couple v. Baby Girl. — *Adoptive Couple v. Baby Girl* involved the termination of a Cherokee birth father's rights.[60] The birth mother informed the biological father of the pregnancy.[61] The biological father declined to provide any financial support until the two were married, but the relationship eventually deteriorated and the marriage was called off.[62] After the relationship faltered, the biological father received a text message from the birth mother asking if he would rather pay child support or relinquish his rights, to which he replied that he relinquished his rights.[63]

The child was placed for adoption.[64] The birth mother believed that the biological father was Cherokee, so her attorney contacted the Cherokee Nation to verify his enrollment, but due to a clerical error on the attorney's part, the Cherokee Nation responded that it could not verify the biological father's enrollment based on the information provided.[65] The child was placed with adoptive parents, but the adoptive parents did not serve the biological father with notice of the adoption until four months after the birth of the child.[66] It is undisputed that the adoptive parents supported the biological mother both financially and emotionally throughout the pregnancy and that the biological father provided no financial assistance during the pregnancy even though he

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56. Id.

57. Id. at 46 & n.21.

58. Id. at 46.

59. Id. The applicability of this reasoning to the "acknowledged or established" issue is discussed below. See infra Part II.

60. 133 S. Ct. 2552, 2557–58 (2013).

61. Id. at 2558.

62. Id.

63. Id.

64. Id.

65. Id.

66. Id.

had the means to do so.[67] The adoptive parents served the biological father with notice of the adoption proceedings approximately four months after the birth of Baby Girl.[68] He signed the papers and stated that he was not contesting the adoption, though he later testified that he believed he was relinquishing his rights to the biological mother and not the adoptive parents.[69] He contacted a lawyer after signing the relinquishment and requested a stay of the adoption proceedings.[70]

The biological father premised his argument on sections 1912(d) and 1912(f) of ICWA, which bar the termination of parental rights in certain situations.[71] Section 1912(d) provides that any party seeking termination of parental rights to a Native American child must satisfy the court that they have made active efforts to prevent the breakup of the Native American family and that such efforts have proved unsuccessful.[72] Section 1912(f) provides that courts may not terminate parental rights to a Native American child in the absence of a determination beyond a reasonable doubt that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.[73] The South Carolina Supreme Court ruled that both section 1912(d) and section 1912(f) barred the termination of the biological father's parental rights to Baby Girl.[74]

On appeal, the United States Supreme Court assumed, for the sake of argument, that the biological father was a "parent" within the meaning of ICWA.[75] The Court held that the biological father did not qualify for the protection of section 1912(d) or section 1912(f).[76] With regard to section 1912(f), the Court ruled that the law contemplated preexisting custody of the child by the parent, as evidenced by the language "*continued* custody of the child by the parent."[77] The Court reasoned that the biological father could not invoke section 1912(f) because he never

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67. Id.

68. Id.

69. Id.

70. Id. at 2558–59.

71. See Brief for Respondent Birth Father at 5, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12-399), 2013 WL 1191183 ("For purposes of this litigation, two of ICWA's substantive parental protections are especially important. One is 25 U.S.C. § 1912(f) . . . . The other is 25 U.S.C. § 1912(d) . . . ."); see also supra notes 34–35 and accompanying text.

72. 25 U.S.C. § 1912(d) (2012).

73. Id. § 1912(f).

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

75. Id. at 2560.

76. Id.

77. See id. at 2560–61 ("Section 1912(f) conditions the involuntary termination of parental rights on a showing regarding the merits of '*continued* custody of the child by the parent.' The adjective 'continued' plainly refers to a pre-existing state." (quoting 25 U.S.C. § 1912(f))).

had custody of the child.[78] Similarly, the Court ruled that section 1912(d) did not apply because section 1912(d) contemplates preventing the breakup of an existing parent–child relationship.[79] The Court ruled that 1912(d) did not apply because the biological father had "abandon[ed]" Baby Girl prior to birth and never had custody of her—meaning that "the 'breakup of the Indian family' has long since occurred, and § 1912(d) is inapplicable."[80] Because the Supreme Court was able to decide the case on these grounds, it was unnecessary for the Court to resolve the question of whether the biological father should qualify as a "parent" under ICWA.[81]

C. *State Courts' ICWA Precedent*

The absence of a federal definition of "acknowledged or established" has forced state courts to form their own interpretations of those terms. State courts interpreting ICWA's "acknowledged or established" language have fallen into one of two camps. The first group of states looks to the laws of that state for determining whether a nonmarital father has acknowledged or established paternity.[82] The second group does not look to state law, instead favoring more amorphous standards of reasonableness or sufficiency.[83] Section I.C.1 provides an overview of those states that defer to state law to determine paternity. Section I.C.2 provides an overview of those states that do not defer to state law.

1. *Deferring to State Law for the Definition of "Acknowledged or Established."* — At least five states look to their own state laws to determine whether a nonmarital father acknowledged or established paternity. Two cases—one from New Jersey[84] and one from Texas[85]—exemplify this philosophy. The former involved a Native American father who waited

78. See id. at 2562 ("Under our reading of § 1912(f), Biological Father should not have been able to invoke § 1912(f) in this case, because he had never had legal or physical custody of Baby Girl as of the time of the adoption proceedings.").

79. See id. ("Consistent with the statutory text, we hold that § 1912(d) applies only in cases where an Indian family's 'breakup' would be precipitated by the termination of the parent's rights. The term 'breakup' refers in this context to '[t]he discontinuance of a relationship,' or 'an ending as an effective entity' . . . ." (citations omitted) (first quoting Breakup, American Heritage Dictionary (3d ed. 1992); then quoting Breakup, Webster's Third New International Dictionary (1961))).

80. Id.

81. Id. at 2560 ("We need not—and therefore do not—decide whether Biological Father is a 'parent.'").

82. See Deluzio, supra note 7, at 521–22 (noting California, Missouri, New Jersey, Oklahoma, and Texas determine paternity according to state paternity laws).

83. See supra note 10 (noting Alaska, Arizona, South Carolina, and Utah do not look to state law when determining paternity).

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

85. Yavapai-Apache Tribe v. Mejia, 906 S.W.2d 152 (Tex. App. 1995).

almost two years to intervene in the adoption of his children.[86] The latter involved a non–Native American father who sought to retain custody of his children over the objection of a Native American tribe that wanted to transfer the proceedings to tribal court.[87]

In *Child of Indian Heritage*, the putative father moved to vacate an adoption on the grounds that he did not receive notice of the adoption proceedings and that the adoption had not taken place in accordance with the requirements of ICWA.[88] The putative father and birth mother were both registered members of the Rosebud Sioux Indian Tribe, but neither had lived on the tribal reservation at any time relevant to the case.[89] In December 1983, the putative father discovered that the birth mother was pregnant and returned to South Dakota to live with her.[90] When the birth mother went into labor, the putative father went to visit relatives in a nearby city and did not return until the baby had been placed with the baby's new adoptive parents.[91] The baby was born on August 17, 1984, and one week later, the birth mother traveled to New York and executed a consent to adoption and termination of parental rights.[92] After relinquishing the child, the birth mother returned to South Dakota, and the putative father moved back in with her a short time later.[93] The court found that the putative father did nothing to locate or regain custody of the child until January 1986, despite the fact that he had been living with the birth mother since the fall of 1984.[94] The trial court held that the putative father had received notice of the proceedings and had waited too long to assert any rights he might have had under ICWA.[95]

The New Jersey Supreme Court affirmed the judgment, holding that the putative father had not acknowledged or established paternity, and therefore, he was not entitled to any of the protections he may have had under ICWA.[96] After a review of the historical background surrounding the passage of ICWA, the court concluded that, since ICWA did not provide express standards for how a nonmarital father can acknowledge or establish paternity, Congress intended to defer to state or tribal law standards for establishing paternity—so long as these approaches are permissible variations on the methods of acknowledging and establishing

86. See infra notes 88–104 and accompanying text.
87. See infra notes 105–114 and accompanying text.
88. *Child of Indian Heritage*, 543 A.2d at 928.
89. Id.
90. Id.
91. Id.
92. Id.
93. Id.
94. Id. at 929.
95. Id. at 930.
96. Id. at 936–37.

paternity within Congress's general contemplation when it passed ICWA and provide a realistic opportunity for a nonmarital father to establish an actual or legal relationship with his child.[97] Accordingly, the court looked to the procedures provided in the New Jersey Parentage Act to determine whether the putative father had acknowledged or established paternity.[98]

The court noted that the New Jersey statute provided a higher standard of protection for nonmarital fathers than the laws of many other states.[99] For example, a nonstepparent private placement adoption in New Jersey could not be finalized until at least eight months after the birth of the child.[100] The court therefore concluded that New Jersey state law "provide[d] an adequate, if not generous, means of acknowledging or establishing paternity."[101] Under New Jersey state law, the pending adoption proceedings presented no obstacle to the putative father's ability to establish his parental rights.[102] The court found that any nonmarital father concerned about protecting his parental rights would have taken one or more of the steps provided in the New Jersey Parentage Act to establish paternity before the adoption was finalized.[103] The court held that "it [was] only [the birth father's] unexcused delay in establishing his rights as a parent that prevent[ed] him from taking advantage of the benefits provided by the Act."[104]

In *Yavapai-Apache Tribe v. Mejia*, the paternal aunt and uncle of two children—whose mother was a "full-blooded member of the Yavapai-Apache Tribe" and whose nonmarital father was not an "Indian" within the meaning of ICWA—filed a lawsuit asking the court to appoint them as the two sole managing conservators of the children.[105] The Yavapai-Apache Tribe received notice of the proceeding pursuant to ICWA, intervened, and filed a motion to transfer jurisdiction to the tribal court.[106] Four months after the Yavapai-Apache Tribe filed its motion, the father of the two children executed a statement of paternity and sought a decree adjudicating the two children as his biological children.[107] The trial court signed the decree five months later.[108] The trial court denied the Yavapai-Apache Tribe's motion to transfer jurisdiction at least partially on the basis that the father exercised his right to object to the

97. Id. at 934–35.
98. Id. at 936.
99. Id.
100. Id.
101. Id.
102. Id. at 939.
103. Id. at 936.
104. Id. at 943.
105. 906 S.W.2d 152, 158 (Tex. App. 1995).
106. Id. at 158–59.
107. Id. at 159.
108. Id.

transfer under section 1911(b) of ICWA.[109] On appeal, the Yavapai-Apache Tribe argued that the father had waited too long to acknowledge or establish paternity, was therefore not a "parent" under the meaning of ICWA, and thus was not entitled to object to the transfer of jurisdiction.[110]

The court held that the nonmarital father had acknowledged paternity under Texas state law and was therefore entitled to the protection afforded to parents under ICWA.[111] The Yavapai-Apache Tribe argued that he had established his paternity too late because ICWA uses the past tense "acknowledged," which the Yavapai-Apache Tribe interpreted to mean that paternity must have been acknowledged before the Yavapai-Apache Tribe filed its motion to transfer.[112] The court noted that a motion to transfer is the "opening volley" in any custody proceeding involving a Native American child and therefore held that Congress could not have intended to require nonmarital fathers to act before that time or forever be prohibited from acknowledging or establishing paternity, especially since ICWA does not set forth any time limits for acknowledging or establishing paternity.[113] Additionally, the court held that, even if the father was too late in executing his statement of paternity and seeking a decree adjudicating his paternity, he had nonetheless satisfied the standard for acknowledging paternity under Texas state law before the proceedings by receiving the two children into his home and holding them out as his own.[114]

2. *Other Standards.* — States that do not look to their own laws for acknowledging or establishing paternity have adopted a hybrid, more liberal approach to determining parent status in ICWA cases. These courts have looked to state law for guidance on what actions constitute steps toward acknowledging or establishing paternity but ultimately base their decisions simply on whether the nonmarital father has done enough in the court's view to acknowledge or establish paternity—even if he has not strictly complied with the requirements set forth by state statute. The courts mentioned below all use some variation of a "reasonableness" standard to determine a father's paternity.

In *Bruce L. v. W.E.*, the father filed an acknowledgment and affidavit of paternity, filed a motion for a paternity test and custody, and later filed

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109. Id.; see also 25 U.S.C. § 1911(b) (2012) ("In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court . . . shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent . . . .").

110. *Yavapai-Apache Tribe*, 906 S.W.2d at 173.

111. Id.

112. Id.

113. Id. at 173–74.

114. Id. at 174–75.

a separate suit for custody.[115] The Alaska Supreme Court held that the father had "sufficiently acknowledged paternity of [the child] to invoke the application of ICWA," even though he had not complied with Alaska's legitimation statute—which requires the signature of both the mother and father on an acknowledgment of paternity—and had not completed his legitimization efforts in court within one year of the child's birth.[116]

In *Michael J., Jr. v. Michael J., Sr.*, the father acknowledged his paternity in front of a juvenile court, underwent a paternity test, and submitted information showing that he was a member of a Native American tribe and that the child was eligible for membership.[117] The guardian ad litem argued that ICWA was not applicable because the father, who was incarcerated at the time of the child's birth, had not demonstrated that he was a "parent" under the statute, since he had never filed a paternity action and hadn't sought custody of the child.[118] The Court of Appeals of Arizona held that "[t]hese actions, however, are not required. The Act merely requires that a putative Indian father acknowledge or establish paternity."[119]

In *Adoptive Couple v. Baby Girl*, the father filed a complaint to establish paternity, custody, and support of the child, and also underwent a paternity test.[120] The South Carolina Supreme Court held that the family court correctly concluded that the father met ICWA's definition of "parent" by "both acknowledging his paternity through the pursuit of court proceedings as soon as he realized Baby Girl had been placed up for adoption and establishing his paternity through DNA testing."[121] The Supreme Court later overruled this decision;[122] however, this case serves as an example of how state courts have decided the issue of whether a nonmarital father has acknowledged or established paternity by looking to factors other than whether the father had acknowledged or established paternity under state law.

In *In re Adoption of B.B.*, the father filed a motion to intervene in the adoption proceedings of his biological son, who had been placed for adoption in Utah unbeknownst to the father.[123] The Utah Supreme Court held that the father's actions were sufficient to acknowledge paternity

115. 247 P.3d 966, 970–72 (Alaska 2011).

116. Id. at 979.

117. 7 P.3d 960, 962–63 (Ariz. Ct. App. 2000).

118. Id. at 961, 963.

119. Id. at 963.

120. 731 S.E.2d 550, 555–56 (S.C. 2012), rev'd, 133 S. Ct. 2552 (2013).

121. Id. at 560.

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

123. No. 20150434, 2017 WL 3821741, at *2–3 (Utah Aug. 31, 2017) (noting that the mother ceased communication with the father a few weeks after moving to Utah and gave birth to the child shortly thereafter).

under ICWA, having considered his actions under a reasonableness standard.[124] Interestingly, the court was able to reconcile the reasonableness approach with the approach taken by states such as New Jersey and Texas. The court concluded that ICWA sets the floor with a federal standard of reasonableness, but courts are free to look to state law when a state's standards are more protective of the parents' rights than the federal reasonableness standard supposedly called for under ICWA.[125]

D. *Department of the Interior and Bureau of Indian Affairs's ICWA Guidelines*

In addition to the interpretations discussed in section I.C, the BIA has issued guidelines and regulations that have further complicated the interpretation challenge for courts. Shortly after Congress passed ICWA, the BIA issued nonbinding guidelines to provide state courts with guidance in ICWA proceedings according to how the BIA interpreted ICWA's requirements.[126] The BIA updated these guidelines in 2015,[127] and in 2016 the BIA issued a binding final rule addressing requirements for state courts overseeing ICWA proceedings.[128]

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124. Id. at *22 (concluding that actions such as supporting the mother financially during part of the pregnancy, seeking legal advice upon learning of the adoption, and filing multiple documents with the district court asserting paternity were sufficient to acknowledge paternity under ICWA).

125. Id. at *20 n.24. This approach accords with the language of section 1921 of ICWA, which provides that "[i]n 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 . . . of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard." 25 U.S.C. § 1921 (2012). In a vacuum, this reconciliation solves the problem this Note addresses. By setting a floor of reasonableness and a ceiling of more protective state law, nonmarital fathers across the country would, at the very least, enjoy the same minimum level of parental rights. Unfortunately, in practice, it is unclear exactly what a minimum standard of reasonableness requires. While a court could decide a hypothetical future case by surveying the decisions discussed in this section to form an idea of what satisfies the reasonableness standard, there simply is not enough case law from which to decipher a federal standard of reasonableness. Furthermore, it is not guaranteed that courts across the country can reach a consensus on what actions are considered reasonable. To be sure, this solution works well for state courts ruling on ICWA cases—certainly, it is not the job of the Utah Supreme Court to announce a minimum federal standard of reasonableness. However, a better solution for the purposes of this Note is for Congress, the BIA, or the Supreme Court to elucidate what the minimum federal standard is to eliminate much of the guesswork that currently takes place at the state level.

126. See Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146, 10,147 (Feb. 25, 2015) ("Following ICWA's enactment, in July 1979, the [DOI] issued regulations addressing notice procedures for involuntary child custody proceedings involving Indian children, as well as governing the provision of funding for and administration of Indian child and family service programs as authorized by ICWA.").

127. See infra notes 137–139 and accompanying text.

128. See infra notes 146–149 and accompanying text.

1. *Overview of BIA.* — In 1824, the federal government established the BIA, which provides services to nearly two million Native Americans and Alaska Natives.[129] The Division of Human Services lies within the Bureau's Office of Indian Services and is responsible for providing guidelines and regulations for the implementation of ICWA.[130] Guidelines are issued as nonbinding guidance for state courts overseeing cases involving ICWA, and regulations are binding, enforceable requirements for state courts overseeing cases involving ICWA.[131] The BIA published the first set of ICWA guidelines in 1979 and first updated the guidelines in 2015.[132] When faced with the 1979 guidelines, states approached them in a number of ways. In most cases, states made no mention of the guidelines in their own statutes—meaning that the bulk of the interpretation of the guidelines fell to state courts.[133] Some courts referenced the guidelines in support of their construction of ICWA,[134] while others rejected the application of the guidelines in their cases.[135] In sum, the influence the BIA guidelines have had on state court decisions is unclear, as evidenced by the fact that the Alaska Supreme Court has both used the BIA guidelines to support its decision in one case and rejected the application of the guidelines in another.[136]

2. *2015 BIA Guidelines.* — In 2014, the BIA invited comments and held listening sessions with various parties to determine whether to update the BIA's ICWA guidelines.[137] In response to the overwhelming

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129. See About Us, Indian Affairs, Dep't of the Interior, http://www.bia.gov/about-us [http://perma.cc/52RB-N34Y] (last updated Nov. 17, 2017) ("Established in 1824, [Indian Affairs] currently provides services (directly or through contracts, grants or compacts) to approximately 1.9 million American Indians and Alaska Natives.").

130. See Office of Indian Services, Indian Affairs, Dep't of the Interior, http://www.bia.gov/WhoWeAre/BIA/OIS/index.htm [https://perma.cc/JX56-R4PW] (last updated Aug. 14, 2017) (stating that the Division of Human Services develops and implements regulations related to social services and guides leadership on ICWA).

131. See Caroline M. Turner, Note, Implementing and Defending the Indian Child Welfare Act Through Revised State Requirements, 49 Colum. J.L. & Soc. Probs. 501, 510–11 (2016) (noting the distinction between nonbinding guidelines and binding regulations).

132. See id. at 549 (discussing the 1979 guidelines as the first federal guidelines issued). The 1979 guidelines went unrevised until the issuance of the 2015 guidelines. Id. at 510.

133. Id. at 534.

134. Id.; see also Catholic Soc. Servs., Inc. v. C.A.A., 783 P.2d 1159, 1160 (Alaska 1989) (per curiam) ("Additionally, the Bureau of Indian Affairs interpretative guidelines confirm the correctness of our view . . . .").

135. Turner, supra note 131, at 534–35; see also Adoption of N.P.S., 868 P.2d 934, 936 (Alaska 1994) (ruling that while the 1979 guidelines draw attention to important considerations, the most important consideration in the case was the best interests of the child—a consideration not mentioned in the guidelines).

136. See Turner, supra note 131, at 534–35 & 534 nn.162–164.

137. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146, 10,147 (Feb. 25, 2015).

proportion of comments requesting changes to the guidelines, the BIA issued updated guidelines for state courts and agencies in 2015.[138] Of particular relevance to this Note was the BIA's suggested interpretation of "parent," which reads:

> *Parent* means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include an unwed father where paternity has not been acknowledged or established. To qualify as a parent, an unwed father need only take reasonable steps to establish or acknowledge paternity. Such steps may include acknowledging paternity in the action at issue or establishing paternity through DNA testing.[139]

This nonbinding definition adds the "reasonable steps" language to the definition of "parent" already codified in ICWA.[140] This is the only time that the BIA has attempted to clarify how to determine whether a nonmarital father has acknowledged or established paternity.

3. *2016 BIA Final Rule.* — On March 20, 2015, the BIA proposed legally binding regulations and opened the comment period on these regulations.[141] The proposed rule chose to retain the definition of parent codified in ICWA instead of adopting the definition suggested in the 2015 BIA Guidelines.[142] Multiple submitted comments suggested including a definition of what it means to have acknowledged or established paternity. The most common suggestion was for the BIA's final rule to adopt the definition of parent included in the 2015 BIA Guidelines, which provides that a nonmarital father need only take reasonable steps such as establishing paternity through DNA testing.[143] Another common suggestion was to look to applicable tribal law to determine whether a

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138. Id.

139. Id. at 10,151.

140. See 25 U.S.C. § 1903(9) (2012) (omitting any language suggesting how a nonmarital father can "acknowledge or establish" paternity).

141. Regulations for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 14,880, 14,881 (proposed Mar. 20, 2015) (to be codified at 25 C.F.R. pt. 23).

142. Id. at 14,886 ("Parent means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include an unwed father where paternity has not been acknowledged or established.").

143. See Ho-Chunk Nation Dep't of Justice, Comment Letter on Proposed Regulations for State Courts and Agencies in Indian Child Custody Proceedings (May 18, 2015), http://www.regulations.gov/document?D=BIA-2015-0001-1051 (on file with the *Columbia Law Review*) (suggesting that DOI adopt the 2015 BIA Guidelines definition verbatim); Nat'l Indian Child Welfare Ass'n, Comment Letter on Proposed Regulations for State Courts and Agencies in Indian Child Custody Proceedings (May 18, 2015), http://www.regulations.gov/document?D=BIA-2015-0001-1073 (on file with the *Columbia Law Review*) (suggesting that DOI adopt the 2015 BIA Guidelines definition and also include "any actions taken to acknowledge or establish paternity under any applicable tribal law or tribal custom or State law" as an example of reasonable steps).

nonmarital father has acknowledged or established paternity.[144] One particularly radical suggestion was to eliminate the need for a nonmarital father to acknowledge or establish paternity to be considered a parent under ICWA.[145]

On June 14, 2016, the BIA issued a final rule addressing requirements for state courts in ensuring proper implementation of ICWA in state court proceedings.[146] The final rule retains the definition of "parent" used in ICWA,[147] despite the recommendation of a few commenters that the BIA should add a federal standard for what constitutes acknowledgment or establishment of paternity.[148] The BIA explained that the final rule mirrors the statutory definition because "[m]any State courts have held that, for ICWA purposes, an unwed father must make reasonable efforts to establish paternity, but need not strictly comply with State laws. At this time, the Department does not see a need to establish an ICWA-specific Federal definition for this term."[149] However, the continued absence of a uniform federal definition of "acknowledged or established" has resulted in inconsistent rights for nonmarital fathers depending on the state in which their child is born. Part II explores this issue in detail.

II. PROBLEMS CREATED BY THE LACK OF A UNIFORM FEDERAL DEFINITION

The lack of a uniform federal definition of "acknowledged or established" has created inconsistent results in state court proceedings involving ICWA. Section II.A demonstrates how the lack of a uniform federal definition frustrates the aim and purpose of ICWA. Section II.B explains how the lack of a uniform federal definition offends the

144. See Agua Caliente Band of Cahuilla Indians, Comment Letter on Proposed Regulations for State Courts and Agencies in Indian Child Custody Proceedings (May 19, 2015), http://www.regulations.gov/document?D=BIA-2015-0001-1181 (on file with the *Columbia Law Review*) (recommending that the definition be amended by adding "[p]aternity may be acknowledged or established in accordance with tribal law, tribal custom, or State law in the absence of tribal law or tribal custom"); Saint Regis Mohawk Tribe, Comment Letter on Proposed Regulations for State Courts and Agencies in Indian Child Custody Proceedings (May 19, 2015), http://www.regulations.gov/document?D=BIA-2015-0001-1329 (on file with the *Columbia Law Review*) (suggesting that the definition be appended to include "those persons whose paternity has been established pursuant to a lawful order of a Tribal Court").

145. Tulalip Tribes, Comment Letter on Proposed Regulations for State Courts and Agencies in Indian Child Custody Proceedings (May 19, 2015), http://www.regulations.gov/document?D=BIA-2015-0001-0656 (on file with the *Columbia Law Review*) ("An unwed father should be recognized as a 'parent' and at the bare minimum, the tribal definition of who a 'parent' is, should be followed.").

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

147. Id. at 38,795.

148. Id.

149. Id. at 38,796 (citation omitted).

Supreme Court's decision in *Holyfield*. Section II.C analyzes how the lack of a uniform federal definition creates different rights for nonmarital fathers based solely on where their case is brought.

A. *Lack of a Uniform Federal Definition Frustrates the Purpose of ICWA*

The purpose of ICWA is to protect the rights of the Native American child as a Native American and to protect the rights of Native American tribes to keep their communities and families intact.[150] Unfortunately, the lack of a federal definition of "acknowledged or established" prevents ICWA from completely achieving its goals.

1. *Congress Passed ICWA in Response to States' Wrongdoings.* — The congressional findings of ICWA make it clear that Congress felt the need to respond to the behavior of state authorities regarding the protection of Native American families and tribes.[151] Specifically, ICWA was a response to the historical practice of state authorities too frequently removing Native American children from their families.[152] The Supreme Court also holds the conviction—which it made clear in *Holyfield*—that Congress, in drafting and enacting ICWA, was "concerned with the rights of Indian families and Indian communities vis-à-vis state authorities."[153] Given the underlying fact that ICWA was a response to the behavior of states, the notion of turning to state law to determine whether a nonmarital father is a parent under ICWA is inconsistent with both the language of the statute and the Supreme Court's interpretation of the statute.[154] The idea that Congress would pass ICWA to limit the authority of the states in matters involving members of Native American tribes, yet intend for courts to rely on state law to determine the definitions of critical terms such as "parent," merits discussion.

Despite the congressional findings of ICWA and Supreme Court precedent, the BIA found it unnecessary to adopt a federal definition of "acknowledged or established" in its 2016 final regulations because many courts already looked to a reasonableness standard when determining who qualifies as a parent.[155] Admittedly, there is reason to believe that a state court deciding a case involving this question as a matter of first impression would decide to apply a reasonableness standard, given that several recent cases chose not to defer to state statutes to determine

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150. See supra section I.A.2.

151. See Barbara Ann Atwood, Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity, 36 UCLA L. Rev. 1051, 1058 (1989) (reviewing the congressional findings of ICWA).

152. See Atwood, Flashpoints, supra note 21, at 608.

153. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 45 (1989).

154. See infra section II.B.

155. See Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,796 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23).

whether the father acknowledged or established paternity.[156] However, this tells only part of the story.

While Alaska, Arizona, South Carolina, and Utah have recently decided cases using a reasonableness standard, instead of deferring strictly to state law to determine whether a nonmarital father has acknowledged or established his paternity, this is by no means a national standard.[157] Five other states still defer to state law, and the remaining forty-one states do not yet have an established standard.[158] There are no binding regulations that would prevent a state court presiding over a case of first impression from deferring to state law for determining paternity—only the nonbinding 2015 BIA Guidelines suggest courts use a reasonableness test as opposed to deferring to state law.[159] Additionally, even if the BIA is content with the reasonableness standard that states have adopted in recent years, issuing a binding regulation would ensure that states will apply that standard going forward. As it stands, there is no binding authority forcing states to apply a uniform federal standard, even if that standard is simply one of reasonableness.

2. *ICWA Intended to Create Federal Standards.* — ICWA presupposes that state courts will heed the mandates of a federal statute and that a uniform application of the statute will follow in state courts across the country.[160] As discussed in Part I, the Supreme Court's decision in *Holyfield* reaffirmed that Congress's intent was to achieve the uniform application of ICWA to state court proceedings.[161] In fact, ICWA's congressional declaration of policy states: "The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families *by the establishment of minimum Federal standards* for the removal of Indian children from their families . . . ."[162] Furthermore, as a general

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156. See supra section I.C.2.

157. See supra note 10.

158. See supra section I.C. It is worth noting that the states with the four largest Native American populations—California, Oklahoma, Arizona, and Texas—have established standards for determining paternity. See Deluzio, supra note 7, at 522. However, this does not foreclose the possibility that a case could be brought in one of the forty-one states without an established standard.

159. See supra section I.D.2 (detailing the nonbinding guidelines and their suggestion of reasonableness—something that is missing altogether from the binding final regulation).

160. Jones, supra note 32, at 396.

161. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 47 (1989) ("We therefore think it beyond dispute that Congress intended a uniform federal law of domicile for the ICWA."); Jones, supra note 32, at 396 ("The United States Supreme Court, in issuing its only decision directly addressing the Indian Child Welfare Act, stated that achieving a consistent application of the law nation wide was clearly the intent of Congress when it enacted the Indian Child Welfare Act.").

162. 25 U.S.C. § 1902 (2012) (emphasis added).

matter of statutory interpretation, "[i]n the absence of a plain indication to the contrary, . . . it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law."[163] Given the level of protections afforded to "parents" under ICWA, it is reasonable to conclude that Congress intended that there be a federal standard of what it means to be a "parent" and that determinations of paternity should not depend on the application of state law.

The current regime clearly offends these intentions. Not only is there no federal standard, but the interpretation of the term from state to state is far from consistent.[164] This has created a disconnect between ICWA's purpose and its real-world results.[165] To remedy this situation and create symmetry between ICWA's purpose and its effect, there must be a federal definition of "acknowledged or established."

B. *Lack of a Uniform Federal Definition Offends the* Holyfield *Decision*

The Supreme Court in *Holyfield* considered a slight variation of the question presented in this Note: "[W]hether there is any reason to believe that Congress intended the ICWA definition of 'domicile' to be a matter of state law."[166] *Holyfield* indicates that the purpose of ICWA leaves no reason to believe that Congress intended to rely on state law for a "critical term."[167] In fact, the Supreme Court even went so far as to proclaim "the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term; *quite the contrary*."[168] The Court in *Holyfield* further explained that "a statute under which different rules apply from time to time to the same child, simply as a result of his or her transport from one State to another, cannot be what Congress had in mind."[169] Yet, this is the exact situation that some nonmarital fathers find themselves in: Different laws may apply simply as a result of the state in which their children are born.[170]

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163. Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 119 (1983) (alterations in original) (internal quotation marks omitted) (quoting NLRB v. Nat. Gas Util. Dist., 402 U.S. 600, 603 (1971)).

164. See supra section I.C (providing an overview of the various interpretations of "acknowledged or established" used in different states).

165. See supra section I.C (discussing outcomes of ICWA cases in different states).

166. *Holyfield*, 490 U.S. at 43.

167. Id. at 44; see also Christine Metteer, Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act, 38 Santa Clara L. Rev. 419, 420 (1998) ("[M]ost analysts of the Act agree that '[i]f *Holyfield* stands for anything, it is that states cannot create their own definitions for the ICWA.'" (quoting C. Steven Hager, Prodigal Son: The "Existing Indian Family" Exception to the Indian Child Welfare Act, 27 Clearninghouse Rev. 874, 879 (1993))).

168. *Holyfield*, 490 U.S. at 44 (emphasis added).

169. Id. at 46.

170. See supra section II.A.

It is hard to argue that courts should not consider "parent" a critical term given that the rights of a nonmarital father can turn on the determination of whether or not he is a "parent" within the meaning of the statute. One has to look no further than ICWA itself to realize that "parent" is a critical term.[171] While ICWA's definitions do not include "domicile," the Supreme Court in *Holyfield* nonetheless designated it a "critical term."[172] "Parent," on the other hand, *is* included in the definitions section of ICWA.[173] While this appearance in the definitions section is not conclusive, it is nonetheless reasonable to conclude that "parent" fits within the Supreme Court's understanding of "critical term" given that it is included in the statutory definitions section of ICWA and its interpretation bears directly on the substantive rights of those seeking ICWA's protections, much like the interpretation of "domicile" determined the rights of the parties in *Holyfield*.[174] Furthermore, since the determination of whether a nonmarital father is a "parent" turns on the definition of "acknowledged or established," it is fair to say that "acknowledged and established" could also be a critical term under current Supreme Court precedent.

Therefore, a regime under which state law defines a critical term such as "acknowledged or established"—and by extension, "parent"—offends the holding of *Holyfield* and is untenable. *Holyfield* is one of only two ICWA cases to reach the Supreme Court and is therefore critical in informing the decisions made regarding interpretations of ICWA. In contrast to *Holyfield*, there is no federal definition for what it means to have acknowledged or established paternity in the way that there was a federal definition of domicile. This has left the door open for Congress, the BIA, or the Supreme Court to adopt a federal definition of "acknowledged or established." Doing so would bring this part of ICWA in line with the holding of *Holyfield* and would eliminate the need for state courts to look to state statutes and case law to determine whether a nonmarital father qualifies for the protections of ICWA.

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171. Indeed, courts ruling in non-ICWA cases have recognized that "parent" is a critical term in various family law contexts. See, e.g., Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 493 (N.Y. 2016) ("Only a 'parent' may petition for custody or visitation under Domestic Relations Law § 70, yet the statute does not define that *critical term*, leaving it to be defined by the courts." (emphasis added)).

172. *Holyfield*, 490 U.S. at 43–45.

173. 25 U.S.C. § 1903(9) (2012).

174. See id. § 1903 (failing to include "domicile" as a term whose definition is provided by ICWA). If anything, there is a stronger case for "parent" to be designated a "critical term" than there is for "domicile," given that Congress itself thought it important enough to include its own definition of the word in the statute.

C. *Nonmarital Fathers' Rights Depend on the State in Which Their Cases Are Brought*

State courts across the country have formed different definitions of what it means to have "acknowledged or established" paternity.[175] Without a federal definition for acknowledging paternity, the substantive rights afforded a nonmarital father by ICWA could—and do—vary from state to state. This is especially problematic given the variance among state statutes regarding the means by which a nonmarital father can acknowledge or establish paternity. The variance in these laws brings with it significant differences in potential outcomes for nonmarital fathers under ICWA—a federal statute that Congress created specifically with uniform application in mind.[176]

For example, in *In re Adoption of a Child of Indian Heritage*, the laws of New Jersey did not permit nonstepparent adoptions to be reduced to a judgment until eight months after the child's birth.[177] These laws gave putative fathers eight months to acknowledge or establish their paternity, by either filing a written acknowledgment of paternity or initiating a legal proceeding to establish paternity.[178] Since the putative father in *Child of Indian Heritage* did not perform one of these steps before the entry of the final judgment of adoption, whatever parental rights he may have had were terminated.[179] However, had he filed a written acknowledgment of paternity or initiated a paternity proceeding within those eight months, he would have been able to exercise his parental rights under ICWA.

In contrast, a nonmarital father seeking to establish paternity in a state such as Utah does not benefit from such protections. Like the New Jersey statute at issue in *Child of Indian Heritage*, Utah law allows a nonmarital father to acknowledge his paternity by executing a declaration of paternity.[180] In contrast to the law at issue in *Child of Indian Heritage*, declarations of paternity filed in Utah must be signed by both the father *and* mother.[181]

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175. See supra section I.C.

176. See supra section I.A.2.

177. 543 A.2d 925, 936 (N.J. 1988) ("[U]nlike . . . other states, which allow adoptions to occur any time after birth . . . or require acknowledgements of paternity to be made within a short period of time after birth . . . adoption in New Jersey cannot be reduced to a final judgment until at least eight months after the child's birth." (citations omitted)).

178. Id. at 934.

179. Id. at 936. ("[D]espite having the opportunity to do so for over nine months after the birth of the child, Wright failed to acknowledge or establish his paternity prior to the entry of the final judgment of adoption, which terminated whatever parental rights to Baby Larry he may have had.").

180. See Utah Code Ann. § 78B-15-302 (LexisNexis 2012) (providing the steps that must be taken to execute a valid declaration of paternity in Utah).

181. Id. § 78B-15-302(1)(b). It is also worth noting that the current New Jersey statute requires the signature of both the father and mother. See N.J. Stat. Ann. § 26:8-28.1 (West

It is not hard to imagine a situation in which a putative father trying to establish his paternity could have a difficult time obtaining the signature of the mother.[182] This comparison between the laws of states like New Jersey[183] and those of states like Utah shows how a nonmarital father's rights under ICWA could differ dramatically between states if courts look to state definitions of "acknowledged or established" for guidance—even though ICWA is a federal law.

The fact that the father may have no control over where the case must be brought further complicates the problem of a father's rights differing from state to state. In instances in which the father is unaware of the child's birth location, as in *Child of Indian Heritage*,[184] his rights could depend on where the mother chooses to place the child for adoption. While cases like *Child of Indian Heritage* may not provide the most sympathetic facts for the father, cases in which the mother conceals the child's birth from the father provide a compelling justification for uniform rights across states.[185] In potential cases involving active fathers, it seems particularly cruel to leave the fate of the parent–child relationship in the hands of a mother who deceives the father. And even if the father were aware of the child's place of birth, it is nothing if not inconsistent to afford a father in a Utah proceeding different rights than that father would be afforded in a New Jersey proceeding—doubly so given the variance in state laws.

III. ADOPTING A FEDERAL DEFINITION OF "ACKNOWLEDGED OR ESTABLISHED"

A federal definition of "acknowledged or established" will solve the problems that stem from leaving state courts without guidance. Section III.A discusses why the best solution to this problem is for Congress or the BIA to introduce a federal definition and addresses the possibility of

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2007). However, other states such as Hawaii have laws on the books today that are very similar to the New Jersey statute in *Child of Indian Heritage* and permit a father alone to sign and file a declaration of paternity. See Haw. Rev. Stat. Ann. § 584-4(a)(6) (LexisNexis 2015) ("A man is presumed to be the natural father of a child if: A voluntary, written acknowledgment of paternity of the child signed by him under oath is filed with the department of health.").

182. In fact, if the father could easily obtain the signature of the mother, it seems unlikely that there would be a dispute as to his parental rights that would require him to invoke the protections of ICWA.

183. Other states such as Hawaii have similar laws on their books. See supra note 181.

184. 543 A.2d at 928 (noting that the putative father left to stay with relatives when the mother went into labor and did not return until after the mother had placed the child with adoptive parents).

185. See, e.g., In re Adoption of Baby B., 308 P.3d 382, 386 (Utah 2012) (recounting the facts of a case in which a mother told the nonmarital father that she was going to Utah to visit her sick father and would return to discuss adoption, which the father had consistently opposed, but secretly placed the child for adoption in Utah).

the Supreme Court introducing a federal definition. Section III.B explains how adopting a federal definition could narrow the holding of *Adoptive Couple*. Finally, Section III.C proposes recommendations for what the definition should be.

A. *Federal Definition Is the Best Way to Create Uniform Rights*

There are a number of options available to Congress, the BIA, and the Supreme Court for ensuring uniform rights for nonmarital fathers across states.[186] However, this Note argues that the best solution is for Congress or the BIA to adopt binding legislation or regulations that introduce a federal definition of how paternity can be acknowledged or established. Section III.A.1 provides an overview of why introducing a federal definition is the best solution given the intent and purpose of ICWA. Section III.A.2 explains why Congress and the BIA are the two parties best suited to introducing a uniform federal definition. Section III.A.3 addresses the possibility of the Supreme Court introducing a uniform federal definition.

1. *Federal Definition Best Serves the Intent and Purpose of ICWA*. — A commonly proposed alternative to creating a federal definition is to encourage states to adopt their own definitions that would be applied similarly in ICWA cases. Relying solely on states to solve this problem, however, undermines the intent of ICWA, which was to remove discretion from states and give it to the federal government.[187] In response to this concern, commentators have suggested that states should adopt the BIA guidelines and regulations as enforceable state requirements, which would result in a de facto uniform federal definition.[188] This suggestion is compelling at first glance—and certainly a step in the right direction—but does not provide enough guidance for nonmarital fathers.

First, the 2015 guidelines suggest that a parent take "reasonable steps" such as establishing paternity through DNA paternity testing.[189] This provides some guidance as to what could qualify as having "acknowledged or established" paternity, but it still leaves some significant room for interpretation. Paternity tests are one way for a nonmarital

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186. For example, some commentators have suggested the creation of a national putative father registry. See, e.g., Mary Beck, Toward a National Putative Father Registry, 25 Harv. J.L. & Pub. Pol'y 1031, 1033 (2002). Others have recommended that states individually make efforts to codify the recommendations of the 2015 BIA Guidelines. See Turner, supra note 131, at 502–05 (arguing states should adopt the recommendations of the BIA).

187. See supra section II.A.

188. See, e.g., Turner, supra note 131, at 505 (arguing states such as New York should incorporate the suggestions in the 2015 BIA Guidelines and the 2016 final rule into state law).

189. See supra note 13 and accompanying text.

father to acknowledge or establish paternity, but there are other methods that could be included in the list of reasonable steps.[190]

Second, the 2016 final rule rejected any potential changes to the definition of "parent" and retained the original statutory language of ICWA.[191] Therefore, a direct codification of the BIA's guidelines and regulations by states would not necessarily solve the issue this Note addresses. Given the discrepancies between the guidelines and the regulations, states would have to review every section of both the guidelines and the regulations one by one and then decide whether to adopt the guidelines' recommendation, the regulations' recommendation, or a hybrid of the two. This seems unnecessarily arduous, given that the same result could be achieved by issuing a binding regulation that defines "acknowledged or established." Furthermore, this approach is likely to produce inconsistent results across different states deciding how to reconcile and codify the amalgamated guidelines and regulations.

Lastly, it would require states' cooperation in adopting the guidelines for a truly national standard to emerge. It seems unlikely that all fifty states would willingly adopt the guidelines, especially given that some state courts have ignored past BIA guidelines.[192] Even if every state were to adopt the guidelines' reasonableness standard, there is no guarantee that one state's interpretation of reasonableness would be the same as—or even similar to—another state's interpretation of reasonableness. While adoption of a reasonableness standard by all fifty states would be a step in the right direction, it could potentially land nonmarital fathers in the same situation this Note addresses: a situation in which their rights are dependent on the state in which their parental rights are terminated. In the absence of congressional intervention, the best way to ensure that nonmarital fathers have uniform rights under ICWA, regardless of where their cases are brought, would be for the BIA itself to issue a binding regulation with a definition of "acknowledged or established."

2. *Congress and the BIA Are Best Suited to Adopt a Uniform Federal Definition.* — The most clear-cut route to establishing a uniform federal definition of "acknowledged or established" would be for Congress to amend ICWA. In contrast to the BIA and the Supreme Court, which are limited to interpreting existing statutory language through drawn-out procedures,[193] Congress could simply introduce a uniform definition

190. See infra section III.C.2.

191. See supra notes 147–149 and accompanying text.

192. See Turner, supra note 131, at 534–35 ("Some state court decisions referenced the guidelines in support of their independent construction of ICWA. Others viewed the guidelines as providing assistance but not as binding. Still others rejected both application of the guidelines in state law and to the specific recommendation at issue." (footnotes omitted)).

193. The BIA must follow the notice-and-comment rulemaking procedures required by the Administrative Procedure Act. See 5 U.S.C. § 553 (2012). The Supreme Court must wait

directly into the statute. For this procedural reason alone, Congress is best positioned to announce a uniform federal definition. However, the likelihood that Congress will take up this issue is slight. The last comprehensive attempt to amend ICWA came in 2003 when a proposed bill failed to make it out of the committee process.[194] And the last significant congressional action took place in 2005 when the Government Accountability Office (GAO) issued its report on state implementation of ICWA at the request of the House.[195] So while an amendment by Congress may be the surest way to introduce a federal definition of "acknowledged or established," it is important to acknowledge that Congress is unlikely to address this issue.

In contrast, the BIA is more likely to introduce a binding federal definition of "acknowledged or established." Unlike Congress, the BIA has shown that it is willing to engage with ICWA in recent years.[196] While the BIA failed to define "acknowledged or established" in the 2016 final regulations, the Agency recognized the existence of the issue in its 2015 guidelines.[197] Despite the procedural hurdles the BIA faces—proposing a regulation, taking comments from interested parties, and responding to comments[198]—the Agency has demonstrated some initiative on the matter, and it has the authority to issue binding regulations that would inform state courts interpreting ICWA.

3. *Potential Difficulties the Supreme Court May Face in Announcing a Uniform Federal Definition.* — While the adoption of a uniform federal definition by Congress or the BIA is the most appealing solution, the Supreme Court could also announce what it means for a nonmarital father to acknowledge or establish paternity under ICWA. However, the Supreme Court has interpreted ICWA only twice—in *Adoptive Couple* and *Holyfield*—in the thirty-eight years since ICWA's enactment.[199] Furthermore, the question of what it means for a nonmarital father to have

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until the right case is litigated all the way up the chain. See U.S. Const. art. III, § 2, cl. 1 (limiting the jurisdiction of the Court to cases and controversies).

194. See B.J. Jones et al., The Indian Child Welfare Act: A Legal Guide to the Custody and Adoption of Native American Children 8–10 (2d ed. 2008); see also H.R. 2750, 108th Cong. (2003) (proposing amendments to ICWA).

195. See Jones et al., supra note 194, at 10–11 (describing the GAO report).

196. See supra section I.D.

197. See supra section I.D. The BIA's decision to include a definition in the 2015 guidelines of what a nonmarital father must do to acknowledge or establish paternity demonstrates that the BIA is at least cognizant of this issue. Multiple parties submitted comments urging the BIA to include a definition in the final regulation, but the BIA declined. See supra section I.D.3. While facially unhelpful, the initial inclusion demonstrates the BIA's willingness to listen and field questions about the definition of parent.

198. See 5 U.S.C. § 553.

199. See Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2556–57 (2013); Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989); see also Kruck, supra note 15, at 459 (noting that *Adoptive Couple* is only the second time that the Supreme Court has found itself interpreting ICWA).

acknowledged or established paternity has reached the Supreme Court only once, and, even then, the Court chose to decide the case on other grounds.[200] The infrequency with which the Court hears ICWA appeals is further complicated by the holding in *Adoptive Couple*, which, at first glance, narrows the opportunity for a question involving the definition of "acknowledged or established" to be considered by the Supreme Court.[201] By conditioning the applicability of section 1912(f) on the prior existence of a custodial relationship, courts can now settle section 1912(f) disputes without having to determine whether the nonmarital father is a parent.[202] This is an especially devastating blow for putative fathers, given that almost all the cases discussed in this Note did not involve prior custody by the father.[203] However, this question has been, and continues to be, a live issue in state courts across the country,[204] and the possibility of litigating the issue in the Supreme Court should not be discarded entirely.

Despite the holding of *Adoptive Couple*, Justice Thomas's and Justice Breyer's concurrences leave open the possibility that the Court could consider a case premised on the acknowledgment or establishment of paternity. Justice Thomas concurred on the grounds that the majority opinion avoided constitutional problems that would have been raised if the Court had agreed with the birth father's interpretation of ICWA.[205] Justice Thomas asserted that the Indian Commerce Clause grants Congress the authority to enact legislation to regulate commerce with Native American tribes, but that child custody proceedings do not qualify as "commerce."[206] In essence, Justice Thomas concurred with the judg-

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200. See *Adoptive Couple*, 133 S. Ct. at 2560 ("We need not—and therefore do not—decide whether Biological Father is a 'parent.' Rather, assuming for the sake of argument that he is a 'parent,' we hold that neither § 1912(f) nor § 1912(d) bars the termination of his parental rights." (citation omitted)).

201. See Kruck, supra note 15, at 467 ("[*Adoptive Couple*] will cause more courts to avoid [ICWA] and will, therefore, undermine its protective purpose.").

202. See id. at 468. ("[T]he Court's definitions of 'breakup of the Indian family' and 'continued custody' strip away § 1912(d) and (f) protection for noncustodial fathers, even if they are heavily involved in their child's upbringing.").

203. See supra section I.C.

204. See, e.g., Bruce L. v. W.E., 247 P.3d 966, 979 (Alaska 2011) (discussing whether the father was a parent within the meaning of ICWA); Michael J., Jr. v. Michael J., Sr., 7 P.3d 960, 962–63 (Ariz. Ct. App. 2000) (same); In re Daniel M. v. Richard S., 1 Cal. Rptr. 3d 897, 900 (Cal. Ct. App. 2003) (same).

205. See *Adoptive Couple*, 133 S. Ct. at 2565 (Thomas, J., concurring) ("Each party . . . has put forward a plausible interpretation of the relevant sections of [ICWA]. However, the interpretations offered by respondent Birth Father and the United States raise significant constitutional problems as applied to this case. Because the Court's decision avoids those problems, I concur in its interpretation.").

206. See id. at 2570 ("In light of the original understanding of the Indian Commerce Clause, the constitutional problems that would be created by application of the ICWA here are evident. First, the statute deals with 'child custody proceedings,' § 1903(1), not 'commerce.'").

ment, but he based his reasoning on his interpretation of the Indian Commerce Clause instead of the Court's focus on the "continued custody" language. Justice Breyer also concurred in the judgment but warned that the Court's interpretation may unintentionally exclude too many categories of Native American parents, and he specifically mentioned the nonmarital father who is deceived as to the birth of his child as an example of the opinion's potential overreach.[207]

Taken together, these two concurrences make it clear that the holding of *Adoptive Couple* left open the possibility that a nonmarital father could seek protection under section 1912 in cases in which he has been deceived or prevented from supporting his child. Therefore, because a father may bring a section 1912 claim under certain circumstances, the Supreme Court could ultimately adopt a federal definition. However, because these circumstances are very narrow, they reinforce the argument that Congress or the BIA should make these changes rather than the Court.

B. *A Federal Definition Could Potentially Narrow the Holding of* Adoptive Couple

Much of the academic discourse in the wake of *Adoptive Couple* has revolved around whether the case was rightly decided.[208] Adopting a federal definition of "acknowledged or established" could potentially narrow the holding of *Adoptive Couple*, especially with regard to section 1912(d) claims. The majority in *Adoptive Couple* concluded, with respect to section 1912(d): "Consistent with the statutory text, we hold that § 1912(d) applies only in cases where an Indian family's 'breakup' would be precipitated by the termination of the parent's rights. *The term 'breakup' refers in this context to '[t]he discontinuance of a relationship*,' or 'an ending as an effective entity' . . . ."[209]

Providing a clear course of action by which a nonmarital father can acknowledge or establish paternity and therefore be considered a parent could potentially narrow this holding. Once a nonmarital father is deemed or adjudicated to be a parent, then he could potentially qualify for the constitutional protections afforded to parent–child relationships. By qualifying for these constitutional protections, a nonmarital father could argue that any termination of his rights would qualify as a breakup,

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207. See id. at 2571 (Breyer, J., concurring) (clarifying that the Court's opinion does not extend to instances such as a father who has visitation rights, has met his child support obligations, or has been deceived as to his child's existence).

208. See, e.g., Kruck, supra note 15, at 461–73 (disagreeing with the outcome of *Adoptive Couple* and proposing legislation that would limit its holding).

209. *Adoptive Couple*, 133 S. Ct. at 2562 (emphasis added) (citations omitted) (first quoting Breakup, American Heritage Dictionary (3d ed. 1992); then quoting Breakup, Webster's Third New International Dictionary (1961)).

per the language of *Adoptive Couple*, and therefore, he would qualify for the protection of section 1912(d) under *Adoptive Couple*'s holding.

Speaking outside of the context of ICWA and to the rights of putative fathers generally, the Supreme Court in *Quilloin v. Walcott* recognized that "the relationship between parent and child is constitutionally protected."[210] While the Court in *Quilloin* ultimately concluded that the father was not entitled to certain constitutional protections, the outcome could be different in cases in which the father has taken significant steps to shoulder parental responsibility.[211] The Court further elucidated this principle in two subsequent cases: *Caban v. Mohammed*[212] and *Lehr v. Robertson*.[213] In *Caban*, the Court stated that, while nothing in the Equal Protection Clause precludes a state from withholding the privilege of vetoing an adoption from a nonmarital father when the father has never come forward to participate in the rearing of his child, a father can qualify for protection when he has established a substantial relationship with the child and has admitted paternity.[214] And in *Lehr*, the Court stated that a nonmarital father acts as a "father" toward his children when he demonstrates a full commitment to responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child."[215]

If a nonmarital father could acknowledge or establish his paternity and therefore become a "parent" under ICWA, then a court might be able to use the language in the *Quilloin-Caban-Lehr* trilogy to hold that a parent–child relationship exists and therefore section 1912(d) contemplates the breakup of that relationship, per the majority opinion in *Adoptive Couple*. Taken together, the *Quilloin-Caban-Lehr* trilogy and ICWA stand for the proposition that a familial relationship can exist without prior custody by the father. By establishing that a familial relationship is being discontinued by termination of his rights, a nonmarital father could potentially avail himself of the protections of section 1912(d) despite not having had prior custody of the child.

C. *A Federal Definition Should Be Reasonable Within the Context of ICWA*

In section III.C.1, this Note argues that ICWA intends for any federal definition of "acknowledged or established" to promote the stability of Native American families. In section III.C.2, this Note proposes a

210. 434 U.S. 246, 255 (1978).

211. Cf. id. at 256 (considering parental commitment in determining whether a parent–child relationship is worthy of constitutional protection); Deluzio, supra note 7, at 525 (noting that more than a biological link is required for constitutional protection of a parent–child relationship).

212. 441 U.S. 380 (1979).

213. 463 U.S. 248 (1983).

214. *Caban*, 441 U.S. at 392–93.

215. *Lehr*, 463 U.S. at 261 (alteration in original) (internal quotation marks omitted) (quoting *Caban*, 441 U.S. at 392).

recommended definition for what a nonmarital father must do to acknowledge or establish paternity.

1. *ICWA Intended to Promote Stability of Native American Families.* — ICWA's congressional declaration of policy states, "The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to *promote the stability and security of Indian tribes and families*."[216] The stability of the Native American family in this context would be best promoted by creating a definition of "acknowledged or established" that would be easy for nonmarital fathers to satisfy.[217] Creating a definition that is too strict could lead to nonmarital fathers being unable to "acknowledge or establish" their paternity, which would preclude them from receiving the protections afforded by ICWA and would do little to promote the stability of Native American families.

2. *The Definition Should Clearly Outline What Nonmarital Fathers Must Do.* — After a review of the laws of several states, this Note recommends the following definition:

A nonmarital father will be considered to have acknowledged or established paternity if he has done any of the following:

> (1) Acknowledged or established paternity in the state in which the child was born or he reasonably believed the child would be born according to the laws of that state;[218]
>
> (2) Registered in the putative father registry in the state in which the child was born or in which the father reasonably believed the child would be born;[219]

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216. 25 U.S.C. § 1902 (2012) (emphasis added).

217. Of course, introducing a definition that is easy for nonmarital fathers to satisfy would create the highest probability of those fathers getting custody of their children and therefore best promote the stability of the Native American family. However, there are many countervailing interests to consider, such as promoting the stability of adoptions in general. Providing nonmarital fathers with too low a bar to clear could create uncertainty in adoptions and could potentially chill the adoption of Native American children if adoptive parents would need to constantly worry that their child could be taken from them by the biological father.

218. Aside from the twelve states—Alabama, Florida, Georgia, Illinois, Indiana, Minnesota, Missouri, Montana, New Hampshire, South Carolina, Tennessee, and Virginia—whose sole means of establishing certain rights related to paternity is by filing with the putative father registry, all states provide means by which a nonmarital father can establish his paternity. See Child Welfare Info. Gateway, The Rights of Unmarried Fathers 2 n.8 (2014), https://www.childwelfare.gov/pubPDFs/putative.pdf [http://perma.cc/W5LJ-LTFJ]. Another suggestion put forth by scholars is the creation of a national putative father registry. See generally Karen Greenberg, Daniel Pollack & Andrea MacIver, A National Responsible Father Registry: Providing Constitutional Protections for Children, Mothers and Fathers, 13 Whittier J. Child & Fam. Advoc. 85 (2014). A national putative father registry would likely solve many of the problems discussed in this Note, but until a national registry is created, the best way to protect nonmarital fathers is by defining what it means to "acknowledge or establish" paternity.

(3) Has instituted a paternity action or filed an affidavit acknowledging his paternity of the child in the state in which the child was born within thirty days of the child's birth;[220]

(4) Has established his paternity through DNA testing;[221] or

(5) Has openly held out the child to be his own or financially supported the child to a large extent.[222]

This recommended definition aims to clarify what nonmarital fathers must do to acknowledge or establish their paternity and also to balance the needs of nonmarital fathers with the needs of the birth mother and adoptive parents. This definition uses the reasonableness standard discussed in the 2015 guidelines and various cases and builds upon it by introducing more certainty.[223] This suggested definition was reached by looking at both case law and state statutes to determine what courts and states have generally held to be "reasonable" steps to acknowledge or establish paternity. The actions enumerated in this proposed definition are meant to create a more comprehensive definition of what actions are "reasonable" when taking into account the purpose and goals of ICWA. For example, many states allow a putative father to establish paternity by registering with the state, but this Note suggests building upon that method by allowing a nonmarital father to register in a state in which he reasonably believes his child may be born. Additional

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219. Approximately twenty-five states have putative father registries that have been established to allow a father to voluntarily acknowledge paternity and record that acknowledgment. These states are: Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and Wyoming. See The Rights of Unmarried Fathers, supra note 218, at 2 n.6. In nineteen other states, fathers can file acknowledgments of paternity through "social services departments, registrars of vital statistics, or other similar entities." See id. at 2 n.7.

220. In twenty-one states, a father may claim paternity of a child by filing an acknowledgment or affidavit of paternity with a court. These states are: Alabama, Arizona, Arkansas, Connecticut, Florida, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New Mexico, North Dakota, Oregon, Rhode Island, Texas, and Virginia. See id. at n.9.

221. In twenty states, a court may establish paternity when a genetic test confirms a man to be the biological father of a child. These states are: Alaska, Arizona, California, Colorado, Connecticut, Hawaii, Indiana, Kansas, Louisiana, Mississippi, Nevada, New Jersey, North Carolina, North Dakota, Rhode Island, South Dakota, Tennessee, Texas, Virginia, and Washington. See id. at 3 n.11.

222. This is a common means of establishing paternity in many states. The father in *Yavapai-Apache Tribe* was adjudicated to have established paternity in this way. See supra notes 105–114 and accompanying text. Including this requirement provides a failsafe for nonmarital fathers who have supported the child but may not have necessarily satisfied any of the other proposed means—for example, it is unlikely that a father who has held a child out as his own and financially supported the child has felt it necessary to institute a paternity action.

223. See supra sections I.C.2, I.D.2.

protections, such as this more flexible filing requirement, are justified by ICWA's overarching goal of promoting the stability of Native American families. Furthermore, this creates an additional layer of protection for nonmarital fathers who are deceived as to where or when the birth of their child has occurred. By specifying exactly what a nonmarital father can—and should—do to acknowledge or establish paternity, a degree of uncertainty is removed for both nonmarital fathers and state courts that have to decide whether the father has done enough to qualify for the protections of ICWA.

CONCLUSION

The introduction of a federal definition of "acknowledged or established" would eliminate the varied treatment that the term has received in state courts across the country. ICWA is a federal statute that provides a wide range of protections for parents of Native American children, yet the application of ICWA is highly variable from state to state. This creates the issue of the same individuals potentially having different substantive rights under a federal statute based solely on the state in which their case is brought. The Supreme Court's holding in *Adoptive Couple* eliminates the issue of determining whether paternity has been "acknowledged or established" in certain cases, but deciding whether or not a nonmarital father is a "parent" is still an open issue in many other scenarios distinguishable from the facts of *Adoptive Couple*. This Note's solution helps ensure that nonmarital fathers in these cases can have their rights adequately protected if they have done what is required to be considered a "parent" under ICWA.