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WHAT IT MEANS TO BE A PARENT: A PROBLEMATIC OUTCOME IN *ADOPTIVE COUPLE V. BABY GIRL*

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I. INTRODUCTION

The Indian[1] Child Welfare Act of 1978 (ICWA) was a response by Congress to an alarming trend on Native American reservations.[2] Based on surveys taken in 1969 and 1974, between 25—35% of Indian children were taken from their parents' custody by child services and given to non-Native American foster homes and adoptive parents.[3] The reasons for removal were usually vague[4] and based largely in ignorance of or disdain for Native American culture.[5] Recognizing that a tribe's most valuable resource is its

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[1] The term "Indian," used since our founding to refer to the body of law governing Native American affairs, is outdated, offensive, and ubiquitous. While I urge a badly needed modernization of the legal lexicon, for clarity's sake I will use "Indian" as indicated in the statutory definition when citing to statutes and cases that also use the word "Indian."

[2] 25 U.S.C. §1901 (2012).

[3] For example, the surveys revealed that 90% of Navajo school-aged children were sent to boarding schools, and that in 1969 85% of all Native American children in foster care were placed with non-Native American families. Moreover, Native Americans were almost never eligible to be foster or adoptive parents, due to "discriminatory standards" based in middle-class values. H.R. Rep. No. 95-1386, 9 (1978).

[4] Concrete reasons for removal, such as removal due to physical abuse, were seldom cited; a striking survey from North Dakota revealed that 99% of removal cases cited vague terms like "neglect" or "social deprivation." *Id.* at 10.

[5] For example, Native Americans might have up to a hundred relatives or fellow tribal members who would be considered responsible adults with whom to leave a child. Social workers might label the practice of leaving children with extended family members or

children, Congress, through ICWA, created federal minimum standards for termination of parental rights and a preference system for adoptions that minimized the chance that Indian children would be removed from the reservation and from their families.[6]

The Supreme Court has heard only two cases involving ICWA since the passage of the act in 1978.[7] The second case, *Adoptive Couple v. Baby Girl*, was decided during the summer of 2013.[8] The verdict in *Adoptive Couple v. Baby Girl*, while leaving the casual observer satisfied on behalf of the sympathetic adoptive couple, was troublesome for several reasons. This case note explores the history of ICWA, the sections at issue in *Adoptive Couple v. Baby Girl*, the ruling in that case, and why I believe the Court's narrowing of ICWA's scope is problematic.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY OF *ADOPTIVE COUPLE V. BABY GIRL*

Birth Mother, a predominantly Hispanic woman, and Biological Father, a member of the Cherokee nation[9] with 3/128 Cherokee heritage, were engaged when Birth Mother became pregnant in January 2009 in Oklahoma.[10] Biological Father insisted that he would provide no financial support to Birth Mother until the two were married.[11] Birth Mother broke off the engagement in May 2009 and a month later sent a text to Biological Father, asking if he would rather pay child support or relinquish his parental rights.[12] He responded that he would relinquish his rights.[13]

Birth Mother decided to give the baby up for adoption and found Adoptive Couple, South Carolina residents, through an adoption agency. They provided financial assistance during the later part of the pregnancy and were present in the delivery room at Baby Girl's birth on September 15, 2009.[14]

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community members as "neglect;" however, this label does not account for Native American cultural norms. *Id*. *See also* Michael J. Dale, *State Court Jurisdiction Under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test*, 27 GONZ. L. REV. 353, 355 (1992).

[6] 25 U.S.C. § 1901(3) (2012).

[7] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989); Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013).

[8] Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013).

[9] Biological Father was 3/128 (2.3%) Cherokee, based on Baby Girl's 3/256 (1.2%) Cherokee heritage cited by the Court. These small percentages qualified both individuals for Cherokee Nation membership. *Adoptive Couple*, 133 S. Ct. at 2556.

[10] *Id*. at 2558.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

Meanwhile, Birth Mother's attorney attempted to notify the Cherokee Nation of the adoption.[15] However, due to errors in the spelling of Birth Father's name and an incorrect birth date, the Nation could not locate Biological Father in its records.[16]

Birth Mother relinquished her parental rights, and Adoptive Couple returned to South Carolina with Baby Girl to begin adoption proceedings.[17] Four months later, Biological Father was served with a notice of the adoption and consent papers.[18] After signing the papers,[19] Birth Father intervened and objected to the adoption, seeking custody of Baby Girl. In May, the Cherokee Nation intervened.[20]

At trial in September 2011, the South Carolina Family Court concluded that, because Baby Girl was an "Indian child" and Biological Father was a "parent" under ICWA, the ICWA's heightened standards for removing a child from parental custody applied.[21] The court awarded custody of the 27-month-old to Biological Father, whom she had never met.[22] The South Carolina Supreme Court affirmed the decision, adding that 25 U.S.C. § 1912(d) and § 1912(f) had not been satisfied.[23]

III. ICWA PROVISIONS AT ISSUE

In this case, there were three ICWA provisions at issue. First, 25 U.S.C. §1912(d) states that a party seeking to terminate parental rights or to adopt an Indian child must prove "active efforts . . . to prevent the breakup" of the Indian family, such as rehabilitation programs or remedial services.[24] Next, section 1912(f) provides that a termination of parental rights will not be ordered absent proof "beyond a reasonable doubt" that "continued custody" by that parent is "likely to result in serious emotional or physical damage to the child."[25] Finally, section 1915(a) establishes a

[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] Biological Father claims that he mistook the nature of the papers, and that had he known that Baby Girl was up for adoption, he would not have signed them. *Id*. Once the South Carolina Supreme Court determined that ICWA applied to this case, there was a statutorily prescribed procedure for giving consent to the adoption that also applied. Since this procedure was not followed, the consent was not valid, and the ICWA allows a parent to revoke consent to an adoption at any time before it is finalized. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 561 (S.C. 2012). The Supreme Court did not consider the validity of the consent on appeal.
[20] *Adoptive Couple*, 731 S.E.2d at 555.
[21] *Id*. at 567.
[22] *Adoptive Couple*, 133 S. Ct. at 2556.
[23] Adoptive Couple, under ICWA, had the burden of proving both that remedial family services had been provided to Birth Father, and also that Birth Father posed a serious risk to Baby Girl's safety, as explained below. *Adoptive Couple*, 731 S.E.2d at 567.
[24] 25 U.S.C. § 1912(d) (2012).
[25] 25 U.S.C. § 1912(f) (2012).

preference system for the adoption of Indian children. First preference is given to the extended family of the child, followed by other members of the same tribe, followed by members of other tribes, followed by non-Indians.[26]

IV. PRECEDENT INTERPRETING THE ICWA BEFORE *ADOPTIVE COUPLE*

The only other Supreme Court case involving ICWA turned on a jurisdictional question.[27] In that case, unmarried Native American parents sought to give their twin babies, born off of the reservation, up for adoption.[28] The Court determined that because their biological parents were domiciled on the Choctaw reservation, so too were the babies; therefore, their adoption was under the exclusive jurisdiction of the tribe.[29] The state of Mississippi was without jurisdiction to authorize the adoption, even though the parents voluntarily surrendered the babies.[30]

Some state courts have also interpreted the ICWA. State courts developed one particular exception to ICWA, beginning with the Kansas Supreme Court in 1982: the "Existing Indian Family Exception."[31] According to that court, ICWA was designed to protect Indian families by keeping them intact; therefore, when an Indian child has never lived with an Indian family, ICWA does not apply.[32]

Scholars have pointed out that the Existing Indian Family Exception is problematic for several reasons.[33] First, it creates an artificial emphasis on individual parental rights, as opposed to ICWA's intended emphasis on balancing tribal and children's interests.[34] Second, it reads language into the statute that is not present and contradicts a Supreme Court tradition of reading Indian law statutes broadly.[35] Third, it was a creature of state courts, whose failure to anticipate its associated problems was the reason Congress had to enact ICWA.[36] It would be inconsistent for states to create an exception to a law enacted to supersede their authority.[37] For these reasons, the Existing Indian Family Exception has largely fallen out of

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[26] 25 U.S.C. § 1915(a) (2012).
[27] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).
[28] *Id*. at 48-49.
[29] *Id.* at 53.
[30] *Id*.
[31] *In re* Adoption of Baby Boy L, 643 P.2d 168 (Kan. 1982).
[32] *Id*. at 175.
[33] Michael J. Dale, *State Court Jurisdiction Under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test*, 27 GONZ. L. REV. 353, 381 (1992).
[34] *Id*.
[35] *Id*.
[36] *Id*.
[37] *Id*.

favor with state courts[38]; in fact, *Baby Boy L* was explicitly overturned in Kansas in 2009.[39]

V. *ADOPTIVE COUPLE*: THE VERDICT AND THE DISSENT

On June 25, 2013, the Supreme Court, in a 5–4 vote, overturned the South Carolina Supreme Court's decision to give custody of Baby Girl to Biological Father and remanded the case for further custody proceedings.[40]

1. *The Majority Opinion*

There were two questions presented in this case:

> (1) Whether a non-custodial parent can invoke ICWA to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law.[41]
> (2) Whether ICWA defines "parent" in 25 U.S.C. § 1903(9) to include an unwed biological father who has not complied with state laws to attain legal status as a parent.[42]

Justice Alito, writing for the Court, bypassed the latter question and assumed, *arguendo*, that Birth Father was a "parent."[43] However, using statutory interpretation, the Court concluded that Birth Father did not have the right to invoke ICWA.[44] Section 1912(f) protects the "continued custody" of the child; because Birth Father never had physical or legal custody of Baby Girl, there was no custody to continue, and 1912(f) did not apply.[45] Similarly, 1912(d) seeks to prevent the breakup of existing families. Because Baby Girl never lived with Birth Father (and indeed had never even met him), there was no family to break up, and 1912(d) could not apply.[46] Finally, the 1915(a) preference system for adoptions, the Court clarified, is only triggered when there are competing petitions for adoption.[47] Because Birth Father, Baby Girl's paternal relatives, and other

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[38] Marcia Zug, Commentary, Adoptive Couple v. Baby Girl*: Two-and-a-Half Ways to Destroy Indian Law*, 111 MICH. L. REV. FIRST IMPRESSIONS 46, n.11 (2013), *available at* http://www.michiganlawreview.org/assets/fi/111/Zug.pdf.
[39] *See In re* A.J.S., 204 P.3d 543 (Kan. 2009).
[40] Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013).
[41] *Id.* at 2559.
[42] *Id.*
[43] *Id.*
[44] *Id.* at 2560.
[45] *Id.*
[46] *Id.*
[47] *Id.* at 2564.

Cherokee nation members failed to petition to adopt Baby Girl, section 1915(a) did not bar Adoptive Couple from having their petition granted.[48]

The Court was concerned that interpreting the ICWA protections too broadly might give a biological father as estranged as a sperm donor the right to sabotage an adoption.[49] Examining the legislative intent of Congress, the Court found that ICWA was meant to prevent the removal of Native American children from existing families, not to bar a voluntary adoption by a non-Indian parent with sole custody.[50] The Court thought that a verdict for Birth Father would deter otherwise fit non-Indian parents from adopting a child with any Indian heritage.[51] ICWA is not meant to return children *to* their non-custodial Native American parent, but to prevent children from being *removed* from their Native American parent's pre-existing custody.[52]

2. *The Concurring Opinions and Scalia's Dissent*

Justice Breyer was concerned that the verdict might be applied to non-custodial fathers who had contributed to their children financially and were otherwise engaged in being good fathers.[53] In addition, he noted that section 1915(a) preferences were subject to policies set inside the tribe—tribes could reasonably include non-custodial fathers in their preference system.[54]

Justice Thomas took a completely different approach.[55] Indeed, he would have found the entirety of ICWA unconstitutional.[56] Under the Tenth Amendment, Congress can only regulate traditional state powers—like family law—if it is explicitly granted that power by the Constitution.[57] Since ICWA has its basis in the Indian Commerce Clause ("ICC"), Justice Thomas analyzed the language of the ICC and found that it empowers Congress only in the area of commerce, i.e. trade.[58] Because family law is outside of the realm of trade, Congress did not have the initial authority to enact the ICWA.[59]

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48 *Id*.
49 *Id.* at 2563 n.8.
50 *Id*. at 2563.
51 *Id.* at 2563-64.
52 *Id*. at 2563.
53 *Id.* at 2571 (Breyer, J., concurring).
54 *Id.*
55 Justice Thomas' constitutional reasoning, as I will discuss, would have had far too many consequences, which is probably why the majority did not adopt it.
56 *Adoptive Couple*, 133 S. Ct. at 2571 (Thomas, J., concurring).
57 U.S. CONST. amend X.
58 *Adoptive Couple*, 133 S. Ct. at 2567 (Thomas, J., concurring).
59 *Id*.

Justice Scalia pointed out that "continuing" could reasonably be construed to mean permanent, as opposed to temporary, custody.[60] Thus, the court would have to ascertain whether *continuing* custody is likely to result in serious emotional or physical harm to the child. In addition, he observed that the "entitlement" of a willing and fit biological parent to rear his or her offspring is firmly entrenched in the common law.[61]

3. *Justice Sotomayor's Dissent*

Justice Sotomayor's blistering dissent begins by accusing the majority of blatantly contradicting Congress. The majority's concerns about the difficulty of adopting Indian children, she explains, is exactly what the ICWA was intended to do—make it easier to keep Indian children with their tribes by making it more cumbersome to take them away from the tribe.[62]

She follows with the dissent's strongest argument: there is no statutory language that separates the concepts of a parent-child relationship and a custodial relationship.[63] The majority accepts a statutory uniform definition of parenthood that is based in biology,[64] but then hinges ICWA's applicability on the existence of a custodial relationship.[65] Justice Sotomayor's point is bolstered by ICWA's repeated references to "termination of parental rights," rather than to "termination of custodial rights."[66] Reading the statute in the context of its definition section[67] and in the language used throughout, it seems most likely that Congress intended a broad concept of parenthood to apply. Using this logic, Birth Father would have had ICWA's due process protections regardless of custody because he was the biological parent of Baby Girl.[68] Because some states provide the types of rehabilitative and remedial family services described in ICWA to unwed fathers and children (sometimes including ones whose paternity has not been determined), it would not be anomalous for the ICWA to require them in this situation.[69]

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[60] *Id.* at 2571-72 (Scalia, J., dissenting). Justice Scalia otherwise joined the dissent.
[61] *Id.*
[62] *Id.* at 2572 (Sotomayor, J., dissenting).
[63] *Id*. at 2573 (Sotomayor, J., dissenting).
[64] *See* 25 U.S.C. §1903(9) (definition of "parent" as "any biological parent or parents of an Indian child").
[65] *Adoptive Couple*, 133 S. Ct. at 2573 (Sotomayor, J., dissenting).
[66] *Id.* at 2577 (Sotomayor, J., dissenting).
[67] In addition, the definition of "parent" specifically excludes "the unwed father where paternity has not been acknowledged or established," further indicating that Congress was considering nontraditional family arrangements when it wrote ICWA. 25 U.S.C. §1903(9).
[68] *Adoptive Couple*, 133 S. Ct. at 2573 (Sotomayor, J., dissenting).
[69] *Id.* at 2579; *see also id.* at 2580 n.10 (citing state decisions on rehabilitative programs).

In addition, the dissent argues that the majority unfairly dismisses Birth Father's biological ties to Baby Girl by saying that he "abandoned" her, which is a legal term of art defined by state family law.[70] Because the ICWA makes no provision for parents who have abandoned their children, it could be confusing for future courts to have to consider an abandonment standard without further definition by the Court.[71]

Finally, as Justice Breyer also observed, painting all noncustodial parents with the same broad brush results in ICWA protections being denied to otherwise loving parents.[72] The majority's contention that this situation occurs infrequently does not excuse leaving the decision as open as it is—is it right to deny federal protections to even one fit and involved parent?[73]

VI. ANALYSIS

There are a few noteworthy observations concerning the conflict between the majority and the dissent in *Adoptive Couple v. Baby Girl*. The distinction between the two outcomes logically stems from two different views of parenthood. The majority subscribes to a social view of parenthood—with two Justices on the Court being adoptive parents themselves,[74] this is not entirely unexpected. A social view of parenthood holds that a child's parents are the ones who love, support, and raise her; thus, the parents are the child's primary caregivers. The dissent, on the other hand, adheres to a strictly biological basis of parenthood as defined within the ICWA. Given the changing social landscape of the country in the past few decades, this split on the definition of what constitutes a parent is not surprising.[75] However, currents of popular thought do not create Congressional intent.

The majority reaches a feel-good conclusion for adoptive parents, but the dissent's arguments ring truer from a statutory interpretation standpoint. The majority, it seems to me, is saying, "Although you may fit the statutory definition of parent, you are not 'parent enough' to receive federal protection." The dissent rebuts this by pointing to the clear statutory definition of "parent" located in the ICWA—the person with whom the child shares one half of her DNA unless paternity is unknown or not

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[70] *Id*. at 2576 n.3 (Sotomayor, J., dissenting).
[71] *Id.*
[72] *Id.* (citing Breyer, J., concurring).
[73] *Id.*
[74] *See* Nina Totenberg, *Emotions Run High as Supreme Court Hears Adoption Case*, NATIONAL PUBLIC RADIO (April 16, 2013, 3:00 PM), http://www.npr.org/2013/04/16/177507503/supreme-court-case-tests-indian-child-welfare-act (last visited July 14, 2013).
[75] *See*, *e.g*., David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125 (2006).

established.[76] A parent receives the protections of ICWA absent a determination he or she is extremely unfit and would endanger the child.[77]

The way ICWA is written, any biological parent can intervene and stop an adoption *unless* the adoptive couple can prove remedial measures were taken by them, the state, or the tribe.[78] It is a matter of following procedure to avoid situations like the one in *Adoptive Couple v. Baby Girl*. As uncomfortable as this reality may seem, it is what the statute says. If Congress feels it necessary to update the law and clarify its intent (and I would argue that it is necessary), it should do so. However, because the Court created an artificial split between custodial parents and noncustodial parents, courts must now exclude a class, however small, of fit noncustodial parents from ICWA protections. It is important to note that noncustodial parents are not robbed of *every* family law protection, but only the protections of this particular statute.[79]

Similarly, the majority ignores one of ICWA's unstated purposes in its reading of congressional intent. The ICWA uses Native American cultural norms when establishing the "best interests" of Indian children, as opposed to white middle-class norms.[80] According to the cultural reasoning ICWA adopts, the best interest of *any* Indian child is first to be with the tribe.[81] Under this reasoning, it would not matter if an Indian parent (or any tribal member) had preexisting custody—the best and healthiest place for an Indian child is with the tribe. Again, the implications of this idea may cause discomfort—any person seeking to adopt a child who meets the requirements for tribal membership, however remote in the bloodline she is, has to jump through ICWA's proverbial hoops. As a result, some Native American children could, by tribal demand, be forced into a culture that is completely foreign to them.[82] However, it is Congress' role to change the statute, not the Court's.

Finally, the Court bypassed the constitutional argument in favor of adhering to the existing family exception. Marcia Zug explains that invalidating the whole of ICWA on constitutional grounds would open the door for invalidating a great deal of Indian law:

Apart from intervening to affirm the "existing family exception," there are no non-far-reaching rulings that will return Veronica to her adoptive parents. The Court will either have to undermine significant portions of federal Indian law as race based, curtail Congress's Indian Commerce Clause power with far-reaching consequences, or embrace a

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[76] 25 U.S.C. § 1903(9) (2012). Birth Father's paternity was not disputed in this case.
[77] *Id.* at § 1912(f).
[78] *Adoptive Couple*, 133 S. Ct. at 2580 (Sotomayor, J., dissenting).
[79] The majority also mentions this fact. *Adoptive Couple*, 133 S. Ct. at 2563 n.8.
[80] Dale, *supra* note 33, at 370.
[81] *Id.*
[82] A reminder: we are only talking about children who are up for adoption or otherwise part of custody proceedings or the foster care system.

Tenth Amendment limitation on the reach of Indian law that cuts a broad swath through many existing laws.[83]

No doubt wanting to keep this ruling narrow, the Court sidestepped the issue. Although the Court did not use the words "existing family exception," it affirmed the spirit of this doctrine by requiring preexisting custody on the part of the parent seeking to stop an adoption. As mentioned previously, the existing family exception has fallen out of favor in state courts. The Supreme Court, in creating binding precedent on the issue, has dictated a reading of the statute in conflict with the majority of lower courts.

VII. CONCLUSION

Clearly, *Adoptive Couple* was anything but an easy case. While the Court overturned the lower court's decision, in doing so it had to read into the law a distinction between custodial and noncustodial parents, all while creating a type of existing family standard. As a result, the enforcement of ICWA may, in some ways, depart from the Native American "best interests of the child" standard it was intended to preserve. While the majority's verdict may seem obvious to a layperson (there should be no "take-backs" when giving up parental rights), reading the statute as it is written required a different result.

It is no surprise that, thirty-five years later, the cultural climate of the United States is much more accepting of the idea of parenthood being something more than biology. However, we do not read statutes in the context of today—we read them as they were written, and the ICWA was written to afford all biological parents its protections. Nevertheless, as it stands today, the Court has stretched the language of the ICWA and contravened a majority of the lower courts to get its desired result, rather than issuing a ruling based on the strict language of the statute or compelling Congress to clarify a clearly problematic piece of law. As with all things, time will tell if it was worth it.

[83] Zug, *supra* note 38, at 53-54.