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The ICWA's Pre-Existing Custody Requirement: A Flexible Approach to Better Protect the Interests of Indian Fathers, Children, and Tribes

By Jeffrey A. Parness & Amanda Beveroth*

I. INTRODUCTION

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 and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture¹

Congress's declaration of policy through the Indian Child Welfare Act (the "ICWA") captures the broad scope of interests that the ICWA is intended to protect in Indian adoptions.² The ICWA provides heightened protections aimed at preserving the relationship not only between Indian children and their families, but also between Indian children and their tribes—as children are central to tribes' continuing culture and community.³ Among its protections, the ICWA provides that an Indian parent's parental rights cannot be terminated unless the parent's "continued custody" of the child will result in "serious emotional or physical damage to the child."⁴ In *Mississippi Band of Choctaw Indians v. Holyfield*, the U.S. Supreme Court first recognized the unique tribal interests in Indian children, holding that the ICWA should broadly apply in custody proceedings involving an Indian child.⁵ The Supreme Court's recent decision in *Adoptive Couple v. Baby Girl* implicated the ICWA's policy of safeguarding the unique interests of Indian tribes, Indian families, and Indian children.⁶

The *Adoptive Couple* case, involving the daughter of a Cherokee father and non-Indian mother, captured the nation's attention when it reached the Supreme Court.⁷ Relying on the ICWA's language of "continued custody," the Court found that the ICWA requires pre-existing custody before its protections apply.⁸ Significantly, the ICWA's "continued custody" requirement has the potential to severely limit the application of its protections in cases involving unwed biological Indian fathers without physical custody.⁹ Limiting the ICWA's protections not only impacts unwed Indian fathers' interests, but also impacts tribal interests in their children, as tribes

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¹ 25 U.S.C. § 1902 (2012).

² See, e.g., *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 35–37 (1989); *In re Adoption of Baade*, 462 N.W.2d 485, 489–90 (S.D. 1990).

³ See *Holyfield*, 490 U.S. at 35.

⁴ 25 U.S.C. § 1912(f) (2012).

⁵ See *Holyfield*, 490 U.S. at 34–37.

⁶ *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013).

⁷ *Adoptive Couple*, 133 S. Ct. at 2558; see, e.g., "Baby Veronica" Handed Over to Adoptive Parents, Cherokee Nation Confirms, CBS NEWS (Sept. 24, 2013, 1:04 AM), <http://www.cbsnews.com/news/baby-veronica-handed-over-to-adoptive-parents-cherokee-nation-confirms/>.

⁸ *Adoptive Couple*, 133 S. Ct. at 2560–62.

⁹ See *id.* at 2572–73 (Sotomayor, J., dissenting).

are self-governing communities.¹⁰ Also impacted are Indian children's interests to be raised, to participate, and to benefit from their parents' and tribes' culture and community.¹¹ This Article argues that "continued custody" should not be limited to physical custody. Rather, "continued custody" should also include efforts to meaningfully accept the role of parenthood so that unwed Indian fathers without physical custody are not automatically excluded from the ICWA's protections.¹² This would ensure that courts consider tribal interests in Indian children, Indian fathers' interests, and Indian children's interest in relation to their tribes and families.

States' application of the ICWA has varied since its enactment in 1978.¹³ Prior to *Holyfield*, state courts limited the ICWA's application to instances where there was an existing Indian family.¹⁴ In overturning the existing Indian family doctrine, state courts employed *Holyfield* to determine that the ICWA applied in *any* child custody proceeding involving an Indian child.¹⁵ By positioning the pre-existing custody requirement between the stringent existing Indian family doctrine and the ICWA's broader application under *Holyfield*, state courts safeguard tribes' unique interests in Indian children in line with congressional intent.¹⁶

Part II of this Article will provide the historical background to the ICWA, including Congress's enactment of the ICWA, a brief history of the existing Indian family doctrine and many state court rejections of the doctrine under *Holyfield*, and the Supreme Court's recent decision in *Adoptive Couple*.¹⁷ Part III will demonstrate that the extreme nature of *Adoptive Couple*, where there was no meaningful parent-child relationship, does not mean that when an Indian father without physical custody demonstrates efforts to assume parenthood and establish a parent-child relationship, there has been no pre-existing custody.¹⁸ Part IV will argue that state court precedent that evaluated efforts by unwed fathers and state legislation provide bases for state courts to continue with a broad application of the ICWA without undermining "continued custody." This Article urges state courts to implement a flexible standard that evaluates efforts by the unwed father to assume parenthood in determining whether the ICWA's pre-existing custody requirement has been met. Finally, Part V concludes that the ICWA's pre-existing custody requirement should carry a low burden of proof to ensure that the unique interests of Indian

¹⁰ See *Holyfield*, 490 U.S. at 34.

¹¹ See *id.*

¹² See *Adoptive Couple*, 133 S. Ct. at 2558. The Court found that the biological father in *Adoptive Couple* "made no meaningful attempts to assume his responsibility of parenthood" because the biological father provided no financial support to the birth mother during her pregnancy or to the baby girl after her birth, the biological father sent a text message to the birth mother indicating he relinquished his parental rights, and the biological father had no contact with the baby girl until she was twenty-seven months old when the South Carolina Family Court awarded the biological father custody of the baby girl. *Id.* at 2558–59 (internal quotation marks omitted). The facts that the Court relied on to find the father made no attempts to assume parenthood suggests that where an unwed non-physical custodial Indian father makes such efforts, such as providing financial assistance and visiting his child, demonstrate the father has made meaningful steps to accept the responsibility of parenthood. See *id.*; see *id.* at 2578–79 (Sotomayor, J., dissenting). Justice Sotomayor suggests that based on the majority's interpretation of the ICWA, a biological Indian father "who, though he has never had custody of his biological child, visits her and pays all of his support obligations" would not be protected by the ICWA because he is a non-physical custodial parent. *Id.* Thus, it follows that a father who visits his child and pays his support obligations should receive the ICWA's protections. See *id.*

¹³ See Dan Lewerenz & Padraic McCoy, *The End of the "Existing Indian Family" Jurisprudence: Holyfield at 20, in the Matter of A.J.S. and the Last Gasps of a Dying Doctrine*, 36 WM. MITCHELL L. REV. 684, 695–96, 701 (2010).

¹⁴ See, e.g., *In re Adoption of Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982), *overruled by In re A.J.S.*, 204 P.3d 542 (Kan. 2009).

¹⁵ See, e.g., *Jared P. v. Glade T.*, 209 P.3d 157, 160 (Ariz. Ct. App. 2009).

¹⁶ See, e.g., *Bruce L. v. W.E.*, 247 P.3d 966, 974 (Alaska 2011) ("ICWA applies to any proceeding that might result in the termination of a parent-child relationship involving an Indian child."); 124 CONG. REC. 38,101–03 (1978).

¹⁷ See *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); see *Adoptive Couple*, 133 S. Ct. 2552; see also *Jared P.*, 209 P.3d at 160 (interpreting *Holyfield* to reject the existing Indian family doctrine).

¹⁸ See *Adoptive Couple*, 133 S. Ct. at 2572–73, 2576, 2578 (Sotomayor, J. dissenting) (noting that the majority's decision, which was based on highly-contested facts, makes the ICWA's protections inapplicable to any Indian parent who never had custody even if the parent made efforts to have a parent-child relationship); *but cf. id.* at 2558–62 (majority opinion) (noting that the unwed father made no effort toward accepting parenthood so there was no pre-existing custody).

tribes, Indian fathers, and Indian children are adequately considered in child custody proceedings.¹⁹

II. THE ICWA ON INDIAN CHILDREN ADOPTIONS TO DATE

A. Background of the ICWA

During the mid-1970s, the crisis of Indian children being removed from their homes through abusive and culturally-insensitive welfare practices gained Congress's attention.²⁰ Enacted in 1978, the ICWA was "the result of over [four] years of congressional hearings, oversight, and investigation," which involved hundreds of witnesses testifying on adoption and foster care practices regarding Indian children, statistical evidence of the rate of removal for Indian children, and reports detailing high numbers of Indian children removed from their homes by non-tribal, governmental agencies.²¹ Congressional inquiries into the problem revealed "25 percent of all Indian children [were] removed from their homes and placed in some foster care or adoptive home or institution."²² Further, the Association on American Indian Affairs' survey results from July 1976 demonstrated that the removal of Indian children from their homes occurred at a much higher rate than for non-Indian children.²³ The findings showed that in Arizona, for example, "1 out of every 29 Indian children is placed for adoption as compared to 1 out of 134 non-Indians."²⁴ In Wisconsin, "1 out of 14 [Indian children is placed for adoption] as compared to 1 out of 251 [non-Indian children]."²⁵ Alarming, the survey further found that "in some States as high as 95 percent of these children are placed in non-Indian foster or adoptive homes or institutions."²⁶ Through its investigation, Congress concluded that the primary cause of the crisis was non-tribal; it was the willful or inadvertent cultural insensitivity of governmental agencies.²⁷ The congressional record shows that witnesses repeatedly testified about the "failure or inability of State agencies, courts, and procedures to fairly consider the differing cultural and social norms in Indian communities and families."²⁸ Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians, testified before the U.S. House of Representatives that the government agents removing Indian children from their homes "[had] no basis for intelligently evaluating the cultural and social premises underlying Indian home life and child rearing."²⁹ The evidence

¹⁹ See *Holyfield*, 490 U.S. at 32–37.

²⁰ *Id.* at 32; Brief for Current and Former Members of Congress as Amici Curiae Supporting Respondents at 6, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399) [hereinafter *Amici Curiae Brief*], available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-399_amicus_current_former_congress_members.authcheckdam.pdf.

²¹ 124 CONG. REC. 38,101 (1978) (statement of Rep. Udall).

²² *Id.* at 38,102.

²³ *Id.* (statement of Rep. Lagomarsino).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* (statements of Rep. Udall & Rep. Lagomarsino) ("The most distressing and critical factor giving rise to this emerging crisis of Indian families has been the inability or unwillingness of State agencies or officials to understand the different cultural and social norms prevailing in the Indian world. . . . The reasons behind these statistics go beyond the general poverty prevalent in many Indian communities. Hearing witnesses reiterate time and again the failure or inability of State agencies, courts, and procedures to fairly consider the differing cultural and social norms in Indian communities and families.")

²⁸ *Id.* (statement of Rep. Lagomarsino).

²⁹ *Indian Child Welfare Act of 1978: Hearing on S. 1214 Before the Subcomm. on Indian Affairs & Pub. Lands of the H. Comm. on Interior & Insular Affairs*, 95th Cong. 191–92 (1978) [hereinafter *1978 Hearings*] (statement of Calvin Isaac, Tribal Chief of the Miss. Band of Choctaw Indians and Member of the Nat'l Tribal Chairman's Ass'n), available at <http://www.narf.org/icwa/federal/lh/hear020978/hear020978.pdf>; see also *Amici Curiae Brief*, *supra* note 20, at 9–11 (discussing state agencies' failure to consider tribes' interests in Indian children and Indian children's interest in preserving a relationship with their tribe).

before Congress demonstrated that instead of tribes or Indian families deciding the placement and future of Indian children, government agents, who were “at best ignorant of [tribes’] cultural values, and at worst contemptful of the Indian way,” were making these critical decisions.³⁰ The result was that the majority of Indian children were placed in non-Indian homes—removed from the tribe, the child’s Indian family, and Indian culture.³¹

Upon examination, Congress recognized the significant impact that the removal of Indian children had on tribal ability to continue Indian heritage and self-governance.³² Fay La Pointe, a leader in the Puyallup Tribe of Indians, testified before Congress stating, “[w]e know that our children are our greatest resource, and without them we have no future.”³³ Calvin Isaac’s testimony further emphasizes the importance of Indian children to their tribes.³⁴ He stated that Indian children are the “only real means for the transmission of the tribal heritage,” and that as the majority of Indian children removed from their homes were placed in non-Indian families, these children were “denied exposure to the ways of their People,” and tribes were denied the opportunity to raise children within the tribal culture.³⁵ He lamented that this severely limited the continuance of tribal heritage.³⁶

The congressional record indicates the denial of the transmission of Indian culture by non-tribal government agents “constitute[d] a serious threat to [tribes’] existence as on-going, self-governing communities.”³⁷ Not only did the removal of Indian children from their families and subsequent placement in non-Indian homes result in the inability of these Indian children to learn their tribal culture and limit their ability to take on future leadership positions within their tribes, but such practices also undercut tribal ability to care for their members and threatened tribal sovereignties.³⁸ The non-tribal agents’ removal of Indian children from their tribes and families disregarded tribal sovereignty and resulted in detriment to Indian family relationships and the continuance of Indian heritage, further undermining tribal ability to self-govern through the “wholesale removal of [Indian] children.”³⁹ Further, there were few, if any, opportunities for tribes to intervene or to provide cultural insight in custody decisions regarding Indian children because, as the congressional record notes, “[g]enerally, there [were] no requirements for responsible tribal authorities to be consulted about or even informed of child removal actions by nontribal government or private agents.”⁴⁰

³⁰ 1978 Hearings, *supra* note 29, at 192 (statement of Calvin Isaac).

³¹ *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs*, 95th Cong. 318 (1977) [hereinafter 1977 Hearings] (statement of Howard E. Tommie, Chairman of the Nat’l Indian Health Bd.), available at <http://www.narf.org/icwa/federal/lh/hear080477/hear080477.pdf>. Howard E. Tommie testified on statistics from the Association on American Indian Affairs, stating that in 1975, “in North Dakota, [seventy-five percent] of those Indian children in foster care were placed with non-Indian families. In Montana, the figure rose to [eighty-seven percent] and in California, which has the third highest Indian population of any state in the nation, the figure reached [ninety-three percent].” *Id.*

³² 124 CONG. REC. 38,102 (1978) (statement of Rep. Udall) (“Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy. . . . What resource is more critical to an Indian tribe than its children? What is more vital to the tribes’ future than its children?”).

³³ 1978 Hearings, *supra* note 29, at 78 (testimony of Fay La Pointe, a Puyallup tribe leader); see also *Amici Curiae Brief*, *supra* note 20, at 9 (quoting Fay La Pointe’s testimony before Congress at the 1978 Hearings to argue that Congress enacted the ICWA to protect tribes’ interests in their children).

³⁴ 1978 Hearings, *supra* note 29, at 193 (statement of Calvin Isaac).

³⁵ *Id.*

³⁶ *Id.*

³⁷ 124 CONG. REC. 38,103 (statement of Rep. Lagomarsino).

³⁸ See 1978 Hearings, *supra* note 29, at 193 (statement of Calvin Isaac).

³⁹ 124 CONG. REC. 38,103 (statement of Rep. Lagomarsino); see also 1978 Hearings, *supra* note 29, at 192–93 (statement of Calvin Isaac) (describing the negative impact the removal of Indian children has on tribes’ members, including drug abuse and suicide).

⁴⁰ 124 CONG. REC. 38,102 (statement of Rep. Lagomarsino).

The congressional record also demonstrates that Congress recognized Indian children's interest in being raised in their tribal community. Although speaking specifically about unborn Indian children, Fay La Pointe from the Puyallup Tribe of Indians acknowledged Indian children's interests in being raised within the tribal culture, which includes the child's "right to know where he/she is from . . . the tribe of his/her ancestors."⁴¹ Further evidence presented to Congress demonstrated that being raised in non-Indian households negatively impacted Indian children.⁴² Expert testimony indicated that being raised outside of Indian culture resulted in Indian children, particularly during adolescence, having difficulty in forming a cultural identity resulting in negative behavior, such as runaway problems and suicide attempts.⁴³ These difficulties were compounded by the separation of Indian children from their extended Indian families as the children formed their cultural identity.⁴⁴ Evidence from both professionals and Indian leaders as to the negative effects faced by Indian children raised in non-Indian households led Congress to determine that being raised outside of tribal communities "[does] not meet [Indian children's] special cultural needs."⁴⁵ Further, Congress recognized that being raised outside of tribal communities denied Indian children their "right to share in the cultural and property benefits of membership in [their] tribe."⁴⁶

Congress further acknowledged the negative effects on Indian parents and their families caused by the removal of their children and the significant interests that Indian parents and their families had in raising their Indian children.⁴⁷ The congressional record indicates that the removal of Indian children negatively impacts Indian parents by lowering the parents' self-esteem and exacerbating already existing issues, like alcohol abuse.⁴⁸ Evidence presented to Congress also suggested that Indian parents often did not understand their rights in custody proceedings.⁴⁹ The evidence further indicated that non-tribal agents did not understand Indian family relationships that extend beyond the nuclear family and often refused to place Indian children with tribal families.⁵⁰ In recognizing that Indian parents experience negative effects from the removal of their children and often do not understand their rights, Congress acknowledged the interests that Indian parents and Indian families had in raising Indian children in order to pass on their culture.⁵¹ Clearly, the ICWA was enacted to promote the interests of Indian tribes, Indian children, and Indian parents.

B. Mandates

The ICWA was passed to remedy the crisis of the large-scale removal of Indian children from their families in order to protect the interests of Indian parents and families, alongside the interests of the tribes in their children and the interests of the Indian children in their tribes.⁵² The

⁴¹ 1978 Hearings, *supra* note 29, at 79 (statement of Fay La Pointe).

⁴² See *Indian Child Welfare Program Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior & Insular Affairs*, 93d Cong. 49 (1974) [hereinafter 1974 Hearings] (statement of Dr. Joseph Westermeyer, Dep't of Psychiatry, Univ. of Minn.), available at <http://www.narf.org/icwa/federal/lh/hear040874/hear040874.pdf>.

⁴³ See *id.* at 45–49.

⁴⁴ See *id.* Extended families would traditionally be "counted as close, responsible members of [Indian children's] famil[ies]" when Indian children are raised within their tribes. 1977 Hearings, *supra* note 31, at 316 (statement of Howard E. Tommie).

⁴⁵ 124 CONG. REC. 38,102–03 (statement of Rep. Lagomarsino).

⁴⁶ *Id.* at 38,103.

⁴⁷ See *id.*

⁴⁸ *Id.*

⁴⁹ See 1978 Hearings, *supra* note 29, at 201 (statement of Mona Shephard, Coordinator, RST Social Servs. Program, Rosebud Sioux Tribe, Rosebud, S.D.).

⁵⁰ See 1977 Hearings, *supra* note 31, at 316 (statement of Howard E. Tommie).

⁵¹ See *id.* at 320–21; see 1978 Hearings, *supra* note 29, at 201 (statement of Mona Shephard); see also *Amici Curiae Brief*, *supra* note 20, at 9–11 (arguing that Congress recognized the negative impact the removal of Indian children had on tribes and enacted the ICWA to protect tribes' interests in their children).

⁵² See *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32–37 (1989); 124 CONG. REC. 38,101–03 (1978).

congressional record demonstrates that Congress saw as its “responsibility” to remedy the crisis by “assist[ing] tribes in protecting their most precious resource, their children.”⁵³ Thus, the congressional declaration of policy behind the ICWA states, “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.”⁵⁴ Congress, therefore, specifically identifies interests of Indian tribes and families in the language of the ICWA, indicating that the purpose of the ICWA is to protect Indian tribes and families alongside Indian children.⁵⁵

Of particular importance is the ICWA’s provision recognizing heightened protections of the parental rights of Indian parents. Regarding the termination of parental rights, § 1912(f) provides that “[n]o termination of parental rights may be ordered in the absence of a determination . . . that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child.”⁵⁶ The ICWA further provides that “[a]ny party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law . . . [undertake] active efforts . . . to prevent the breakup of an Indian family”⁵⁷ Finally, even if an Indian parent’s parental rights are terminated, § 1915(a) provides that “[i]n any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to placement with (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.”⁵⁸ These ICWA provisions demonstrate congressional intent to ensure that the relationships between Indian parents and their children are protected and, importantly, that tribal relationships with Indian children are protected.⁵⁹

Although a federal statute, state courts apply the ICWA in their own unique ways because the ICWA is applied in child custody proceedings, such as adoptions or terminations of parental rights, which occur in state courts.⁶⁰ The ICWA anticipated some state law standards for adoption proceedings involving Indian children.⁶¹ States’ application of the ICWA has varied because the ICWA sets minimum, not maximum, standards for states to apply in custody proceedings involving Indian children.⁶²

C. Precedents

1. The Pre-2013 U.S. Supreme Court Precedent

In 1989, the Supreme Court issued its first decision applying the ICWA in *Mississippi Band of Choctaw Indians v. Holyfield*.⁶³ Although the case presented a jurisdictional issue, causing the Court not to decide the outcome of the custody proceeding regarding two Indian children, the Court’s analysis of the ICWA confirmed that the purpose of the ICWA was to protect the interests of not only Indian families and children, but also tribal interests in Indian children.⁶⁴ Relying on the congressional findings emphasizing the negative impact felt by the

⁵³ 124 CONG. REC. 38,103 (statement of Rep. Lagomarsino).

⁵⁴ 25 U.S.C. § 1902 (2012).

⁵⁵ *Id.*

⁵⁶ *Id.* § 1912(f) (2012).

⁵⁷ *Id.* § 1912(d).

⁵⁸ *Id.* § 1915(a) (2012).

⁵⁹ See Amici Curiae Brief, *supra* note 20, at 6–8.

⁶⁰ See *In re N.B.*, 199 P.3d 16, 18–19 (Colo. App. 2007) (providing a background of states’ different applications of the ICWA).

⁶¹ See *id.* at 18 (noting that the ICWA sets “minimum standards for the removal of Indian children,” thereby leaving room for state courts to set higher standards).

⁶² 25 U.S.C. § 1902 (2012). If a state chooses to do so, it may set higher standards than the federal standards established by the ICWA. See, e.g., OKLA. STAT. ANN. tit. 10, § 40.1 (West 2015) (explicitly providing that Indian tribes have an interest in Indian children, “regardless of whether or not said children are in the physical custody of an Indian parent or Indian custodian . . .”).

⁶³ *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

⁶⁴ *Id.* at 37, 53.

tribes from the removal of Indian children, the Court emphasized that Indian tribes have a “unique and compelling interest” in Indian children, which Congress sought to protect through provisions of the ICWA.⁶⁵ These protections included jurisdictional provisions giving tribal courts authority over Indian child custody proceedings, requiring notice to tribes when custody proceedings took place in state courts, and preferring placements of Indian children with Indian families.⁶⁶ The Court concluded that the ICWA stood “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.”⁶⁷ *Holyfield*, therefore, confirmed that in custody proceedings involving Indian children, the ICWA applied in order to ensure that the interests of the Indian child, family, and tribe were considered.⁶⁸

2. The Pre-2013 State Court Precedents

Although the Supreme Court did not make its first ruling on the ICWA until 1989, state courts were applying and interpreting the ICWA in Indian child custody proceedings since the ICWA's enactment in 1978.⁶⁹ Prior to the Court's *Holyfield* decision, many state courts had been applying the existing Indian family doctrine when applying the ICWA to Indian child custody proceedings.⁷⁰ The existing Indian family doctrine, first established by the Kansas Supreme Court in *In re Adoption of Baby Boy L.*, “is a judicially created exception to the ICWA for factual situations when the minor has never been a member of an Indian home or exposed to Indian culture.”⁷¹ In reaching this conclusion, the Kansas court relied on language from the ICWA that emphasizes the ICWA's purpose of protecting Indian families, including language about preventing the “breakup of the Indian family.”⁷² The Kansas court concluded that the ICWA set protections for Indian children and families in “the removal of Indian children from an existing Indian family unit.”⁷³ Other state courts soon followed so that the ICWA's application in Indian child custody proceedings was limited to cases where an existing Indian family could be established.⁷⁴

Following *Holyfield*, however, state courts began to overrule the existing Indian family doctrine⁷⁵ on the premise that the ICWA stood for protecting more than an existing Indian family.⁷⁶ Later courts found that the ICWA also stood to protect the unique interests of the tribe in its children so that the ICWA applied in *any* custody proceeding where the child was an Indian child.⁷⁷ In rejecting the existing Indian family doctrine, state courts further found that the ICWA

⁶⁵ *Id.* at 34–37; see Lewerenz & McCoy, *supra* note 13, at 698.

⁶⁶ *Holyfield*, 490 U.S. at 35–37; see Lewerenz & McCoy, *supra* note 13, at 698.

⁶⁷ *Holyfield*, 490 U.S. at 37 (quoting H.R. REP. NO. 95-1386, at 23 (1978)).

⁶⁸ *Id.* at 34–37.

⁶⁹ See, e.g., Lewerenz & McCoy, *supra* note 13, at 686–97.

⁷⁰ See generally *id.* (providing a more thorough analysis of the existing Indian family doctrine and states' adoption, rejection, and in some instances, revocation of the doctrine).

⁷¹ *In re Alexandria P.*, 176 Cal. Rptr. 3d 468, 484 (Ct. App. 2014), *reh'g denied*, (Sept. 4, 2014), *review denied*, (Oct. 29, 2014); see also *In re Adoption of Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982) (establishing the existing Indian family doctrine), *overruled by In re A.J.S.*, 204 P.3d 543 (Kan. 2009).

⁷² 25 U.S.C. § 1912(d) (2012); *In re Baby Boy L.*, 643 P.2d at 175–76.

⁷³ *In re Baby Boy L.*, 643 P.2d at 175–76; 25 U.S.C. § 1912(d); see also Lewerenz & McCoy, *supra* note 13, at 694–95 (providing a more thorough explanation of the Kansas Supreme Court's adoption of the existing Indian family doctrine).

⁷⁴ See, e.g., *Claymore v. Serr*, 405 N.W.2d 650, 654 (S.D. 1987); see also Lewerenz & McCoy, *supra* note 13, at 686–87, 702–12 (providing a more thorough explanation of other states' subsequent adoptions of the existing Indian family doctrine and an analysis of states' justifications of the doctrine following *Holyfield*).

⁷⁵ In overturning the existing Indian family doctrine post-*Holyfield*, the Kansas Supreme Court noted that “[t]he majority of our sister states who have considered the existing Indian family doctrine have rejected it.” *In re A.J.S.*, 204 P.3d 543, 548 (Kan. 2009); see also *In re Alexandria P.*, 176 Cal. Rptr. 3d at 484 (noting that many state courts have repudiated the existing Indian family doctrine).

⁷⁶ See, e.g., *In re Adoption of Baade*, 462 N.W.2d 485, 489–90 (S.D. 1990).

⁷⁷ *Id.*

also protected Indian children's interests in their relationships with their tribes, families, and culture.⁷⁸ For example, a Colorado Appellate Court found that a parent is unable to "unilaterally determin[e] that the Indian child will not be raised in an Indian home and will not participate in Indian culture."⁷⁹ In reaching this decision, the court relied on *Holyfield's* "recognition of the tribes' interests in Indian children as well as the interests of the Indian children themselves."⁸⁰ Thus, Congress's intent, alongside *Holyfield's* acknowledgment of the unique interests of tribes in Indian children and children's interests in relationships with their tribe and families, demonstrates the ICWA should apply broadly in Indian child custody proceedings.⁸¹

3. The 2013 U.S. Supreme Court Precedent

After *Holyfield*, the U.S. Supreme Court next heard a case involving the ICWA in 2013 in *Adoptive Couple*. The facts were "hotly contested," suggesting to some that *Adoptive Couple* represents an extreme case.⁸² The case involved an unwed biological Cherokee father seeking custody of his baby girl, who was in the process of being adopted by a couple selected by the non-Indian birth mother.⁸³ When the birth mother informed the biological father she was pregnant, the two were engaged; however, their relationship dissolved shortly thereafter.⁸⁴ The birth mother then sent the biological father a text message asking if he would prefer to pay child support or relinquish his parental rights.⁸⁵ The biological father responded by text message that he would prefer to relinquish his parental rights.⁸⁶ The birth mother subsequently selected the adoptive couple through a private adoption agency.⁸⁷ The biological father provided no financial support to the birth mother or the baby girl throughout the pregnancy or in the months following the baby girl's birth.⁸⁸ When the baby girl was about four months old, the biological father was served with notice of a proposed adoption in a South Carolina state court and signed papers stating that he would not contest the adoption; however, he asserted that at the time, he believed he was relinquishing his parental rights to the birth mother.⁸⁹ One day after signing, the biological father contacted a lawyer and then requested a stay of the adoption proceedings, stating he did not consent to the adoption and sought custody of the baby girl.⁹⁰

The South Carolina Family Court awarded the biological father custody of his baby girl in September 2011.⁹¹ The court reasoned that the adoptive couple did not meet the ICWA's standard on the involuntary termination of a birth father's parental rights.⁹² The South Carolina

⁷⁸ See *In re N.B.*, 199 P.3d 16, 21 (Colo. App. 2007).

⁷⁹ *Id.* at 21.

⁸⁰ *Id.*

⁸¹ See *id.*

⁸² *Adoptive Couple v. Baby Girl*, 133 S. Ct. at 2576 (2013) (Sotomayor, J., dissenting).

⁸³ *Id.* at 2558–59 (majority opinion).

⁸⁴ *Id.*

⁸⁵ *Id.* at 2558.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 2558–89.

⁹¹ *Id.* at 2559.

⁹² The South Carolina Family Court relied upon § 1912(f) of the ICWA. *Id.* Section 1912(f) states that:

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912(f) (2012).

Supreme Court affirmed, relying in part on the ICWA to find that “active efforts” had not been made to prevent the breakup of an Indian family.⁹³

The U.S. Supreme Court reversed that decision. In its review of the facts, the Supreme Court concluded that the biological father had “made no meaningful attempts to assume his responsibility of parenthood”⁹⁴ so that § 1912(f) of the ICWA did not apply. The Court reasoned that “the continued custody of the child by the parent” in § 1912(f) placed a condition on the application of the ICWA’s heightened protections for terminating parental rights.⁹⁵ The Court concluded that the phrase indicated there must be a “pre-existing state,” so that the Indian parent must currently have or have had custody of the child for there to be “pre-existing custody” in order for § 1912(f) to apply.⁹⁶ The Court reasoned that the biological father “never had custody” of the baby girl because he failed to provide financial support to the birth mother during her pregnancy and after the baby girl’s birth, he indicated that he relinquished his parental rights, and he never had physical custody of the child.⁹⁷ The Court held that where, as in this case, a non-Indian parent with sole custody of the child voluntarily initiates lawful adoption proceedings and the Indian parent “never had custody of the Indian child,” the ICWA’s standard that parental rights cannot be terminated absent a showing “that continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child”⁹⁸ did not apply, since there is no pre-existing custody to evaluate.⁹⁹ Therefore, the Court held the heightened burden under the ICWA on involuntary parental rights terminations did not apply.¹⁰⁰

The Court also analyzed the application of § 1912(d), which requires that “active efforts” be made to “prevent the breakup of the Indian family” before parental rights to an Indian child are terminated.¹⁰¹ The Court concluded that the provisions of §§ 1912(d) and 1912(f) were “adjacent” so that the phrase “breakup of the Indian family” indicated that there must be a relationship between the Indian child and Indian parent before § 1912(d) can be applied.¹⁰² In other words, there must also be “pre-existing custody” to evaluate in order for § 1912(d) to apply.¹⁰³ The Court reasoned that because the biological father never had physical or legal custody of the baby girl and had no prior contact with the baby girl, there was no family relationship between the biological father and the baby girl that would be disturbed, so § 1912(d) did not apply.¹⁰⁴

⁹³ In addition to § 1912(f) of the ICWA, the South Carolina Supreme Court also relied on § 1912(d) to find that the ICWA barred the termination of Biological Father’s parental rights. *Adoptive Couple*, 133 S. Ct. at 2559. Section 1912(d) states that:

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 have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

25 U.S.C. § 1912(d). Further, the South Carolina Supreme Court found that even if the biological father’s parental rights were terminated, adoption preferences under § 1915(a) would apply. *Adoptive Couple*, 133 S. Ct. at 2559. Section 1915(a) of the ICWA states:

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.

25 U.S.C. § 1915(a) (2012).

⁹⁴ *Adoptive Couple*, 133 S. Ct. at 2558.

⁹⁵ *Id.* at 2560 (citing 25 U.S.C. § 1912(f)).

⁹⁶ *Id.* at 2561–62.

⁹⁷ *Id.* at 2558, 2560–62.

⁹⁸ 25 U.S.C. § 1912(f).

⁹⁹ *Adoptive Couple*, 133 S. Ct. at 2561–62.

¹⁰⁰ *Id.* at 2562.

¹⁰¹ *Id.* at 2562–64 (citing 25 U.S.C. § 1912(d)) (analyzing § 1912(d) and its application as to the unwed, non-physical custodial Indian father).

¹⁰² *Id.* at 2562–63.

¹⁰³ *Id.* at 2561–63.

¹⁰⁴ *Id.* at 2562.

Further, the Court held, “§ 1915(a)’s preferences are inapplicable in cases where no alternative party has formally sought to adopt the child. This is because there simply is no ‘preference’ to apply if no alternative party that is eligible to be preferred under § 1915(a) has come forward.”¹⁰⁵ Additionally, the Court stressed that “Baby Girl’s paternal grandparents never sought custody of Baby Girl. . . . Nor did other members of the Cherokee Nation or ‘other Indian families’ seek to adopt Baby Girl, even though the Cherokee Nation had notice of—and intervened—in the adoption proceeding.”¹⁰⁶ The significance the Court placed on the fact that neither the child’s paternal Indian grandparents nor other members of the Cherokee Nation sought to adopt the child indicates that had such parties sought to adopt the child, the ICWA’s preference under § 1915(a) would have applied as either of these parties would provide an alternative party eligible for the ICWA’s preference.¹⁰⁷ The reasoning in *Adoptive Couple* suggests that in cases where tribal members seek to adopt an Indian child, the ICWA’s § 1915(a) preferences apply.¹⁰⁸

The 2013 U.S. Supreme Court precedent has prompted differing readings. In its 2014 decision, the California Court of Appeals applied a flexible interpretation of *Adoptive Couple*, holding in *In re Alexandria P.* that where a couple has been “identified as prospective adoptive parents” and “are considered extended family by the tribe,” *Adoptive Couple* does not apply and the couple is entitled to § 1915(a) preferences.¹⁰⁹ In contrast, the Supreme Court of Alaska, in its 2014 decision, *Native Village of Tununak v. Alaska Department of Health and Social Services*, held that the tribe’s mere production of contact information for a potential placement was insufficient to invoke § 1915(a) preferences.¹¹⁰ Rather, the Alaska Supreme Court found that *Adoptive Couple* requires a “formal step to adopt the child” for § 1915(a) preferences to apply.¹¹¹ Such a strict interpretation of *Adoptive Couple*, however, greatly limits the ICWA’s protections to the detriment of tribes.¹¹² In his dissent, Alaskan Justice Winfree detailed the obstacles rural tribal relatives face when filing for the formal adoption of an Indian child, including lack of access to the legal system, difficulty knowing when an urban Indian child is involved in a custody proceeding, and difficulty knowing when a non-Indian family has filed a formal adoption petition for an Indian child.¹¹³ Because strict application of *Adoptive Couple* requiring a formal adoption petition to invoke the ICWA’s preferences “will have disastrous results” for tribes, a flexible approach, such as that applied by the California Court of Appeals, is needed to protect tribes’ interests in Indian children.¹¹⁴ Thus the ICWA’s § 1915(a) preferences should apply wherever members of the tribe are identified as prospective parents.¹¹⁵

Adoptive Couple could also be read to add an additional requirement for an Indian parent—particularly an unwed biological Indian father—to meet before the ICWA’s protections apply.¹¹⁶ The Court’s interpretation of the ICWA’s “continued custody” could be said to mandate that an Indian parent must establish “pre-existing custody,” meaning physical custody, before either §§ 1912(f) or 1912(d) apply to the custody proceedings.¹¹⁷ Such a pre-existing custody

¹⁰⁵ *Id.* at 2564.

¹⁰⁶ *Id.*

¹⁰⁷ *See id.*

¹⁰⁸ *See id.*

¹⁰⁹ *In re Alexandria P.*, 176 Cal. Rptr. 3d 468, 486 (Ct. App. 2014).

¹¹⁰ *Native Vill. of Tununak v. State, Dep’t of Health & Soc. Servs.*, 334 P.3d 165, 177 (Alaska 2014).

¹¹¹ *Id.* at 172.

¹¹² *Id.* at 182 (Winfree, J., dissenting).

¹¹³ *Id.*

¹¹⁴ *Id.* at 172; *see In re Alexandria P.*, 176 Cal. Rptr. 3d at 486.

¹¹⁵ *See Native Vill. of Tununak*, 334 P.3d at 183 (Winfree, J., dissenting).

¹¹⁶ *See Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2561–63 (2013).

¹¹⁷ *See id.*

requirement, however, has the potential to exclude many unwed biological Indian fathers; rather courts should read *Adoptive Couple* differently and enable unwed biological Indian fathers to establish pre-existing custody through demonstrations of such efforts to accept the responsibilities of parenthood.¹¹⁸ Efforts to accept the responsibility of parenthood could include: prior contact with the child (or attempted contact) that creates (or would have created) a relationship between the father and child or providing (or trying to provide) financial support during the mother's pregnancy and after the child's birth, so as to recognize a birth mother may thwart a biological father's efforts partially or fully.¹¹⁹ This reading of the pre-existing custody requirement is supported by the Court's notation in *Adoptive Couple* regarding the tribe not seeking to adopt, when also it found the unwed father had no pre-existing custody.

Justice Sotomayor characterized the facts the majority relied upon as "hotly contested," suggesting *Adoptive Couple* was an extreme case that should be read narrowly.¹²⁰ A narrow interpretation of *Adoptive Couple* recognizes an additional burden within the ICWA in custody proceedings involving an Indian child, but does not severally limit the ICWA's application. As Justice Breyer points out in his concurrence, the Court concluded that the biological father in *Adoptive Couple* was an "absentee Indian father who had next-to-no involvement with his child,"¹²¹ suggesting only that this particular unwed father was outside the scope of the ICWA, but not that the ICWA itself should be greatly limited so as to preclude participation of any unwed biological fathers and their tribes in Indian child custody cases.¹²²

While the determinative facts the majority used offer an example of when the pre-existing custody requirement of the ICWA has not been met, *Adoptive Couple* is an extreme case and should not be read to establish a high burden for meeting the pre-existing custody requirement of the ICWA. Rather, *Adoptive Couple*, given congressional goals, should be read to leave room for state courts to set minimum standards for meeting the pre-existing custody requirement without a showing of prior custody. On a spectrum of cases on whether the ICWA applies, *Adoptive Couple* is situated at the far end. This view of *Adoptive Couple* coincides with Justice Breyer's concurrence where he states that the case "should decide . . . no more than is necessary."¹²³ Justice Breyer's concurrence recognizes the facts in *Adoptive Couple* as extreme. Justice Breyer opines that the ICWA's broad scope is not severally limited because the majority's decision is limited to the special facts.¹²⁴ This suggests state courts are in a position to ensure the ICWA's broad application in Indian child custody proceedings by looking to all parenting efforts by the unwed father in determining whether the pre-existing custody requirement is met.¹²⁵ In reaching its decision that the unwed father did not meet the pre-existing custody requirement, the

¹¹⁸ See *id.* at 2558. The Court concluded that because the father provided no financial assistance to the child, indicated he relinquished his parental rights, and had no prior contact with the child, the father "made no meaningful attempts to assume his responsibility of parenthood." *Id.* at 2558–59 (internal quotation marks omitted).

¹¹⁹ *Id.* at 2571 (Breyer, J., concurring); *cf. id.* at 2558 (majority opinion) (considering efforts the father did not make to conclude there was no parent-child relationship). In his concurrence, Justice Breyer notes the "case does not involve a father with visitation rights or a father who has paid all of his child support obligations. . . . Neither does it involve special circumstances such as a father who was deceived about the existence of the child or a father who was prevented from supporting his child." *Id.* at 2571 (Breyer, J., concurring) (citation omitted). Thus, Justice Breyer's concurrence suggests where a father has made such efforts; the ICWA's protections may apply. See *id.*

¹²⁰ *Id.* at 2576 (Sotomayor, J., dissenting).

¹²¹ *Id.* at 2571 (Breyer, J., concurring).

¹²² See *id.*

¹²³ *Id.*

¹²⁴ See *id.*

¹²⁵ See *id.* at 2558 (majority opinion) (noting that this was not a case where there was visitation between the father and child or a case where the father provided financial support to his child; supporting the argument that where the father makes such parental efforts, pre-existing custody is established); see *In re Adoption of Baade*, 462 N.W.2d 485, 489 (S.D. 1990) (providing an example of a state court broadly applying the ICWA).

majority in *Adoptive Couple* looked to the unwed father's relinquishment of his parental rights and failure to provide financial support.¹²⁶ Congressional policies demonstrate that *Adoptive Couple* should be read narrowly so as to limit the ICWA's application only in extreme cases where the unwed father failed to assume, or failed to try to assume, the responsibility of parenthood and where the tribe also did not seek adoption.¹²⁷ Therefore, an unwed father should meet the pre-existing custody requirement so long as he demonstrates affirmative actions to take on parenthood, though short of physical custody.¹²⁸

A narrow reading of *Adoptive Couple* enables state courts to set minimum standards as to what actions undertaken by unwed fathers are sufficient to fulfill the pre-existing custody requirement.¹²⁹ For example, state courts could take into consideration whether the unwed father visited and supported the birth mother during pregnancy, or visited and had some relationship with the child, short of physical custody.¹³⁰ State courts could also take into consideration any factors that limited the unwed father in taking on parenthood, as with an unwed father who in good faith did not know he had a child.¹³¹ Such readings of the ICWA would align unwed biological Indian fathers in circumstances similar to the circumstances of non-Indian unwed biological fathers, who under *Lehr v. Robertson*, who need to step up to parenthood in order to secure federal constitutional childrearing interests in adoption proceedings.¹³²

III. STATE COURT PRECEDENTS

A. *In re Adoption of Baby Girl B.*

Prior to *Holyfield* under the ICWA, state courts looked to parent-like efforts by the unwed Indian father, where the father did not have physical custody, in order to determine whether there was an existing Indian family.¹³³ For example, in the case of *In re Adoption of Baby Girl B.*, the Court of Civil Appeals in Oklahoma concluded that the unwed father's lack of custody did not bar the heightened protections of §§ 1912(e) and (f) of the ICWA because the father did not receive reasonable notice of parenthood and did not waive any right to seek custody so that he was a non-custodial parent through no fault of his own.¹³⁴ *In re Adoption of Baby Girl B.* supports the proposition that when the unwed father is a non-physical custodial parent through no fault of his own, he should not be excluded from the ICWA protections.¹³⁵ Considering such factors as lack of reasonable notice of parenthood to the unwed father ensures that the father's interests are protected and safeguards the unique interests of tribes that the ICWA was designed

¹²⁶ See *Adoptive Couple*, 133 S. Ct. at 2558.

¹²⁷ See *infra* Part II.A–B; see *Adoptive Couple*, 133 S. Ct. at 2578–79 (Sotomayor, J., dissenting); *cf. id.* at 2558, 2561–62, 2564 (majority opinion) (finding where the father provided no financial support and relinquished his parental rights there was no pre-existing custody, so § 1912(f)'s preferences did not apply and finding where the tribe did not seek to adopt the child, § 1915(a)'s preferences were inapplicable).

¹²⁸ See *Adoptive Couple*, 133 S. Ct. at 2578–79 (Sotomayor, J., dissenting); *cf. id.* at 2558–59 (majority opinion) (noting that the father failed to provide financial support, relinquished his parental rights, and had no contact with the child after her birth).

¹²⁹ *Cf. id.* at 2558, 2560–61 (majority opinion) (looking at the father's failure to have a parent-child relationship when determining there was no pre-existing custody).

¹³⁰ See *id.* at 2573, 2578 (Sotomayor, J., dissenting) (arguing that parents who have established emotional ties, visit their children, and provide financial support should receive the ICWA's protections).

¹³¹ *Id.* at 2571 (Breyer, J., concurring).

¹³² See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 261–62 (1983).

¹³³ See *In re Adoption of Baby Girl B.*, 67 P.3d 359, 365–66 (Okla. Civ. App. 2003).

¹³⁴ *Id.* The unwed father did not know about his child until he received notice when the adoption proceedings between the adoptive parents and birth mother began. *Id.* He then took steps to establish his paternity. *Id.* at 366.

¹³⁵ See *id.* at 365–66; see also *Adoptive Couple*, 133 S. Ct. at 2571 (Breyer, J., concurring) (“Neither does [the case] involve special circumstances such as a father who was deceived about the existence of the child or a father who was prevented from supporting his child.”).

to protect.¹³⁶ Thus, when analyzing whether an unwed father has established custody sufficient to evaluate “continued custody,”¹³⁷ so that the ICWA’s heightened protections regarding termination of parental rights apply, state courts should consider such factors as the unwed father’s knowledge of the child’s existence and thus whether the unwed father had a reasonable opportunity to take on parenthood.¹³⁸ A non-physical custodial Indian father should not be automatically excluded from the ICWA’s protections.¹³⁹

B. In re Adoption of Baade

Prior to 2013 and after *Holyfield*, the majority of state courts applied the ICWA’s heightened protections to any custody proceeding involving an Indian child.¹⁴⁰ One example is *In re Adoption of Baade*.¹⁴¹ There, the Supreme Court of South Dakota established the standard that the “ICWA’s application to a case is only contingent upon whether an ‘Indian child’ is the subject of a ‘child custody proceeding.’”¹⁴² Earlier, the Supreme Court of South Dakota had established the existing Indian family doctrine in *Claymore v. Serr*,¹⁴³ which held that the ICWA’s application was dependent upon the Indian child being a part of an existing Indian family.¹⁴⁴ The court’s decision in *In re Baade* is noteworthy because it overturns the existing Indian family doctrine by applying *Holyfield*.¹⁴⁵ The court reasoned that *Holyfield*’s finding that the ICWA was also intended to “protect . . . the rights of the Indian community and tribe in retaining its children in its society”¹⁴⁶ required state courts to look beyond the interests of an existing Indian family in

¹³⁶ See *In re Baby Girl B.*, 67 P.3d at 365–66; see *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34–37 (1989).

¹³⁷ 25 U.S.C. § 1912(f) (2012); see also *id.* § 1912(d) (requiring that “active efforts” must have been made “to prevent the breakup of the Indian family”). The Court concluded that like “continued custody,” “breakup of the Indian family” indicates that there must be a relationship between the unwed Indian father and the child for the court to evaluate. *Adoptive Couple*, 133 S. Ct. at 2560 (majority opinion).

¹³⁸ See *In re Baby Girl B.*, 67 P.3d at 365–66; *Adoptive Couple*, 133 S. Ct. at 2571 (Breyer, J., concurring).

¹³⁹ See *In re Baby Girl B.*, 67 P.3d at 366; *Adoptive Couple*, 133 S. Ct. at 2571 (Breyer, J., concurring); *id.* at 2578 n.8 (Sotomayor, J., dissenting); cf. *id.* at 2558–59 (majority opinion) (relying on the father’s indication that he relinquished his parental rights among other facts to conclude that the father did not have pre-existing custody, which suggests that where a father does not take such an affirmative step, pre-existing custody may exist and the ICWA may apply).

¹⁴⁰ See, e.g., *In re Adoption of Baade*, 462 N.W.2d 485, 490 (S.D. 1990).

¹⁴¹ *Id.*

¹⁴² *Id.* (referring to the terms in the ICWA). Section 1903(4) of the ICWA defines an “Indian child” as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” 25 U.S.C. § 1903(4) (2012). Section 1903(1) further provides that a custody proceeding includes: foster care placements, termination of parental rights, preadoptive placements, and adoptive placements. 25 U.S.C. § 1903(1) (defining further foster care placement, termination of parental rights, preadoptive placement, and adoptive placement as individual terms).

¹⁴³ *Claymore v. Serr*, 405 N.W.2d 650, 654 (S.D. 1987).

¹⁴⁴ *Id.* at 653–54. In defining family, the South Dakota Supreme Court applied a narrow definition of family. The court held that family within the context of the ICWA, was restricted to the nuclear family. *Id.* at 653. This reasoning fails to recognize the emphasis Congress placed on tribal culture, where an Indian child may have a close relationship with extended family members, who could provide care to the child while maintaining the child’s relationship with the tribal community. By considering testimony regarding the support extended families in tribes provide to raise children, Congress sought to acknowledge tribes’ interests in their children and preserve tribes’ existence as self-governing communities. See *1977 Hearings*, *supra* note 31, at 316 (“For example, Indian extended families are far larger than non-Indian nuclear families. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family.”); see also *Amici Curiae Brief*, *supra* note 20, at 10–11 (arguing the legislative history of the ICWA demonstrates Congress’s concern for familial relationships within tribes and that Congress intended to protect Indian children’s relationships with their tribes through the ICWA).

¹⁴⁵ *In re Baade*, 462 N.W.2d at 489–90; see *Lewerenz & McCoy*, *supra* note 13 at 717–22 (providing a more-thorough explanation of several state courts’ applications of *Holyfield* to reject the existing Indian family doctrine in favor of a more broad application of the ICWA); see *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34–37. In *Holyfield*, the Supreme Court concluded that “the protection of th[e] tribal interest is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents.” *Holyfield*, 490 U.S. at 52. In reaching its conclusion, the Court relied upon hearings and evidence before Congress that emphasized the impact the removal of Indian children had on tribes in their ability to continue as self-governing entities. The Court reasoned that through the ICWA, Congress intended to protect tribal interests in their children alongside those of the Indian family and child. See *id.* at 32–37.

¹⁴⁶ *Holyfield*, 490 U.S. at 37 (quoting H.R. REP. NO. 95-1386, at 23 (1978)) (internal quotation marks omitted).

order to “recognize the legitimate concerns of the tribe.”¹⁴⁷ As a result, the court concluded that the ICWA should be read liberally to apply in any custody proceeding involving an Indian child in order to protect the interests of Indian families, children, and tribes.¹⁴⁸

C. Bruce L. v. W.E.

Following *Holyfield* and decisions that rejected the existing Indian family doctrine, like *In re Baade*, state courts continued to look to efforts by the unwed father to determine if the ICWA applied. In *Bruce L. v. W.E.*,¹⁴⁹ the Supreme Court of Alaska looked to efforts by the father in order to determine whether the father had established paternity for the ICWA's application.¹⁵⁰ The court also examined the state law issue of whether the unwed father communicated and provided financial support and care to the Indian child.¹⁵¹ The court's analysis offers an analogous example of what efforts are necessary for an unwed father to fulfill the ICWA pre-existing custody requirement.¹⁵² In determining that the unwed father was a parent for purposes of the ICWA, the court concluded that the unwed father had made reasonable efforts to acknowledge paternity by contesting the adoption at issue in the case and by filing a separate suit for custody.¹⁵³

While *Adoptive Couple* provides an example of when the pre-existing custody requirement has not been met, the reasonable efforts analysis used by the *Bruce L.* court provides a basis for custody that can be reconciled with *Adoptive Couple* and allows the court to move beyond the extreme facts of *Adoptive Couple*.¹⁵⁴ As state courts apply *Adoptive Couple*, *Bruce L.* provides a sensible standard that promotes congressional policies. Under *Bruce L.*, courts should consider the reasonable efforts toward parenthood made by the unwed father in determining whether a flexible pre-existing custody requirement has been met.¹⁵⁵ A reasonable-efforts standard is consistent with *Adoptive Couple* by precluding the ICWA's protections for unwed fathers whom the statute was not designed to protect, like fathers who had no involvement or interest in their child's life.¹⁵⁶

The *Bruce L.* court's analysis also provides additional insights into the factors that state courts could use to determine if the ICWA's pre-existing custody requirement is met.¹⁵⁷ In its analysis the court valued a father's communicating with his child or seeking assistance of the courts in communicating in some way when the child is too young to communicate through mail or phone.¹⁵⁸ Such acts indicate the non-physical custodial unwed Indian father's interest in

¹⁴⁷ *In re Baade*, 462 N.W.2d at 489.

¹⁴⁸ *Id.* at 489–90.

¹⁴⁹ *Bruce L. v. W.E.*, 247 P.3d 966 (Alaska 2011).

¹⁵⁰ *Id.* at 979.

¹⁵¹ *Id.* Although parental consent is required for adoption in Alaska, a state law does not require parental consent when the non-custodial parent has unjustifiably failed to communicate with the child for one year or failed to provide care and support to the child.

¹⁵² *See id.*; *see also Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2571 (2013) (Breyer, J., concurring) (acknowledging that the case did not involve a father with visitation rights, who had paid child support, or who was deceived about or prevented from supporting his child); *cf. id.* at 2558 (majority opinion) (providing an example of where there is no pre-existing custody due to the father's failure to make efforts to take on the role of parenthood).

¹⁵³ *Bruce L.*, 247 P.3d at 979.

¹⁵⁴ *See id.*; *see also Adoptive Couple*, 133 S. Ct. at 2558–59, 2561–62 (finding no pre-existing custody where the father made no effort to take on the role of parenthood).

¹⁵⁵ *See Bruce L.*, 247 P.3d at 979; *see also Adoptive Couple*, 133 S. Ct. at 2558–59, 2561–62 (establishing the pre-existing custody requirement).

¹⁵⁶ *See Bruce L.*, 247 P.3d at 979; *see Adoptive Couple*, 133 S. Ct. at 2563 n.8; *see also id.* at 2571 (Breyer, J., concurring) (“First, the statute does not directly explain how to treat an absentee Indian father who had next-to-no involvement with his child in the first few months of her life. That category of fathers . . . seem[s] to fall outside the scope of the language of 25 U.S.C. §§ 1912(d) and (f). . . . Thus, this case does not involve a father with visitation rights or a father who has paid ‘all of his child support obligations.’”).

¹⁵⁷ *See Bruce L.*, 247 P.3d at 979.

¹⁵⁸ *Id.* at 980–81.

preserving his relationship with his child.¹⁵⁹ Similarly, an unwed father seeking judicial recourse to prove his failure to provide child support was understandable demonstrates the father's attempt to fulfill the role of parenthood.¹⁶⁰ By looking to all efforts by the non-physical custodial father in determining whether the father's consent for the adoption is required, *Bruce L.* also reinforces the idea that the pre-existing custody requirement should not automatically exclude unwed non-physical custodial fathers from the ICWA's protections.¹⁶¹ Rather, *Bruce L.* provides factors for courts to examine when determining whether an Indian father without physical custody has taken steps to establish a relationship with his child, which would fulfill the ICWA's pre-existing custody requirement.¹⁶²

IV. FUTURE INDIAN CHILD ADOPTION PROCEEDINGS

A. Cases

Pre-2013 cases should guide future cases in developing standards to evaluate efforts toward parenthood by unwed fathers. The Oklahoma court's analysis in *In re Adoption of Baby Girl B.* provides the basis for state courts to continue to apply the ICWA broadly and to limit the pre-existing custody requirement, without undermining *Adoptive Couple*, and with strong promotion of congressional policies.¹⁶³ State courts need not automatically exclude unwed Indian fathers without physical custody from the ICWA's protections.¹⁶⁴ The pre-2013 state court cases demonstrate the types of acts by unwed fathers that would meet the pre-existing custody requirement of the ICWA.¹⁶⁵ In *Adoptive Couple*, the Court found that by relinquishing parental rights, having no prior contact with his child, and failing to provide support and care, the biological father had made no effort to assume the responsibility of parenthood.¹⁶⁶ But, where an unwed non-physical custodial father can demonstrate affirmative steps to take on the responsibility of parenthood, thereby establishing a level of custody, the father can be deemed to meet the ICWA's pre-existing custody and the ICWA's heightened protection should apply.¹⁶⁷

State courts should implement a reasonable-efforts standard, such as that found in *Bruce L.*, which would also ensure that unwed fathers without physical custody are not automatically excluded from the ICWA's protections.¹⁶⁸ This standard provides an opportunity for an unwed

¹⁵⁹ *Id.*

¹⁶⁰ *See id.* at 981. If a parent unjustifiably fails to provide child support for one year, that parent's consent is not required for adoption. *See id.* at 979. Non-payment of child support is justified by evidence, such as W2 forms and pay stubs, of indigence. *Id.* at 981.

¹⁶¹ *See id.* at 979, 981; *see also Adoptive Couple*, 133 S. Ct. at 2571 (Breyer, J., concurring) (noting that the case did not involve a father who provided financial support or who visited the child).

¹⁶² *See Bruce L.*, 247 P.3d at 979; *see Adoptive Couple*, 133 S. Ct. at 2571 (Breyer, J., concurring); *see id.* at 2575 (Sotomayor, J., dissenting); *cf. id.* at 2558–59 (majority opinion) (noting that the father relinquished his parental rights, failed to provide financial support, and had no contact with the child to find the father made no effort to assume the role of parenthood, suggesting that, absent a relinquishment of parental rights and affirmative steps toward parenthood, the ICWA may apply).

¹⁶³ *See, e.g., In re Adoption of Baby Girl B.*, 67 P.3d 359, 365–66 (Okla. Civ. App. 2003).

¹⁶⁴ *See In re Baby Girl B.*, 67 P.3d at 366; *see Claymore v. Serr*, 405 N.W.2d 650, 653–54 (finding that the father's various visits with the child established a parent-child relationship with the child so the father did not abandon the child); *see Bruce L.*, 247 P.3d at 979 (finding that "to qualify as an ICWA parent, an unwed father [without physical custody] does not need to comply perfectly with state laws for establishing paternity, so long as he has made reasonable efforts to acknowledge paternity," suggests a similar standard could be used to establish pre-existing custody).

¹⁶⁵ *See In re Baby Girl B.*, 67 P.3d at 366; *see Claymore*, 405 N.W.2d at 653–54; *see Bruce L.*, 247 P.3d at 979; *cf. Adoptive Couple*, 133 S. Ct. at 2558–59 (noting that the father's failure to take steps toward parenthood and suggesting that affirmative steps toward parenthood, such as providing financial support, may establish pre-existing custody).

¹⁶⁶ *Adoptive Couple*, 133 S. Ct. at 2558–59.

¹⁶⁷ *Cf. id.* at 2558–59 (placing weight on the father's relinquishment of parental rights, failure to provide financial support, and failure to have contact with the child to find the father made no effort to assume parenthood, and suggesting that where an unwed father without physical custody does take such steps, there is a level of custody to evaluate).

¹⁶⁸ *See Bruce L.*, 247 P.3d at 979.

father to demonstrate that he has made reasonable efforts to take on the responsibility of parenthood, thereby fulfilling the pre-existing custody requirement.¹⁶⁹ An ICWA custodial requirement sympathetic to biological fathers, children, and tribes can be implemented by states via cases or statutes.

State lawmakers should not greatly limit the ICWA's application by extending *Adoptive Couple* beyond its facts. It was an extreme case where the Court found there was absolutely no parent-child relationship and therefore there was no pre-existing custody.¹⁷⁰ *Adoptive Couple* only limits the ICWA by narrowly construing the phrases "continued custody" and "breakup of an Indian family" found in §§ 1912(f) and 1912(d) to mean a "pre-existing state."¹⁷¹ While an Indian child alone is no longer sufficient to trigger the ICWA's protections,¹⁷² pre-existing custody should not always preclude the ICWA's protections where an Indian parent "never had custody of [his or her] children, no matter how fully th[at] parent[] ha[s] embraced the financial and emotional responsibilities of parenting."¹⁷³ Such an interpretation moves away from the liberal applications of the ICWA following *Holyfield* by limiting the ICWA's protections to Indian parents with physical custody.¹⁷⁴

Although *Adoptive Couple* places an additional condition on the ICWA's application, the Supreme Court's use of §§ 1912(f) and 1912(d) in an extreme setting does not significantly limit the ICWA's protections. Rather, the ICWA should continue to have a broad scope.¹⁷⁵ Sections 1912(f) and 1912(d) on pre-existing custody should be able to be met without a showing of physical custody, which allows future courts to acknowledge the tribal interests in Indian children without undermining *Adoptive Couple*.¹⁷⁶ The Court's recognition in *Holyfield* that the ICWA presumes "that it is in the Indian child's best interest that its relationship to the tribe be protected," supports a flexible pre-existing custody requirement within the ICWA.¹⁷⁷ As *In re Baade* illustrates, state courts interpreted *Holyfield* to find that the ICWA is broad in scope and open to a liberal interpretation in order to protect a tribe's right to have its children raised in its community, with the ICWA applying in any custody proceeding involving an Indian child.¹⁷⁸ Despite the potential in *Adoptive Couple* to limit the ICWA, *Holyfield* and state courts' applications of *Holyfield* support the view that *Adoptive Couple* is an extreme case and that the ICWA should broadly apply so that all efforts by Indian fathers aimed at parenthood are relevant to the ICWA's pre-existing custody requirement.¹⁷⁹

¹⁶⁹ See *id.*; see also *Adoptive Couple*, 133 S. Ct. at 1278–79 (Sotomayor, J., dissenting) (arguing that where non-physical custodial parents have taken on the financial and emotional responsibilities of parenthood, the ICWA's protections should apply); *cf. id.* at 2558–59 (majority opinion) (concluding that the father failed to take on the responsibility of parenthood based on several facts, such as the father's failure to provide financial support); *cf. id.* at 2571 (Breyer, J., concurring) (noting that the case does not involve a father who provided financial support or who had visitation).

¹⁷⁰ *Adoptive Couple*, 133 S. Ct. at 2560 (majority opinion).

¹⁷¹ *Id.*

¹⁷² In the case of an unwed father, he must also establish that he presently or previously had custody of the Indian child before the ICWA's heightened protections for an Indian parent and child can apply. See *id.* at 2560–61.

¹⁷³ *Id.* at 2573 (Sotomayor, J., dissenting).

¹⁷⁴ See *id.* at 2560 (majority opinion).

¹⁷⁵ See, e.g., *In re Adoption of Baade*, 462 N.W.2d 485, 489 (S.D. 1990); *Bruce L. v. W.E.*, 247 P.3d 966, 979 (Alaska 2011).

¹⁷⁶ See *Adoptive Couple*, 133 S. Ct. at 2560; *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34–37 (1989).

¹⁷⁷ *Holyfield*, 490 U.S. at 34–37, 49 n.24 (internal quotation marks omitted); see *Adoptive Couple*, 133 S. Ct. at 2560–63; see *id.* at 2571 (Breyer, J., concurring).

¹⁷⁸ *In re Baade*, 462 N.W.2d at 489–90.

¹⁷⁹ See *Holyfield*, 490 U.S. at 34–37 (applying broadly the ICWA in order to protect tribes' interests in their children); see *In re Baade*, 462 N.W.2d at 489.

In re A.J.S. and *In re Vincent M.*¹⁸⁰ also support a flexible pre-existing custody requirement to protect tribal interests in Indian children. In overturning the existing family doctrine, the *In re A.J.S.* court reasoned that competing interests, like the mother's desire for the child to be adopted, do not nullify the interest of the tribe under the ICWA.¹⁸¹ The court found that the ICWA's application in Indian child custody proceedings ensures that courts consider tribal interests alongside those interests of adoptive parents and birth mothers.¹⁸² Similarly, the court in *In re Vincent M.* reasoned that application of the ICWA's protections in Indian custody proceedings does not necessarily mean the child's placement will change; rather, the ICWA's application ensures tribal interests are considered.¹⁸³ A flexible application of the pre-existing custody requirement also ensures that tribal interests are safeguarded by providing an unwed, non-physical custodial father an opportunity to demonstrate sufficient efforts toward parenthood to meet pre-existing custody so that the ICWA's protections apply.¹⁸⁴

Because *In re Baade*, *In re Vincent M.*, and *In re A.J.S.* found that the ICWA's protections should apply broadly in order to safeguard the legitimate interests of tribes, unwed Indian fathers without physical custody should not be automatically excluded from the ICWA's protections.¹⁸⁵ Giving unwed non-physical custodial fathers the opportunity to demonstrate meaningful steps toward parenthood safeguards tribal interests without undermining *Adoptive Couple*.¹⁸⁶

Decided by the California Court of Appeals in 2014, *In re Alexandria P.* also supports a flexible approach, noting that "Justice Scalia's dissent in *Adoptive Couple* raises the question of whether visitation would be sufficient to warrant the ICWA's protections under [§§] 1912(d) and (f)."¹⁸⁷ The court goes on stating, "[h]owever, the [C]ourt does not address the concern beyond noting that such parents might receive protections under state law."¹⁸⁸ The California court's evaluation of *Adoptive Couple* reinforces the idea that state courts have the ability and should take a flexible approach to the pre-existing custody requirement and suggests that courts should look to efforts by an Indian father, such as visitation when determining whether the ICWA's protections apply.¹⁸⁹

B. Statutes

State legislation in response to *Holyfield* also rejects the existing Indian family doctrine, reinforces the view that *Adoptive Couple* is an extreme case, and recognizes that states should take a flexible approach to the pre-existing custody requirement in order to preserve an Indian

¹⁸⁰ *In re Vincent M.*, 59 Cal. Rptr. 3d 321 (Ct. App. 2007). Although the appellate court in *In re Vincent M.* rejected the existing Indian family doctrine, the California appellate courts are split on the doctrine's continued validity. See *In re Alexandria P.*, 176 Cal. Rptr. 3d 468, 484–85 (Ct. App. 2014) (citations omitted) (recognizing the split in California's appellate districts and noting that four courts have rejected the doctrine while the other two courts have upheld the doctrine). The Second Appellate District of California recently repudiated the doctrine in *In re Alexandria P. Id.*

¹⁸¹ *In re A.J.S.*, 204 P.3d 543, 550–51 (Kan. 2009).

¹⁸² *Id.*

¹⁸³ *In re Vincent M.*, 59 Cal. Rptr. 3d at 336.

¹⁸⁴ See *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2558, 2560–63 (2013) (providing efforts for state courts to examine through the facts the Court relied on to determine there was no pre-existing custody); cf. *In re A.J.S.*, 204 P.3d at 550–51 (applying broadly the ICWA to protect tribes' interests in their children).

¹⁸⁵ *In re A.J.S.*, 204 P.3d at 550–51; *In re Vincent M.*, 59 Cal. Rptr. 3d at 337; *In re Adoption of Baade*, 462 N.W.2d 485, 489–90 (S.D. 1990); see *Adoptive Couple*, 133 S. Ct. at 2558, 2560–63.

¹⁸⁶ See *Adoptive Couple*, 133 S. Ct. at 2558, 2560–63; see *id.* at 2571 (Breyer, J., concurring).

¹⁸⁷ *In re Alexandria P.*, 176 Cal. Rptr. 3d 468, 486 (Ct. App. 2014) (citing *Adoptive Couple*, 133 S. Ct. at 2578–79 (Sotomayor, J., dissenting)).

¹⁸⁸ *Id.*

¹⁸⁹ See *id.*

child's relationship with his or her tribe.¹⁹⁰ Oklahoma,¹⁹¹ Washington,¹⁹² Minnesota,¹⁹³ Wisconsin,¹⁹⁴ and California¹⁹⁵ have all passed legislation aimed at ending the existing Indian family doctrine.¹⁹⁶ At the heart of this legislation is the broad application of the ICWA to Indian child custody proceedings in order to protect tribes' unique interest in their children.¹⁹⁷ In Oklahoma, the statute specifically acknowledges the protection of tribes' interest in their children, stating that the state's policy "recognize[s] that Indian tribes and nations have a valid governmental interest in Indian children regardless of whether or not said children are in the physical or legal custody of an Indian parent or Indian custodian at the time state proceedings are initiated."¹⁹⁸ Likewise, a Wisconsin statute provides that the ICWA applies in "any Indian juvenile custody proceeding regardless of whether the Indian juvenile is in the legal custody or physical custody of an Indian parent."¹⁹⁹ A Minnesota statute also states that both the Minnesota Indian Preservation Act and "the federal Indian Child Welfare Act are applicable without exception in any child custody proceeding . . . involving an Indian child."²⁰⁰ Similarly, in Washington the statute provides, "if the child is an Indian child [the Washington Indian Child Welfare Act] shall apply."²⁰¹ In 2006, the California legislature added to the Welfare and Institutions Code.²⁰² Section 224 provides, "[i]t is in the interest of an Indian child that the child's membership in the child's Indian tribe and connection to the tribal community be encouraged and protected, regardless of whether the child is in the physical custody of an Indian parent or Indian custodian at the commencement of a child custody proceeding"²⁰³ Thus, the California legislature seeks "to protect and encourage an Indian child's connection to the tribal community, regardless of the child's prior connection to the tribe."²⁰⁴

These statutes recognize the emphasis in the ICWA on tribal interests in Indian children, regardless of present custody of the child, as well as, demonstrate how states can move to a broad application of the ICWA in order to safeguard tribal interests.²⁰⁵ Broad application of the ICWA through state legislation ensures safeguards for the interests of Indian parents and Indian tribes in their children.²⁰⁶ Although *Adoptive Couple* recognizes that pre-existing custody must be established under the ICWA, a flexible pre-existing custody standard should provide unwed non-physical custodial Indian fathers an opportunity to demonstrate efforts to take on the role of

¹⁹⁰ See, e.g., OKLA. STAT. ANN. tit. 10, § 40.1 (West 2015) (recognizing broadly tribes' interests in their children); Lewerenz & McCoy, *supra* note 13, at 713–14 (analyzing state legislation regarding the ICWA).

¹⁹¹ OKLA. STAT. ANN. tit. 10, § 40.1.

¹⁹² WASH. REV. CODE ANN. § 13.34.040(3) (West 2015).

¹⁹³ MINN. STAT. ANN. § 260.771(2) (West 2015).

¹⁹⁴ WIS. STAT. ANN. § 938.028(3)(a) (West 2015).

¹⁹⁵ CAL. WELF. & INST. CODE § 224 (West 2015).

¹⁹⁶ Lewerenz & McCoy, *supra* note 13, at 712–14.

¹⁹⁷ See, e.g., OKLA. STAT. ANN. tit. 10, § 40.1 (West 2015); see also Lewerenz & McCoy, *supra* note 13, at 712–14 (discussing the rejection of the existing Indian family doctrine, which greatly limited the ICWA and adoption of statutes that recognize tribes' interests in Indian children).

¹⁹⁸ OKLA. STAT. ANN. tit. 10, § 40.1.

¹⁹⁹ WIS. STAT. ANN. § 938.028(3)(a).

²⁰⁰ MINN. STAT. ANN. § 260.771(2) (West 2015).

²⁰¹ WASH. REV. CODE ANN. § 13.34.040(3) (West 2015).

²⁰² CAL. WELF. & INST. CODE § 224 (West 2015).

²⁰³ *Id.* at § 224(a)(2).

²⁰⁴ *In re Alexandria P.*, 176 Cal. Rptr. 3d 468, 485 (Ct. App. 2015).

²⁰⁵ See OKLA. STAT. ANN. tit. 10, § 40.1 (West 2015); see WIS. STAT. ANN. § 938.028(3)(a) (West 2015).

²⁰⁶ See OKLA. STAT. ANN. tit. 10, § 40.1; see WIS. STAT. ANN. § 938.028(3)(a); see also Lewerenz & McCoy, *supra* note 13, at 712–14 (discussing states' rejections of the existing Indian family doctrine, which narrowly applied the ICWA in favor for legislation that applied individual state Indian child welfare acts broadly); see also *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34–37 (1989) (noting that the congressional record emphasizes both the tribes' interests and parents' interest in Indian children).

parenthood and not automatically exclude such fathers from the ICWA's protections.²⁰⁷ This flexibility would promote congressional policies, as recognized in the congressional record and in *Holyfield*.²⁰⁸

V. CONCLUSION

The pre-existing custody requirement of the ICWA should not automatically exclude unwed Indian fathers without physical custody from the ICWA's protections.²⁰⁹ The extreme facts in *Adoptive Couple* should be recognized.²¹⁰ In *Adoptive Couple*, there was no parent-child relationship because the unwed Indian father made no effort whatsoever to establish parenthood.²¹¹ As a result, the tribe in *Adoptive Couple* had no interest.²¹² *Adoptive Couple* should be read to mean that where there is some parent-child relationship, there is pre-existing custody. Many state courts and state legislatures have properly rejected the existing Indian family doctrine following *Holyfield* and have broadly applied the ICWA's protections in order to safeguard the unique relationships at stake in a custody proceeding involving an Indian child. States must continue to promote the goals of the ICWA relating to Indian parents, children, and tribes.²¹³

Although there is a pre-existing custody requirement in the ICWA, it can be met without physical custody through employing a flexible standard. State courts and state legislatures should establish flexible standards allowing inquiries into the efforts by an unwed Indian father to assume parenthood.²¹⁴ A flexible pre-existing custody requirement also safeguards tribal interests in Indian children without undermining *Adoptive Couple*.²¹⁵ A flexible pre-existing custody requirement within the ICWA is needed to ensure congressional goals are met.²¹⁶

²⁰⁷ See *Holyfield*, 490 U.S. at 34–37 (applying broadly the ICWA's protections in order to protect tribes' interest); cf. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2560–64 (2013) (looking to the father's failure to take steps, such as providing financial support, to find that there was no parent-child relationship so there was no continued custody).

²⁰⁸ See *Holyfield*, 490 U.S. at 34–37; see 124 CONG. REC. 38,101–03 (1978) (statements of Rep. Udall & Rep. Lagomarsino).

²⁰⁹ See *Adoptive Couple*, 133 S. Ct. at 2560–64; see *id.* at 2573, 2578–79 (Sotomayor, J., dissenting).

²¹⁰ See *id.* at 2558–59 (majority opinion); see *id.* at 2578 (Sotomayor, J., dissenting).

²¹¹ See *id.* at 2558–59 (majority opinion).

²¹² See *id.* at 2560–64 (noting that because the ICWA did not apply, the tribe did not have an interest in the proceedings, and therefore, no standing).

²¹³ See *Holyfield*, 490 U.S. at 34–37; see OKLA. STAT. ANN. tit. 10, § 40.1 (West 2015); see WIS. STAT. ANN. § 938.028(3)(a) (West 2015); see 124 CONG. REC. 38,101–03 (1978) (statements of Rep. Udall & Rep. Lagomarsino); see also Lewerenz & McCoy, *supra* note 13, at 712–14 (discussing state legislators' rejections of the existing Indian family doctrine).

²¹⁴ Cf. *Adoptive Couple*, 133 S. Ct. at 2558–59 (finding that the father did not accept the responsibility of parenthood because he failed to provide child support, had no prior contact with the child, and indicated that he relinquished his parental rights through a text message).

²¹⁵ See *Holyfield*, 490 U.S. at 34–37; cf. *Adoptive Couple*, 133 S. Ct. at 2558–61 (excluding from the ICWA's protections unwed fathers without physical custody who take no affirmative steps toward parenthood).

²¹⁶ See *Holyfield*, 490 U.S. at 34–37; cf. *Adoptive Couple*, 133 S. Ct. at 2558–62 (finding that where there was no effort to assume parenthood, there was no "pre-existing custody to evaluate," so the ICWA's protections did not apply, suggesting where affirmative steps toward parenthood exist, there may be "pre-existing custody to evaluate" under the ICWA).