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# Tribes and Race: The Court's Missed Opportunity in *Adoptive Couple v. Baby Girl*

Christopher Deluzio\*

## Introduction

Adoption policy in the United States has unequivocally embraced the idea that every child, irrespective of race, has an equal right to a loving home and supportive parents. To that end, public adoption agencies and family courts are largely barred from considering the race of either the child or the couple seeking adoption when deciding custody and placement issues. But there is one dramatic exception to this colorblindness: the Indian Child Welfare Act (“ICWA”).

The ICWA is a radical and lingering departure from the steady embrace of colorblindness by both Congress and the Court. The Act creates heightened federal standards for termination of parental rights of an Indian parent, gives placement preference to tribe members and others in cases involving the placement of Indian children, and even extends jurisdiction—often exclusive—to tribes in certain custody and adoption proceedings.

The divisive nature and tenuous constitutional footing of the ICWA were on full display most recently in *Adoptive Couple v. Baby Girl*.<sup>1</sup> In this heart-wrenching and widely publicized case,<sup>2</sup> the Court tackled the

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1. *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013).  
2. See, e.g., Emily Bazelon, *Send Veronica Back: A Truly Terrible Ruling in the Baby Girl Custody Case*, SLATE (Jul. 18, 2013), [http://www.slate.com/articles/double\\_x/doublex/2013/07/baby\\_veronica\\_case\\_the\\_south\\_carolina\\_court\\_got\\_it\\_wrong.html](http://www.slate.com/articles/double_x/doublex/2013/07/baby_veronica_case_the_south_carolina_court_got_it_wrong.html); Andrew Cohen, *What the Court's 'Baby Veronica' Ruling Means for Fathers and Native Americans*, ATLANTIC (Jun. 25, 2013), <http://www.theatlantic.com/national/archive/2013/06/what-the-courts-baby-veronica->

issue of whether the ICWA would operate to bar the adoption of a child with only 3/256 Cherokee blood by an adoptive couple personally selected by the child's unwed biological mother. Effectively, before the United States Supreme Court's decision, the South Carolina state courts felt compelled by the ICWA to grant custody to the child's putative father solely because of the child's Indian heritage, despite a family court's finding that the adoption would have been in the best interests of the child. Worse, the child had spent over a year with the couple and formed strong familial bonds with her adoptive parents.

Unlike other federal laws designed to protect and reinforce the self-governance of tribes—rooted in the tribes' inherent sovereignty and subjected to lower rational basis review—the ICWA in *Adoptive Couple* acted as a naked racial preference for those with Indian blood. The child at issue was not born to an Indian mother, had never met her biological father until his intervention in the adoption proceedings, and had never even stepped foot on a reservation prior to her adoption. The Supreme Court, seeking to avoid the difficult and obvious equal protection issues implicated in *Adoptive Couple*, inexplicably failed to acknowledge ICWA for what it was in this case: an inherently racial classification that should have been subjected to and failed strict scrutiny. Unfortunately, the Court never exposed ICWA to that kind of scrutiny; instead, the Court avoided the obvious constitutional questions raised by ICWA by relying on creative textual interpretation.

Part I will provide an overview of the legal doctrines implicated in *Adoptive Couple*. First, Part I will discuss both ICWA's text and purpose and scholarly attention given to the law. Second, Part I will examine the law of putative fathers insofar as relevant to understanding ICWA's application in *Adoptive Couple*. Part II provides insight into the Court's equal protection jurisprudence with a particular emphasis on considerations of race in adoption and laws implicating Indian tribes. This Part introduces the limited scholarly treatment afforded to the equal protection issues implicated by ICWA and builds on the existing work that recognizes the inherently *racial* nature of any *tribal* classification. Part III tells the intriguing story of *Adoptive Couple* by providing a

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ruling-means-for-fathers-and-native-americans/277215/; Dan Frosch & Timothy Williams, *Justices Saw Law Doesn't Require Child to be Returned to her Indian Father*, N.Y. TIMES (Jun. 25, 2013), <http://www.nytimes.com/2013/06/26/us/justices-order-return-of-indian-child-to-adoptive-parents.html>; S.M., *The Native American Adoption Case: Thicker than Water*, ECONOMIST (Jun. 12, 2013), <http://www.economist.com/blogs/democracyinamerica/2013/06/native-american-adoption-case>.

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factual overview of the case, presenting the procedural history of the dispute, and summarizing the parties' arguments before the Supreme Court. Lastly, Part IV analyzes the Court's decision in *Adoptive Couple*. Incorporating the themes developed throughout this Article, Part IV critically examines the Court's failure to resolve the putative father and equal protection issues raised in *Adoptive Couple*. Part IV suggests how the Court should have resolved *Adoptive Couple* in a constitutionally and doctrinally satisfying way while identifying some of the perils and repercussions of the Court's judicial minimalism. This Part also includes a brief epilogue that provides an update to the status of Baby Girl's adoption.

### I. Legal Background

This Part provides an overview of the legal doctrines and jurisprudence at play in *Adoptive Couple*.<sup>3</sup> Section A begins with a discussion of the text and purpose of the ICWA before turning to an analysis of the contentious judicially crafted "existing Indian family doctrine" exception to the ICWA. Section B examines the law of putative fathers, first under the ICWA and, second, under the Supreme Court's landmark decisions.

#### A. ICWA

Congress passed the ICWA in 1978 in response to the breakdown of Indian families caused by the removal of Indian children via state custody proceedings.<sup>4</sup> In passing the ICWA, Congress laid out a broad and lofty policy of protecting Indian children, promoting Indian tribal identity, and preserving Indian culture. The ICWA established minimum federal guidelines for Indian child custody proceedings. Unfortunately, the ICWA has caused uncertainty about both the applicability of its provisions to non-custodial Indian parents—as evidenced by the emergence of a judicially-created "existing Indian family doctrine"—and the steps unwed Indian fathers must take in order to enjoy the

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3. *Adoptive Couple*, 133 S.Ct. 2552.

4. *See* Indian Child Welfare Act (ICWA) of 1978 § 2, 25 U.S.C. § 1901(4) (2012) (finding "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.").

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preferential treatment afforded by the ICWA. Section B addresses this latter concern relating to putative fathers. The constitutional equal protection objections and concerns posed by the ICWA are reserved for discussion in Part II.

### 1. Purpose and Provisions of the ICWA

Congress, in passing the ICWA, charted an intrusive federal role in the protection of Indian children, families, and tribal identity:

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 culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.<sup>5</sup>

This active and seemingly intrusive federal involvement by Congress was couched in the general obligation of the United States to protect and preserve Indian tribes.<sup>6</sup> Even a cursory review of the legislative history of the ICWA confirms that much of the congressional concern focused on the harm experienced by Indian children and their families.<sup>7</sup> The

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5. *Id.* § 1902.

6. *Id.* § 1901(2) (“Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources.”).

7. *See, e.g.*, H.R. REP. NO. 95-1386, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7531 (“The wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today.”); *id.* (“In addition to the trauma of separation from their families, most Indian children in placement or in institutions have to cope with the problems of adjusting to a social and cultural environment much different than their own.”); *id.* at 10, 7532 (“In judging the fitness of a particular family, many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.”); S. REP. NO. 95-597, at 11 (1977) (stating that the ICWA was motivated by “reports that an alarmingly high percentage of Indian children were being separated from their natural parents through the actions of nontribal government agencies”).

Supreme Court has also noted that Congress, via the ICWA, aimed to remedy the harm caused by the breakdown of Indian families:

The . . . ICWA . . . was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.<sup>8</sup>

More specifically, Congress zeroed in on the effects of custody proceedings in the States on Indian families, finding “that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”<sup>9</sup> In order to remedy these destructive forces in the States, the ICWA included implementation of “minimum Federal standards” governing the removal of Indian children from Indian families. As such, the ICWA is best characterized as an atypical foray by the federal government into substantive family law, which the Court has typically characterized as the exclusive domain of the States.<sup>10</sup>

The ICWA's substantive provisions apply to child custody proceedings in the states involving an “Indian Child,” which the ICWA defines 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.”<sup>11</sup> A “parent” under the ICWA is “any biological parent or parents of an

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8. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989); *see also id.* at 34 (noting that congressional testimony during the debates surrounding passage of the ICWA included significant focus “on the harm to Indian parents and their children who were involuntarily separated by decisions of local welfare authorities”); *id.* at 55 (Stevens, J., dissenting) (“The Act is thus primarily addressed to the unjustified removal of Indian children from their families through the application of standards that inadequately recognized the distinct Indian culture.”).

9. 25 U.S.C. § 1901(5).

10. *See, e.g., Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.” (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890))).

11. 25 U.S.C. § 1903(4).

Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom.”<sup>12</sup> However, the ICWA’s definition of parent “does not include the unwed father where paternity has not been acknowledged or established.”<sup>13</sup>

Relevant to adoption proceedings, the ICWA significantly restricts the ability of state courts to terminate a “parent’s” custody rights without consent:

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*.<sup>14</sup>

The ICWA also gives adoption placement preferences to the extended family of the Indian child and other tribal members.<sup>15</sup> The ICWA also provides Indian tribes with exclusive jurisdiction over child custody proceedings involving Indian children domiciled or residing on the tribe’s reservation,<sup>16</sup> transfer to Indian tribes of proceedings to terminate the parental rights to an Indian child (subject to parental objection),<sup>17</sup> and Indian tribes with the right to intervene in proceedings to terminate the

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12. *Id.* § 1903(9).

13. *Id.*

14. *Id.* § 1912(f) (emphasis added).

15. *See id.* § 1915(a) (“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.”).

16. *See id.* § 1911(a) (“An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.”).

17. *See id.* § 1911(b) (“In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child’s tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child’s tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.”).

parental rights to an Indian child.<sup>18</sup>

Thus, state courts dealing with the adoption of an Indian child must apply a high federal standard of harm despite any contrary state law, consider the ICWA's tribal placement preferences, allow Indian tribes to intervene, and transfer to Indian tribes if neither parent objects and a parent, custodian, or tribe petitions the court. And for children residing or domiciled on a reservation, Indian tribes have exclusive jurisdiction over all child custody proceedings.

## 2. Existing Indian Family Doctrine

The “existing Indian family doctrine”—a judicially crafted exception to the ICWA—limits the reach of the ICWA to only Indian children being removed from the *existing* custody of an Indian parent or family.<sup>19</sup> The doctrine first emerged in a 1982 decision by the Kansas Supreme Court:

A careful study of the legislative history behind the [Indian Child Welfare] Act and the Act itself discloses that the overriding concern of Congress and the proponents of the Act was the maintenance of the family and tribal relationships existing in Indian homes and to set minimum standards for the removal of Indian children from their existing Indian environment. It was not to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian

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18. *See id.* § 1911(c) (“In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.”).

19. *See, e.g.,* Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward A New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 676 n.8 (2002) (“Under the existing Indian family exception, several state courts have refused to apply the ICWA to children who otherwise qualify as Indian children under the Act, where neither the child nor the child's parents have a social, cultural, or political relationship with a tribe.”); Toni Hahn Davis, *The Existing Indian Family Exception to the Indian Child Welfare Act*, 69 N.D. L. REV. 465, 472 (1993) (describing the existing Indian family doctrine as “an exception based on the notion that the ICWA will only be applicable if an Indian child is removed from an ‘existing Indian family unit’ or ‘Indian home or culture’”).

environment over the express objections of its non-Indian mother.<sup>20</sup>

A court adhering to the doctrine and presiding over a parent termination proceeding, for instance, would not apply the ICWA's substantive provisions to a parental termination proceeding, for instance, where the Indian child at issue was not already in the custody of an Indian parent. Although Kansas ultimately abandoned the doctrine,<sup>21</sup> at least seven states currently embrace the existing Indian family doctrine: Alabama,<sup>22</sup> Kentucky,<sup>23</sup> Indiana,<sup>24</sup> Louisiana,<sup>25</sup> Missouri,<sup>26</sup> Nevada,<sup>27</sup> and Tennessee.<sup>28</sup>

The doctrine has received some attention from scholars, and this commentary has been almost uniformly critical.<sup>29</sup> The principal objection to the doctrine attacks the judicial exemption as both a departure from the plain text of the ICWA and an infringement of tribal sovereignty. Professor Atwood, for instance, who provides an excellent discussion of the two-pronged objections to the doctrine, summarizes things quite nicely: "The exception, which *rewrites the Act's definition of 'Indian child' without statutory basis, undercuts the sovereign authority of tribes to determine their own membership.*"<sup>30</sup>

The sovereignty-based criticisms of the existing Indian family doctrine suggest that the doctrine undermines the authority of tribes to

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20. *In re Adoption of Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982), *overruled by In re A.J.S.*, 204 P.3d 543, 551 (Kan. 2009).

21. *See In re A.J.S.*, 204 P.3d at 551.

22. *See S.A. v. E.J.P.*, 571 So. 2d 1187, 1189 (Ala. Civ. App. 1990).

23. *See Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996).

24. *See J.Q. v. D.R.L.*, 525 N.E.2d 298, 303 (Ind. 1988).

25. *See Hampton v. J.A.L.*, 658 So. 2d 331, 337 (La. Ct. App. 1995).

26. *See In re S.A.M.*, 703 S.W.2d 603, 608-9 (Mo. Ct. App. 1986).

27. *See Dawn v. Nev. State Div. of Child & Family Servs.*, 221 P.3d 1255, 1264 (Nev. 2009).

28. *See In re K.L.D.R.*, No. M2008-00897-COA-R3-PT, 2009 WL 1138130, at \*5 (Tenn. Ct. App. Apr. 27, 2009).

29. *See, e.g.*, Atwood, *supra* note 19, at 589-90; Davis, *supra* note 19, at 471-72; Lorie M. Graham, "The Past Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine," 23 AM. INDIAN L. REV. 1 (1998); Suzianne D. Painter-Thorne, *One Step Forward, Two Giant Steps Back: How the "Existing Indian Family" Exception (Re)Imposes Anglo American Legal Values on American Indian Tribes to the Detriment of Cultural Autonomy*, 33 AM. INDIAN L. REV. 329 (2009); Wendy Therese Parnell, Comment, *The Existing Indian Family Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act*, 34 SAN DIEGO L. REV. 381 (1997).

30. Atwood, *supra* note 19, at 634 (emphasis added).

determine their own membership pursuant to their statutory authority in the field. Opponents attacking the doctrine on this front, such as Professor Atwood, argue that such a usurpation of power by state courts is an affront to tribal authority in contravention of congressional intent:

The primary objection to the doctrine is that it disregards the interests of the tribe under the ICWA and denies to tribes the sovereign right to determine membership. . . . The right of Indian tribes to maintain a relationship with children eligible for membership was a central concern of Congress in enacting the ICWA, and the existing Indian family exception thwarts that interest. Thus, in the view of the courts that have rejected the doctrine, the existing Indian family exception directly conflicts with the idea of tribal sovereignty and the goal of strengthening tribal relations. Further, in allowing state courts to assess the sufficiency of an individual's ties with his or her Indian heritage, the doctrine invites precisely the kind of state court interference and paternalism that the ICWA was intended to eliminate.<sup>31</sup>

Similarly, Professor Davis stresses the contravention of congressional policy inherent in judicial adoption of the doctrine:

[I]t is clear that Congress was concerned about the rights of Indian children, Indian families, and Indian communities vis-a-vis states and their courts: "More specifically, its purpose was, in part, to make clear that in certain situations the state courts did not have jurisdiction over child custody proceedings." Contrary to this purpose, the existing Indian family exception has been used to evade applicability of the Act and to confine a variety of cases concerning Indian children, their families, and tribes in the state courts under state law.<sup>32</sup>

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31. *Id.* at 632-33 (footnote omitted); *see also* Parnell, *supra* note 29, at 420 ("Courts adopting the exception fail or refuse to recognize the tribal interests Congress intended to protect in enacting the ICWA.").

32. Davis, *supra* note 19, at 495 (footnote omitted) (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 400 U.S. 30, 45 (1989); *see also* Graham, *supra* note 29, at 36

Professor Painter-Thorne goes so far as to suggest that state courts applying the doctrine are perpetuating the wrongs that the ICWA was designed to correct and prevent:

[W]hen state courts use the existing Indian family exception to avoid ICWA, they perpetuate the very injustice ICWA sought to remedy by permitting nontribal members to determine the boundaries of Indian families. Such efforts may pressure tribal courts to conform to an outsider's cultural perspective by minimizing extended kin roles to fit within the nuclear family framework so as to assuage state court concerns. Moreover, these decisions have the potential to further alter Indian kinship structures. . .so that it even more closely resembles the Anglo-American model, not as a consequence of cultural choice, but as a means to avoid state usurpation of tribal jurisdiction.<sup>33</sup>

The textual objection to the existing Indian family doctrine accuses state courts of ignoring the plain meaning of the text of the ICWA in order to maintain state court jurisdiction over Indian child custody cases. For instance, Professor Metteer argues that “instead of relying on the Act's own definitions of ‘Indian child’ and Indian ‘tribal member,’ the courts have devised a ‘second litmus test’ to manipulate the application and implementation of the Act by variously defining their own criteria for ‘Indian-ness.’”<sup>34</sup> Professor Davis also highlighted the argument that courts applying the doctrine are departing from the text of the ICWA:

When there is no “existing Indian family” from which an Indian child is being removed, proponents of the exception argue, the ICWA is inapplicable. This

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(“Every Indian nation has its own membership or citizenship criteria which may be determined by ‘written law, custom, intertribal agreement, or treaty with the United States.’ The Existing Indian Family Doctrine, which allows state courts and agencies to substitute their views of what ‘belonging’ to a tribal family means for that of the tribe's views, thwarts this essential function of tribal sovereignty.” (footnote omitted)).

33. Painter-Thorne, *supra* note 29, at 380.

34. Christine Metteer, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38 SANTA CLARA L. REV. 419, 429 (1998) (footnote omitted).

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argument is made despite the fact that the two threshold requirements for applicability of the ICWA—1) that the matter involves an Indian child, and 2) in a child custody proceeding—are fulfilled, and despite the fact that there is no language in the Act which indicates removal from an Indian family as a requirement.<sup>35</sup>

Professor Painter-Thorne also echoes these textual objections by arguing that “state courts [that apply the doctrine] are imposing a requirement for ICWA application that goes beyond the Act’s *plain-language requirements*.”<sup>36</sup>

These are but a representative sampling of the main objections to the existing Indian family doctrine. While a determination about the merits of these objections is beyond the scope of this Article, an understanding of the doctrine and the principal arguments against it is necessary to fully appreciate the issues presented by the ICWA, its application, and the route taken by the Court in *Adoptive Couple*.

#### B. *The Rights of Putative Fathers*

This section provides a brief overview of the rights of putative fathers and focuses on the steps necessary for putative fathers to gain and protect their parental rights. These steps almost always exceed those required of married fathers and unwed mothers. Additionally, the determination of the requirements placed on putative fathers seeking to affirm their parental rights is almost entirely the province of the several states. Given Biological Father’s status as a putative father and the prominence of the question of what steps he was required to take in order to qualify as a “parent” under the ICWA, this Part is crucial to appreciating fully the range of issues at play in *Adoptive Couple* (despite the Court’s decision to brush aside this crucial threshold issue in

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35. Davis, *supra* note 19, at 476; *see also* Graham, *supra* note 29, at 35 (“Courts and advocates alike have maintained that the Doctrine violates the plain meaning of the ICWA, which states that the law will apply to “custody proceedings” involving “Indian children” who are either a member of their tribe or eligible for membership. There is no statutory requirement that the child or parent meet any additional test of “Indian-ness” beyond membership.”).

36. Painter-Thorne, *supra* note 29, at 376 (emphasis added).

*Adoptive Couple*).<sup>37</sup> Subsection 1 examines the ICWA's relevant provisions and scholarly commentary, while Subsection 2 delves into the Court's broader putative father doctrine.

## 1. ICWA

Despite the ICWA's inclusion of a definition of "parent" in its express terms, some states have diverged in their approaches for determining the parental status of fathers under the ICWA. Recall that the ICWA excludes from its definition of parents "the unwed father where paternity has not been acknowledged or established."<sup>38</sup> It is this exclusion that has caused confusion for some state courts about whether the ICWA incorporates a State's definition of parenthood for unwed biological fathers (or, for purposes of this Article, putative fathers<sup>39</sup>), particularly because the ICWA is silent with respect to the steps putative fathers are required to take in order to "acknowledge" or "establish" their paternity.

Five states have held that a determination of parental rights for putative fathers under the ICWA requires a determination under state paternity laws. Those states—California,<sup>40</sup> Missouri,<sup>41</sup> New Jersey,<sup>42</sup> Oklahoma,<sup>43</sup> and Texas<sup>44</sup>—include three of the four states with the largest Indian populations in the United States, according to the 2010 Census.<sup>45</sup> On the other hand, Alaska,<sup>46</sup> Arizona (the state with the third

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

38. 25 U.S.C. § 1903(9) (2012).

39. See BLACK'S LAW DICTIONARY 683 (9th ed. 2009) (defining putative father as "[t]he alleged biological father of a child born out of wedlock").

40. See *In re Daniel M. v. Richard S.*, 1 Cal. Rptr. 3d 897, 900 (Cal. Ct. App. 2003) ("Moreover, because the ICWA does not provide a standard for the acknowledgment or establishment of paternity, courts have resolved the issue under state law.").

41. See *In re S.A.M.*, 703 S.W.2d 603, 607 n.4 (Mo. Ct. App. 1986) (suggesting that state law controls any paternity determination in a case under the ICWA).

42. See *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988) ("In light of . . . the failure of either the Act or its interpretive regulations to prescribe or define a particular method of acknowledging or establishing paternity, we infer a legislative intent to have the acknowledgment or establishment of paternity determined by state law.").

43. See *In re Adoption of Baby Boy D*, 742 P.2d 1059, 1064 (Okla. 1985), *overruled on other grounds by In re Baby Boy L.*, 103 P.3d 1099, 1101 (Okla. 2004).

44. See *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 173 (Tex. App. 1995) ("Congress intended to have the issue of acknowledgment or establishment of paternity determined by state law.").

45. See U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE

largest Indian population<sup>47</sup>),<sup>48</sup> and South Carolina<sup>49</sup> do not look to their state laws when determining whether paternity has been “acknowledged” or “established” under the ICWA.

There has been silence in the academic discourse surrounding this disagreement among the states about how to define paternity under the ICWA. Regardless, this split affects a large portion of the Nation’s Indian population and has muddied the waters for putative Indian fathers affected by, for instance, termination or adoption proceedings. The Court’s putative fathers jurisprudence will contribute to this Article’s critical analysis in Part IV of the Court’s decision.

## 2. United States Supreme Court Doctrine

Putative fathers—one who is “[t]he alleged biological father of a child born out of wedlock”<sup>50</sup>—have historically had fewer rights than both married fathers and unwed mothers. In the last few decades, however, putative fathers who have established relationships with their children have increasingly convinced the Court of the fundamental nature of their parental rights. The U.S. Department of Health and Human Services has described the Court’s approach to the rights of putative fathers quite well:

In a series of cases involving unmarried fathers, the U.S. Supreme Court affirmed the constitutional protection of such a father’s parental rights when he has established a substantial relationship with his child. The court found

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POPULATION: 2010, at 7 tbl.2 (2012), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf> [hereinafter CENSUS BUREAU].

46. See *Bruce L. v. W.E.*, 247 P.3d 966, 979 (Alaska 2011) (“[E]ven though Bruce did not comply with the Alaska legitimation statute requiring signatures from both parents or complete his legitimization efforts in court within the first year of Timothy’s life, he sufficiently acknowledged paternity of Timothy to invoke the application of ICWA.”) (footnote omitted).

47. See CENSUS BUREAU, *supra* note 45, at tbl.2.

48. See *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960, 963 (Ariz. Ct. App. 2000) (holding that compliance with state law paternity requirements “are not required” under the ICWA).

49. See *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 560 (S.C. 2012), *vacated*, 133 S. Ct. 2552 (2013), *remanded to* 746 S.E.2d 346 (S.C. 2013); see also *infra* Part II.B, discussing South Carolina state proceedings.

50. See BLACK’S LAW DICTIONARY, *supra* note 39, at 683.

that the existence of a biological link between a child and an unmarried father gives the father the opportunity to establish a substantial relationship, which it defined as the father's commitment to the responsibilities of parenthood, as demonstrated by being involved or attempting to be involved in the child's upbringing. Nevertheless, States have almost *complete discretion* to determine the rights of unmarried fathers whose legal relationship to a child has not been established for the purposes of termination of parental rights or adoption proceedings.<sup>51</sup>

The most important inquiry for courts considering the rights of putative fathers, then, is whether the father has established a substantial relationship with the child. Thus, "unwed fathers have an inchoate interest in their children which they can transform into a constitutionally protected interest only if they assume substantial parental responsibilities."<sup>52</sup> To that end, states are compelled by the Federal Social Security Act to have procedures for putative fathers to acknowledge paternity.<sup>53</sup>

This putative father doctrine is the result of a series of Supreme Court decisions, beginning with *Stanley v. Illinois*<sup>54</sup> in 1972. In *Stanley*, the Court held that Illinois could not remove children, who had lived with their father over a period of several years,<sup>55</sup> from the custody of a putative father after the death of the child's mother "without a hearing on parental fitness and without proof of neglect."<sup>56</sup> Next, in *Quilloin v.*

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51. CHILD WELFARE INFO. GATEWAY, CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE RIGHTS OF UNMARRIED FATHERS 2 (2010) available at [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/putative.pdf](https://www.childwelfare.gov/systemwide/laws_policies/statutes/putative.pdf) [hereinafter CHILD WELFARE INFO] (emphasis added) (footnote omitted).

52. Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031, 1056-57 (2002).

53. See CHILD WELFARE INFO., *supra* note 51 at 3 n.5 ("The Federal Social Security Act requires States to have in place procedures for mothers and putative fathers to acknowledge paternity of a child, including a hospital-based program for the voluntary acknowledgment of paternity that focuses on the period immediately before or after the birth of the child. The procedures must include that, before they can sign an affidavit of paternity, the mother and putative father will be given notice of the alternatives and legal consequences that arise from signing the acknowledgment.") (citing 42 U.S.C. § 666(a)(5) (2012)).

54. *Stanley v. Illinois*, 405 U.S. 645 (1972).

55. *Id.* at 650 n.4.

56. *Id.* at 658.

*Walcott*,<sup>57</sup> while the Court recognized “that the relationship between parent and child is constitutionally protected,”<sup>58</sup> the Court ultimately held that Georgia’s application of a “best interests of the child”<sup>59</sup> standard in adoption proceedings did not violate the rights of a putative father who had “never exercised actual or legal custody over his child, and thus . . . never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child.”<sup>60</sup>

Then, in *Caban v. Mohammed*,<sup>61</sup> the Court struck down a New York law providing that only a mother’s consent, and not a putative father’s, was required in adoption proceedings over children born out of wedlock.<sup>62</sup> The *Caban* Court noted that the putative father in the case had “established a substantial relationship with the child and . . . admitted his paternity,”<sup>63</sup> but the Court also noted that New York would be free to eradicate a putative father’s veto over adoption if the father had “never . . . come forward to participate in the rearing of his child.”<sup>64</sup> And in *Lehr v. Robertson*,<sup>65</sup> the Court held that New York was not constitutionally required to give notice of adoption to a putative father who “never established any custodial, personal, or financial relationship with”<sup>66</sup> the child, thereby failing to establish a substantial relationship,<sup>67</sup> and who failed to file with New York’s putative father registry.<sup>68</sup>

Central to the Court’s jurisprudence on putative fathers is the idea that the biological link between putative father and child only provides the father with an *opportunity* to have a role in the child’s life. More is required of a father if he is to gain the protection of the Constitution. As the Court noted in *Lehr*:

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57. *Quilloin v. Walcott*, 434 U.S. 246 (1978).

58. *Id.* at 255.

59. *Id.* at 251.

60. *Id.* at 256.

61. *Caban v. Mohammed*, 441 U.S. 380 (1979).

62. *Id.* at 392.

63. *Id.* at 393.

64. *Id.* at 392.

65. *Lehr v. Robertson*, 463 U.S. 248 (1983).

66. *Id.* at 267-68.

67. *Id.* at 266-68.

68. *See id.* at 263-65. The Court’s other major putative fatherhood case is *Michael H. v. Gerald D.* 491 U.S. 110, 130-32 (1989) (examining the liberty interest of the child in maintaining her filial relationship and finding that a California law creating a presumption of paternity for the man married to and cohabitating with the mother of the child could block a biological father attempting to assert his own paternity and establish a relationship with the child).

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.<sup>69</sup>

Similarly, June Carbone succinctly synthesized the Court's putative father doctrine by noting that the *Lehr* decision, authored by Justice Stevens, "united the Supreme Court's conflicting decisions on fatherhood by taking the existence of a paternal relationship as a given. If a father's relationship with his children is a substantial one, that relationship merits constitutional protection. If not, the inquiry ends there."<sup>70</sup> The doctrine has, as well, spawned a significant amount of scholarly attention.<sup>71</sup>

This thinking—that the mere act of fathering a child, without more subsequent involvement, provides only an opportunity for the putative father to have a role in the interests of the child—is unsurprisingly reflected in the ICWA's exclusion from its definition of parent "the unwed father where paternity has not been acknowledged or established."<sup>72</sup> Thus, the Court's putative father doctrine, at a minimum, provides a gloss on the proper understanding the ICWA and its application in *Adoptive Couple*.

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69. *Lehr*, 463 U.S. at 262 (footnote omitted).

70. June Carbone, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, 39 SANTA CLARA L. REV. 1091, 1101 (1999).

71. See, e.g., June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1322-28 (2005); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 885-89 (2000); Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 919-27 (1984).

72. 25 U.S.C. § 1903(9) (2012).

## II. The Court's Equal Protection Jurisprudence: Race, Family Law, & Indian Tribes

Before turning to the rich factual story and nuanced legal issues of *Adoptive Couple*, a discussion of the Equal Protection Clause and its impact on race as a factor in adoption is appropriate in order to understand the full gravity of the constitutional issues at play. This Part provides an overview and survey of the Court's Equal Protection Clause jurisprudence insofar as it is relevant to the consideration of race and tribal status in the context of adoption. First, Section A explores race as a factor in adoption, focusing on the approaches of the Court and Congress with respect to race in adoption. Section B then turns to the Court's much more deferential approach to laws aimed at Indian tribes when considered through the lens of equal protection. Section B also discusses a sampling of the leading, albeit limited, scholarly discussion of the ICWA and its Equal Protection Clause implications.<sup>73</sup> This Part presents a picture of the ICWA as a doctrinal anomaly that stands alone, in certain applications, as a naked racial classification and preference in the otherwise colorblind world of adoption. Part III's discussion of the facts and legal issues at play in *Adoptive Couple* will set the stage for Part IV's critical analysis of the *Adoptive Couple* Court's failure both to subject the ICWA to strict scrutiny and ultimately strike it down, as-applied, as a violation of the Equal Protection Clause.

### A. *The Intersection of Race and Adoption*

The Court first entertained the idea of subjecting laws that draw racial distinctions to a strict level of scrutiny in the famous footnote four of *Carolene Products*. Justice Stone suggested that a higher level of scrutiny might be appropriate in cases dealing with minority groups: “[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”<sup>74</sup>

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73. For example, in a forthcoming article about colorblindness in family law, Katie Eyer omits full discussion of the ICWA beyond cursory mention of what the Court *might* do in *Adoptive Couple*. See Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. (forthcoming 2014) (manuscript at 4 n.9, 50-53), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2185728](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2185728).

74. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

Eventually, the Court, speaking through Justice Black, formally embraced the strict scrutiny standard of review for racial classifications in the notorious *Korematsu v. United States* decision: “[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the *most rigid scrutiny*.”<sup>75</sup>

A complete survey and analysis of the subsequent Supreme Court decisions that have come to shape and refine the Court’s approach to judicial review of racial classifications under the Equal Protection Clause are beyond the scope of this Article. There is a plethora of scholarship debating the Court’s doctrinal embrace of colorblindness,<sup>76</sup> and the Roberts Court’s recent opinion in *Fisher* is the most recent example of the Court’s seeming distaste for racial classifications of any kind.<sup>77</sup> Despite this, a brief discussion of the Court’s handling of race as a factor in adoption proceedings is appropriate to highlight briefly colorblindness in the specific context of adoption.

The judiciary’s disdain for the consideration of race in adoption, custody, and foster placements has been more nuanced and ambivalent than Congress’s 1996 decision, discussed *infra*. For instance, Andrew Morrison noted the inconsistent approaches of courts dealing with the question of the permissibility of race as a factor in adoption cases:

The cases addressing the constitutionality of using race in the adoption process are not entirely consistent. However, the courts have generally held “race should be considered, but may not be a controlling factor in determining the best interest of the child.” The majority of cases that address constitutional challenges to the use of race in adoption apply strict scrutiny analysis.<sup>78</sup>

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75. *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (emphasis added).

76. See, e.g., ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992); Christopher W. Schmidt, *Brown and the Colorblind Constitution*, 94 CORNELL L. REV. 203 (2008); David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99 (1986); Laurence H. Tribe, *In What Vision of the Constitution Must the Law Be Color-Blind?*, 20 J. MARSHALL L. REV. 201 (1986); Antonin Scalia, *The Disease as Cure: “In Order to Get Beyond Racism, We Must First Take Account of Race.”*, 1979 WASH. U.L.Q. 147 (1979); Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1 (1974).

77. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).

78. Andrew Morrison, *Transracial Adoption: The Pros and Cons of the Parents’*

Despite this seeming inconsistency, the Supreme Court held in 1984 that consideration of race in a child custody dispute violated the Equal Protection Clause of the Constitution.<sup>79</sup> In *Palmore*, the Court considered a state court's decision to remove a child from the custody of his mother solely because the mother was in an interracial marriage.<sup>80</sup> Applying strict scrutiny analysis, the Court found that "the reality of private [racial] biases and the possible injury they might inflict" were impermissible considerations in a custody dispute and that such a racial classification ran afoul of the Equal Protection Clause.<sup>81</sup> Thus, the Court noted that while "[t]he Constitution cannot control such prejudices . . . neither can it tolerate them."<sup>82</sup> *Palmore* is by far the Court's most direct decision on the issue of race as a factor in adoption and placement proceedings, and the obvious reading of the case leads to the conclusion that colorblindness in custody disputes is consistent with the Equal Protection Clause, if not constitutionally mandated.

Similarly, on the legislative side of things, Congress has expressed clearly its distaste for consideration of race as a factor in adoption. From at least 1996 onward, the policy of the United States has been to bar, in almost all circumstances, consideration of race as a factor in adoption proceedings. Congress legislated to this end via a 1996 amendment to the Multiethnic Placement Act (MEPA) of 1994, which applies to any child welfare agency receiving federal funds.<sup>83</sup> According to John Myers, "[o]nly in narrow circumstances, where the needs of a specific child make race important, can social workers consider race as a factor."<sup>84</sup> The Harvard Law Review's analysis of the MEPA amendments captured the unequivocal decision of Congress to remove race as a factor in adoptions and other types of placements:

With bipartisan support, little public opposition, and

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*Perspective*, 20 HARV. BLACKLETTER L.J. 167, 175 (2004) (quoting Rita J. Simon & Howard Alstein, *The Relevance of Race in Adoption Law and Social Practice*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 171, 175 (1997)).

79. See *Palmore v. Sidoti*, 466 U.S. 429, 433-34 (1984).

80. See *id.* at 430-31.

81. *Id.* at 433.

82. *Id.*

83. See Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808, 110 Stat. 1755 (codified as amended in scattered sections of 42 U.S.C.).

84. JOHN E.B. MYERS, *CHILD PROTECTION IN AMERICA: PAST, PRESENT, AND FUTURE* 102 (2006).

minimal fanfare, the 104th Congress moved to end the longstanding practice of matching adoptive parents and children according to race. Repealing a previous federal statute that explicitly allowed consideration of race as a factor in placement determinations, the Small Business Jobs Protection Act (SBJPA) makes clear that adoption agencies can no longer use race to delay or deny adoptive placement.<sup>85</sup>

More specifically, no State or associated entities that receive federal funds and are involved in adoption or foster care placements may “deny to any person the opportunity to become an adoptive or foster parent, on the basis of the race, color, or national origin of the person, or of the child, involved.”<sup>86</sup> Such recipients of federal funds also may not “delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.”<sup>87</sup> The 1996 amendment to MEPA inserted these exact same prohibitions against the consideration of race in adoption and foster care placement in 42 U.S.C. § 1996b, but the prohibitions in this section apply more broadly to any “person or government that is involved in adoption or foster care placements.”<sup>88</sup> Unsurprisingly, Congress’s 1996 amendments explicitly exempted the ICWA from the prohibitions against the consideration of race, further cementing the ICWA’s unique position as an outlier in an otherwise colorblind world of adoption law.<sup>89</sup>

#### B. *Laws Implicating Indian Tribes*

Indian tribes have long held an uncertain and uncomfortable position in the legal landscape of the United States throughout its history, prompting serious debate about what sovereignty truly means for tribes. In this sense, the quasi-sovereignty of tribes places them in a unique

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85. Recent Legislation, *Transracial Adoption—Congress Forbids Use of Race As a Factor in Adoptive Placement Decisions—Small Business Jobs Protection Act*, *Pub. L. No. 104-188, S 1808 (1996)*, 110 HARV. L. REV. 1352, 1352 (1997) (footnotes omitted).

86. 42 U.S.C. § 671(18)(A) (2012).

87. *Id.* § 671(18)(B).

88. 42 U.S.C. § 1996b(1) (2012).

89. *Id.* § 1996b(3) (“This subsection shall not be construed to affect the application of the Indian Child Welfare Act of 1978.”).

position constitutionally speaking. The tension between this notion of tribal sovereignty and the ancestral and racial heritage of tribal members raises the most serious equal protection concerns. In trying to resolve this tension, the Supreme Court has come down largely on the side of tribal sovereignty, subjecting laws that confer benefits on tribes or subject them to preferential treatment to a low, rational basis, level of scrutiny. This section will first examine the Court's approach to equal protection challenges to laws implicating Indian tribes and discuss some of the scholarly discussion surrounding the Court's jurisdiction. Next, this section will briefly point to the lack of interest by the Court and academia in the ICWA's equal protection flaws.

### 1. Sovereigns, a Racial Group, or Both?

Prior to *Adoptive Couple*, the Supreme Court made clear that "classifications based on Indian tribal membership are not impermissible racial classification."<sup>90</sup> The Court based this conclusion on the concept of tribal sovereignty, whereby classifications affecting tribal members were deemed to be firmly non-racial ones.<sup>91</sup> This doctrinal move allowed the Court to avoid a more critical examination of such laws that would have otherwise demanded strict scrutiny because of their racially divisive nature.

The Court's pivotal decision on this racial-sovereign dichotomy came in 1974 in *Morton v. Mancari*.<sup>92</sup> The *Morton* Court was faced with a challenge to a law that provided employment preferences to Indians within the Bureau of Indian Affairs.<sup>93</sup> With respect to the equal protection issues posed by the preferences, the Court explicitly declined to characterize classifications of Indians as racial and instead keyed in on the enhancement of tribal self-government: "Contrary to the characterization made by appellees, this preference does not constitute 'racial discrimination.' Indeed, it is not even a 'racial' preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government . . . ."<sup>94</sup> Further, the Court also found

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90. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2584 (2013) (Sotomayor, J., dissenting) (citing *United States v. Antelope*, 430 U.S. 641, 645-47 (1977); *Morton v. Mancari*, 417 U.S. 535, 553-54 (1974)).

91. *Adoptive Couple*, 133 S. Ct. at 2584.

92. *Morton*, 417 U.S. 535.

93. *Id.* at 537-41.

94. *Id.* at 553-54 (footnote omitted).

that “[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.”<sup>95</sup> Lest there be any doubt regarding the appropriate level of judicial review applicable to Indian classifications, the Court unequivocally announced that rational basis would apply: “As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed.”<sup>96</sup> Neil Jessup Newton characterized this deferential approach as permitting almost any kind of legislative action:

Because the judiciary has defined congressional authority over Indians so broadly, application of this deferential standard of review to Indian legislation permits almost *any conceivable legislative action*. In short, if the permissible statutory purpose is to manage Indian affairs, any legislation affecting Indians, almost by definition, would be rationally related to that purpose.<sup>97</sup>

While later noting that the law is “settled that ‘the unique legal status of Indian tribes under federal law’ permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive,” the Court again stressed that *tribal* classifications were permissible.<sup>98</sup> However, David Williams has argued that the Court might have implicitly drawn a distinction between the *racial* and *tribal* usages of the term Indian:

The Supreme Court, moreover, did not intend to argue that “Indian” can never be a racial term. Rather, the Court carefully distinguished between two usages of the

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95. *Id.* at 554.

96. *Id.* at 555.

97. Neil Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 242 (1984) (emphasis added).

98. *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979) (quoting *Mortin v. Mancari*, 417 U.S. 535, 551-52 (1974)); *see also United States v. Antelope*, 430 U.S. 641, 645-49 (1977) (reaffirming *Mancari*’s deferential approach toward federal laws with respect to tribes, rejecting equal protection challenges to such legislative efforts, and dismissing attempts to characterize laws affecting tribes as impermissible racial classifications).

term—racial and political. *Mancari*, for example, opposed a “‘racial’ group consisting of ‘Indians’” to a category that includes only “members of ‘federally recognized’ tribes” and excludes “many individuals who are racially to be classified as ‘Indians.’” It is therefore possible, in the Court’s mind, to think of Indians in a racial light and so use the category with a racial meaning. Apparently, however, the racial usage is confined to the general category “Indian,” meaning all Indians; one cannot use the category “enrolled members of the Navajo Nation” in a racial sense. As long as the government confines itself to “legislation singling out *tribal* Indians,” it is on safe ground.<sup>99</sup>

This *racial-tribal* distinction, according to the Court, might have profound constitutional significance, but Williams persuasively argues that one cannot divorce the racial component of “Indian” from its tribal one:

Virtually all of the federal definitions of “Indian” contain, to the naked eye, a substantial genetic and therefore racial component. In *Mancari*, for example, the BIA regulations required that to be eligible for the preference, “an individual must be one-fourth or more degree Indian blood and be a member of a federally recognized tribe.” At most, this definition contains one political element—membership in a federally-recognized tribe. But the preference also has a second and openly genetic requirement that has nothing to do with politics. If one were a member of a recognized tribe but had less than one-fourth Indian blood, then one would not qualify for the preference strictly because one did not have enough Indian genetic material. Tying legal benefits to this kind of racial calibration has historically been associated with racism at its most despicable; consider the distinctions in this country between “octoroons” and “mulattos,” and in South Africa between “blacks” and

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99. David C. Williams, *The Borders of the Equal Protection Clause: Indians As Peoples*, 38 UCLA L. REV. 759, 793-94 (1991) (footnotes omitted).

“coloreds.” It should make us nervous; it should not be shrugged off with the blithe assertion that it is all political. In most federal definitions, then, the category “Indian” is both political and racial. The simple fact that race is one element may not close the analysis; one might still argue that, by combining the two factors, the government can somehow remove the constitutional taint from the racial factor. But to retain any honesty, the Court must acknowledge that the classification is partially racial.<sup>100</sup>

Williams’ position is a strong one: any classification based on tribal status inherently relies on a racial one, as well, because membership in Indian tribes is linked to a person’s racial heritage. Williams is not alone in identifying this problematic element of the Court’s approach.<sup>101</sup> Carole Goldberg, however, takes a more critical view of attempts to characterize tribal classifications—what she calls “racialization”—as racial ones in order to trigger strict scrutiny:

While the U.S. Supreme Court historically used racialization to establish Indians’ inferiority and to justify dominant society controls, today’s courts, I contend, use racialization to trigger strict scrutiny under equal protection law and thereby to deny Indians the benefit of federal measures enacted to compensate for or reverse prior harms. The courts allow Indians to escape this result only by proving up their identity in cultural terms that satisfy non-Indians’ criteria for “Indianness.” If the Indians cannot do so, the courts deny them legal rights otherwise available to them as tribal members and Indians, thereby challenging their identities as well. Some legal scholars are joining this misguided call for cultural tests establishing Indian identity and entitlement to special federal legislation.<sup>102</sup>

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100. *Id.* at 794-95 (footnotes omitted).

101. *See, e.g.*, Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 *YALE L.J.* 537 (1996). *But see, e.g.*, Carole E. Goldberg-Ambrose, *Not “Strictly” Racial: A Response to “Indians as Peoples,”* 39 *UCLA L. REV.* 169 (1991).

102. Carole Goldberg, *Descent into Race*, 49 *UCLA L. REV.* 1373, 1375 (2002)

While Goldberg concedes that tribal citizenship is largely dependent on “the circumstances of one’s birth,” she nonetheless argues that “this leap from the fact of descent-based tribal citizenship into legal doctrines of race is both regrettable and unnecessary, given the alternative that both positive law and constitutional interpretation permit.”<sup>103</sup> Under Goldberg’s view, both the Constitution and political theory lend support to “treating Indian classifications outside the conventional framework of race, so long as those classifications are directed toward fulfillment of unique obligations that the federal government owes to tribes.”<sup>104</sup>

Regardless of one’s view about the extent of the role that race plays in determining a person’s status as a tribal member, it is undeniable that racial heritage plays, at a minimum, *some role*. This uncomfortable reality—that a tribal member’s racial heritage is an element of tribal identity that cannot be ignored—is of immense import when considering the Court’s attempt to ignore the racial element of tribal classifications. The requirements for membership in a modern Indian tribe illustrate the inherently racial nature of membership. For example, the Cherokee Nation purports to “not require a specific blood quorum” as a condition for citizenship.<sup>105</sup> However, the Nation links citizenship to an applicant’s ability to identify a direct blood connection to a group of recognized tribal members:

To be eligible for a federal Certificate Degree of Indian  
Blood and Cherokee Nation tribal citizenship, you must

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(footnote omitted).

103. *Id.* at 1376.

104. *Id.* at 1375; *see also* Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CAL. L. REV. 1165, 1196 (2010) (“Today, measures seeking to restore indigenous peoples to meaningful self-governance and economic health are challenged as violating prohibitions on equal protection. But the history, purpose, and context of equal protection and federal Indian policy reveal that special federal treatment of Indians and tribes is consistent with equal protection and in service of its basic goals. While an anti-racial discrimination norm is at the core of equal protection, racial discrimination for Indian peoples had less to do with defining individuals according to race than with defining tribes as racial groups and denying them sovereignty and property as a result. Policies that seek to fulfill promises made to tribal governments, rebuild tribal lands, or restore tribes as political agents with the ability to provide for their people mitigate the effects of this state-sanctioned racial discrimination. These measures do not violate equal protection; they further it.”).

105. CHEROKEE NATION, *About Citizenship*, <http://www.cherokee.org/Services/TribalCitizenship/Citizenship.aspx> (last visited April 24, 2014).

be able to provide documents that connect you to a direct ancestor listed on the Dawes Final Rolls of Citizens of the Cherokee Nation with a blood degree. This roll was taken between 1899-1906 of Citizens and Freedmen residing in Indian Territory (now northeastern Oklahoma) prior to Oklahoma statehood in 1907.<sup>106</sup>

Further, this connection can only “be proven through the *biological parent* to the enrolled ancestor.”<sup>107</sup> Even the federal government’s Bureau of Indian Affairs requires direct, biological connection to previously recognized rolls of tribal members: “You must show your relationship to an enrolled member(s) of a federally recognized Indian tribe, whether it is through your birth mother or birth father, or both.”<sup>108</sup>

Notwithstanding the compelling arguments that any legislative classification implicating Indian tribal members inherently involves a racial classification, the Court’s doctrine makes clear that legislative action affecting tribes need only pass the deferential rational basis level of scrutiny. Accordingly, equal protection challenges to such federal laws have routinely failed. Or, more accurately, courts have declined to entertain the challenges, instead invoking the *Mancari* Court’s application of rational basis as settled law. *Adoptive Couple*, unfortunately, did nothing to alter the Court’s doctrinal position.

## 2. The ICWA and Equal Protection

In light of the ICWA’s substantive provisions that apply exclusively to Indian children,<sup>109</sup> one would expect ICWA itself to have prompted both a healthy amount of constitutional challenges in court and scholarly criticism on equal protection grounds. However, the Court has largely ignored ICWA’s inherent equal protection uncertainty, and academia has not devoted much attention to this issue either.

Until *Adoptive Couple*, the Court had only taken up a challenge to ICWA in one case, which did not include any substantive equal

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106. *Id.*

107. *Id.*

108. BUREAU OF INDIAN AFFAIRS, CERTIFICATE OF DEGREE OF INDIAN OR ALASKA NATIVE BLOOD INSTRUCTIONS, (Oct. 31, 2014), <http://www.bia.gov/cs/groups/public/documents/text/idc002653.pdf>.

109. *See, e.g.*, 25 U.S.C. § 1903(4) (2012) (defining “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”).

protection discussion. That decision, *Mississippi Band of Choctaw Indians v. Holyfield*, addressed only the meaning of “domicile” for purposes one of ICWA’s provision, section 1911(a),<sup>110</sup> which extends exclusive jurisdiction to tribes over some custody proceedings.<sup>111</sup> The lower courts have largely avoided the equal protection problems with ICWA, instead invoking, for instance, the “existing Indian family doctrine” in order to avoid ICWA’s constitutional difficulties. Part I.A.2, *supra*, examined this controversial doctrine in greater depth.<sup>112</sup> As Part IV’s assessment of the decision in *Adoptive Couple* will more fully illustrate, even the *Adoptive Couple* Court was not immune to asserting the canon of constitutional avoidance in order to avoid tackling head-on ICWA’s equal protection difficulty.

One of the rare notable lower federal court decisions to address directly the racial nature of tribal classifications, *Williams v. Babbitt* in the Ninth Circuit,<sup>113</sup> did not concern ICWA. Rather, the Ninth Circuit addressed an equal protection challenge to an administrative interpretation of the Reindeer Industry Act that prohibited reindeer herding by non-natives in Alaska.<sup>114</sup> Unsurprisingly, the court invoked the canon of constitutional avoidance, thereby striking down the agency’s constitutionally troubling interpretation of the Reindeer Industry Act, in order to sidestep the equal protection problems posed by such a naked racial preference.<sup>115</sup>

A full discussion of ICWA’s equal protection flaws has been lacking in scholarship, as well. The bulk of ICWA’s scholarly treatment has been devoted to the question of whether the judicially crafted “existing Indian family doctrine” is meritorious.<sup>116</sup> John Robert Renner’s

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110. § 1911(a) (“An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.”).

111. *See* *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48-53 (1989).

112. *See supra* Part I.A.2.

113. *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997).

114. *Id.* at 659.

115. *Id.* at 666 (“The constitutional questions raised by the IBIA’s interpretation are grave and, as intervenors and amici point out, implicate an entire title of the United States Code. We see no reason to unnecessarily resolve them when a less constitutionally troubling construction is readily available. We therefore interpret the Reindeer Act as not precluding non-natives in Alaska from owning and importing reindeer.”).

116. *See supra* Part I.A.2.

work might come closest to touching on the specific issues raised by this Article—ICWA’s inherent equal protection difficulty stemming from the law’s race-based preferences—but his article is over twenty years old and largely limits its scope to criticizing proposed amendments to ICWA offered in the 100<sup>th</sup> Congress.<sup>117</sup> Carole Goldberg’s work, which comes down on the other side of the equal protection debate, is a notable exception.<sup>118</sup> In one particularly relevant article, she examined ICWA, along with the Reindeer Industry Act, in order to highlight and criticize the growing “reconceptualiz[ation of] Indian identity as a racial identity.”<sup>119</sup> However, she relies almost exclusively on a discussion and analysis of the approach of the California courts as evidence of this racial “reconceptualization” in the context of ICWA.<sup>120</sup> Her reliance on the doctrinal approach of the intermediate court of one state hardly constitutes a broader judicial trend, and is susceptible to criticism as a straw man erected to further her broader goals to criticize characterization of ICWA and other federal laws as racial classifications.

### III. The Saga of *Adoptive Couple v. Baby Girl*

This Part provides a detailed overview of the heart-wrenching tale of *Adoptive Couple*. Section A begins with an overview of the factual background, largely relying on the excellent characterization of the facts provided by the South Carolina Supreme Court. Section B then examines the procedural history of the case and presents an overview of the rationales underlying the decisions of the South Carolina courts to order transfer of custody of Baby Girl to Biological Father. This Part concludes in Section C with a summary of the arguments made before the United States Supreme Court by the Petitioners, Guardian ad Litem, Respondents, and the United States as amicus curiae. A thorough and critical examination of the Court’s decision in *Adoptive Couple* is reserved for Part V.

#### A. Factual Background

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117. See John Robert Renner, *The Indian Child Welfare Act and Equal Protection Limitations on the Federal Power over Indian Affairs*, 17 AM. INDIAN L. REV. 129, 130-31, 168-74 (1992).

118. See Goldberg, *Descent into Race*, *supra* note 102, at 1375.

119. *Id.* at 1375.

120. *Id.* at 1384-88 (discussing *In re Santos Y*, 110 Cal. App. 4th 1026 (Cal. Ct. App. 2001) and *In re Bridget R.*, 41 Cal. App. 4th 1483 (Cal. Ct. App. 1996)).

As is typical in child custody cases, the parties were not named in the filings and decisions in *Adoptive Couple*. Thus, this Article uses the following names to identify the relevant parties: Baby Girl, Biological Father, Biological Mother, and Adoptive Mother/Father/Couple. Additionally, this factual overview relies heavily on the South Carolina Supreme Court's *Adoptive Couple* decision, which provided an extensive overview of the pertinent facts.<sup>121</sup>

Baby Girl was born in Oklahoma, the child of Biological Father and Biological Mother, a couple that had once been engaged but never married.<sup>122</sup> Biological Father is a registered member of the Cherokee Nation, a Bronze Star recipient and veteran of Operation Iraqi Freedom, and, at the time of the relevant proceedings, a member of the National Guard.<sup>123</sup> During the course of the pregnancy, Biological Mother broke off the couple's engagement, after which point Biological Father failed to "make any meaningful attempts to contact her" or support her financially, despite his ability to do so as an active-duty service member at the time.<sup>124</sup>

Eventually, Biological Mother sent a text message to Biological Father asking him to relinquish his parental rights; the South Carolina Supreme Court described that exchange as follows:

In June 2009, Mother sent a text message to Father asking if he would rather pay child support or surrender his parental rights. Father responded via text message that he would relinquish his rights, but testified that he believed he was relinquishing his rights to Mother. Father explained: "In my mind I thought that if I would do that I'd be able to give her time to think about this and possibly maybe we would get back together and continue what we had started." However, under cross-examination Father admitted that his behavior was not conducive to being a father. Mother never informed Father that she intended to place the baby up for adoption. Father insists that, had he known this, he

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121. See *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 552-56 (S.C. 2012), *vacated*, 133 S. Ct. 2552 (2013), *remanded to* 746 S.E.2d 346 (2013).

122. *Id.* at 552-53.

123. *Id.* at 553 n.2.

124. *Id.* at 553.

would have never considered relinquishing his rights.<sup>125</sup>

Other parties to the case painted Biological Father's response and actions in a more negative light. The Petitioners (Adoptive Couple) noted Biological Father's text message renunciation and described Biological Father's state of mind at the time: "Father expected Mother to raise the baby by herself, explaining that he did not feel 'responsible as a father' unless Mother married him."<sup>126</sup> The Guardian ad Litem painted a similar picture: "Birth Father sent a return text message stating that he surrendered his parental rights . . . . He later testified that he chose to relinquish his parental rights over paying child support in an effort 'to give [Birth Mother] time to think about' whether she should have ended their relationship."<sup>127</sup>

Biological Mother ultimately chose the adoption route because of her financial struggles, and decided to pick Adoptive Couple, whom she met through an adoption agency, because of their stability.<sup>128</sup> In fact, *Adoptive Couple*, South Carolina residents, "provided financial assistance to Mother during the final months of her pregnancy and after Baby Girl's birth."<sup>129</sup> Adoptive Father—an automotive body technician—and Adoptive Mother—a doctoral psychologist who works with families and children with behavior problems—have been married since 2005 and have no other children.<sup>130</sup> While Biological Mother told Adoptive Couple of Baby Girl's Indian heritage, they were led by Biological Mother to believe that Biological Father was not involved.<sup>131</sup> Further, Adoptive Couple attempted to verify Biological Father's tribal enrollment with the Cherokee Nation, but because of inaccuracies in a letter sent by their attorney to the Cherokee Nation, they were under the false impression that Baby Girl was not Cherokee.<sup>132</sup>

At Biological Mother's request, Biological Father was not contacted

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125. *Id.*

126. Brief for Petitioners at 7, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 831 (2013) (No. 12-399), 2013 WL 633597 at \*7.

127. Brief for Guardian ad Litem, as Representative of Baby Girl, Supporting Reversal at 15, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 831 (2013) (No. 12-399), 2013 WL 633603 at \*15 (alteration in original).

128. *Adoptive Couple*, 731 S.E.2d at 553.

129. *Id.*

130. *Id.*

131. *Id.* at 553-54.

132. *Id.* at 554.

at all during her stay at the hospital associated with giving birth.<sup>133</sup> Adoptive Couple, on the other hand, was present in the delivery room, and Adoptive Father cut the umbilical cord.<sup>134</sup> The next day, Biological Mother signed the requisite forms renouncing her parental rights and offering her consent to the adoption; however, Adoptive Couple had to wait for consent from Oklahoma to move Baby Girl to South Carolina.<sup>135</sup> Biological Mother did not identify Baby Girl as “Native American”—she identified her as “Hispanic”—on the documentation needed for Adoptive Couple to move Baby Girl to South Carolina, but if Biological Mother had listed Baby Girl correctly, Adoptive Couple would not have been able to remove Baby Girl from Oklahoma (although there is some dispute among the parties on this point).<sup>136</sup>

B. *South Carolina State Proceedings*<sup>137</sup>

A South Carolina family court first considered Adoptive Couple’s adoption petition.<sup>138</sup> Following Biological Father’s victory in the family Court, the South Carolina Supreme Court certified Adoptive Couple’s appeal and took up the case.<sup>139</sup>

1. Family Court

Biological Father made no effort to contact Baby Girl or Biological Mother following the birth and did not learn of the adoption until almost four months later via a process server.<sup>140</sup> The process server presented

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133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 554-55, 555 & n.8 (“[H]ad ‘Native American’ been circled on the [Interstate Compact on Placement of Children] form, the ICPC administrator would have contacted . . . [the Cherokee Nation]. Whether or not the Cherokee Nation would have ultimately allowed the adoption to go forward is a matter of tribal law. However, the testimony establishes the tribe would not have consented to Baby Girl’s removal at that time, triggering the denial of [Adoptive Couple’s] ICPC application, and [Adoptive Couple] would not have been able to transport Baby Girl to South Carolina.”); *but see* Brief for Petitioners, *supra* note 126, at 9 (“The adoption consent form identified Baby Girl’s ethnicity as ‘Caucasian/Native American Indian/Hispanic.’”).

137. This Article omits any discussion of the short-lived Oklahoma proceedings relevant to the custody struggle over Baby Girl.

138. *Adoptive Couple*, 731 S.E.2d at 555.

139. *Id.* at 556.

140. *Id.* at 555.

papers associated with Adoptive Couple's adoption action in South Carolina, entitled "Acceptance of Service and Answer of Defendant," that Biological Father signed and purported to waive his ability to contest the adoption and other procedural safeguards.<sup>141</sup> Ultimately, the Cherokee Nation intervened in the South Carolina adoption action pursuant to the ICWA, arguing that Baby Girl was an Indian Child under the ICWA.<sup>142</sup> Biological Father eventually answered the Adoptive Couple's complaint, "stating [that] he did not consent to the adoption of Baby Girl and seeking custody."<sup>143</sup>

After Biological Father conclusively established custody, a Guardian ad Litem—who "recommended that the adoption be approved in the best interests of the child"<sup>144</sup>—was appointed, and the family court held a hearing, the court made its findings, which resulted in a denial of the adoption petition and an order to transfer custody to Biological Father:

(1) the ICWA applied and it was not unconstitutional; (2) the "Existing Indian Family" doctrine was inapplicable as an exception to the application of the ICWA in this case in accordance with the clear modern trend; (3) Father did not voluntarily consent to the termination of his parental rights or the adoption; and (4) Appellants failed to prove by clear and convincing evidence that Father's parental rights should be terminated or that granting custody of Baby Girl to Father would likely result in serious emotional or physical damage to Baby Girl.<sup>145</sup>

Biological Father did, in fact, receive custody of Baby Girl, and they traveled back to Oklahoma.<sup>146</sup> Adoptive Couple appealed the family court's decision, and the South Carolina Supreme Court certified the appeal pursuant to state procedure.<sup>147</sup>

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141. *Id.*

142. *Id.*

143. *Id.* at 556.

144. Brief for Petitioners, *supra* note 126, at 12.

145. Adoptive Couple, 731 S.E.2d at 556.

146. *Id.*

147. *Id.*

## 2. Supreme Court

A divided South Carolina Supreme Court affirmed the family court's transfer order. Despite noting that "[u]nder state law, [Biological] Father's consent to the adoption would not have been required,"<sup>148</sup> the court nonetheless found the ICWA applicable, thus enabling Biological Father to block the adoption.<sup>149</sup> In so holding, the court also explicitly rejected the existing Indian family doctrine because "its policy conflicts with the express purpose of the ICWA. . . ."<sup>150</sup> The court also rejected Adoptive Couple's argument that the ICWA, by virtue of not "explicitly set[ting] forth a procedure for an unwed father to acknowledge or establish paternity," defers to state law.<sup>151</sup> Instead, seemingly contrary to the language of the ICWA, which excludes from its definition of parents "the unwed father where paternity has not been acknowledged or established,"<sup>152</sup> the court held that both establishing paternity via DNA testing and pursuing court proceedings to block adoption were "by its plain terms . . . all that is required under the ICWA."<sup>153</sup>

The court, having found Biological Father to be a "Parent" under the ICWA, found Biological Father's relinquishment of parental duties irrelevant to an analysis couched in the ICWA: "Father's perceived lack of interest in or support for Baby Girl during the pregnancy and first four months of her life as a basis for termination his rights as a parent is not a valid consideration under the ICWA . . . ."<sup>154</sup> In light of the heightened federal standards for termination of parental rights over an Indian child,<sup>155</sup> the court affirmed the family court's order "with a heavy heart" despite describing Adoptive Couple as "ideal parents who have exhibited the ability to provide a loving family environment for Baby Girl."<sup>156</sup> In fact, the court felt constrained by the ICWA's placement preferences—which embody a presumption that placement within an Indian home is in the child's best interest—from even engaging in its traditional placement preference analysis: "[A]ny attempt to utilize our state's best interest of

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148. *Id.* at 560 n.19.

149. *Id.* at 560.

150. *Id.* at 558 n.17.

151. *Id.* at 560.

152. 25 U.S.C. § 1903(9) (2012).

153. *Adoptive Couple*, 731 S.E.2d at 560.

154. *Id.* at 564 n.26.

155. *See* § 1912(f).

156. *Adoptive Couple*, 731 S.E.2d at 567.

the child standard to eclipse the ICWA's statutory preferences ignores the fact that the statutory placement preferences [of the ICWA] and the Indian child's best interests are not mutually exclusive considerations."<sup>157</sup>

C. *Parties' Arguments Before the United States Supreme Court*

The two questions presented in the case were:

(1) Whether a non-custodial parent can invoke ICWA [the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-63,] to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law [; and (2)] whether ICWA defines "parent" in 25 U.S.C. § 1903(9) to include an unwed biological father who has not complied with state law rules to attain legal status as a parent.<sup>158</sup>

The sections that follow provide a brief summary of the major arguments that the parties made before the U.S. Supreme Court.

1. Petitioners<sup>159</sup>

Petitioners made a four-part argument essentially grounded in their contention that the ICWA should not have blocked South Carolina courts from applying state law to Baby Girl's adoption proceedings. First, Petitioners argued that the ICWA's definition of "parent" excludes unwed fathers without substantive parental rights under relevant state law.<sup>160</sup> More precisely, Petitioners said "[t]he Act does not resuscitate parental rights for unwed fathers who under state law repudiated those very rights and flouted their parental responsibilities to the pregnant mother and child."<sup>161</sup>

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157. *Id.*

158. Petition for a Writ of Certiorari at i, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 831 (2013) (No. 12-399), 2012 WL 4502948 at \*i.

159. Lisa S. Blatt of Arnold & Porter LLP was Counsel of Record for Adoptive Couple, the Petitioners. *See generally* Brief for Petitioners, *supra* note 126.

160. *See id.* at \*20-29.

161. Brief for Petitioners, *supra* note 126, at \*20.

Second, Petitioners suggested that even if Biological Father met the ICWA's definition of "parent," he should still be unable to assert the ICWA's substantive protections because he never had custody of Baby Girl and the ICWA's purpose was to protect Indian children from being removed from Indian parents, families, and reservations.<sup>162</sup> Largely invoking the existing Indian family doctrine, Petitioners asserted:

Even if the state court correctly interpreted the term "parent," reversal still is required because the court further erred in holding that ICWA creates custodial rights and creates Indian families anew—*i.e.*, when they would *not* otherwise exist under state or tribal law. Specifically, Sections 1912(d) and (f) do not permit a noncustodial father to veto the adoptive choices made by a non-Indian mother when state law confers on the mother sole custodial rights with respect to the Indian child.<sup>163</sup>

Third, Petitioners argued that the South Carolina Supreme Court's interpretation of the ICWA raised "grave constitutional concerns under the Equal Protection Clause, the Due Process Clause, and the Tenth Amendment,"<sup>164</sup> and they suggested that the *canon of constitutional doubt* counseled against such a troublesome interpretation.<sup>165</sup>

Fourth, Petitioners claimed that application of the ICWA's Indian child placement preferences to a situation where there is no preexisting family "would impose a *de facto* ban on interracial adoptions and punish countless abandoned Indian children in need of adoptive homes."<sup>166</sup>

## 2. Guardian ad Litem<sup>167</sup>

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162. *See id.* at \*29-43.

163. *Id.* at \*29.

164. *Id.* at \*17.

165. *Id.* at \*43; *see also id.* at \*43-51.

166. *Id.* at \*19; *see also id.* at \*51-57.

167. Paul D. Clement of Bancroft PLLC was Counsel of Record for Guardian *ad Litem*, "the duly appointed representative of the respondent child ('Baby Girl') . . . with standing to file this brief on Baby Girl's behalf." Brief for Guardian ad Litem, as Representative of Baby Girl, Supporting Reversal at \*1, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 831 (2013) (No. 12-399), 2013 WL 633603 at \*1.

The Guardian ad Litem made a two-pronged argument, focusing first on interpretation of the ICWA in light of its text and purpose and second on the constitutional implications of the South Carolina Supreme Court's decision.

First, the Guardian ad Litem argued that the lower court incorrectly interpreted the ICWA by finding the substantive provisions of the ICWA applicable to Baby Girl and treating Biological Father as a "parent." With respect to the former point, the Guardian ad Litem advocated that the existing Indian family doctrine served as a bar to application of the ICWA: "Throughout [the] ICWA, Congress included language triggered only by previous legal or physical custody by the Indian parent, or at least some sort of state action preventing the Indian parent from obtaining legal or physical custody of the child."<sup>168</sup> On the latter point, the Guardian ad Litem argued that the lower court failed to appreciate that the ICWA incorporated state or tribal law with respect to the procedures necessary to determine paternity: "[T]he lower court ignored a much more logical reading of the statute that would explain Congress' decision to use the phrase 'acknowledged or established' unelaborated and undefined: ICWA meant to incorporate state or tribal law as to when unwed father's paternity is acknowledged or established."<sup>169</sup>

Second, the Guardian ad Litem focused on the constitutional rights of Baby Girl. More specifically, the South Carolina Supreme Court's interpretation of the ICWA, according to the Guardian ad Litem, deprived Baby Girl of "a best interests determination focused [solely] on her own well-being,"<sup>170</sup> subjected Baby Girl to a racial classification in violation of equal protection,<sup>171</sup> and violated her fundamental liberty interests associated "maintaining the only family bonds she has ever known, absent a showing of necessity."<sup>172</sup>

### 3. Respondent Biological Father<sup>173</sup>

Biological Father made four main arguments before the Court,

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168. *Id.* at \*29; *see also id.* at \*31-41.

169. *Id.* at \*29; *see also id.* at \*41-48.

170. *Id.* at \*30; *see also id.* at \*49-53.

171. *Id.* at \*53-55.

172. *Id.* at \*56; *see also id.* at \*56-59.

173. Charles A. Rothfeld of Mayer Brown LLP was Counsel of Record for Respondent Biological Father. *See* Brief for Respondent Birth Father, Adoptive Couple v. Baby Girl, 133 S. Ct. 831 (2013) (No. 12-399), 2013 WL 1191183.

urging affirmance of the South Carolina Supreme Court's decision. First, Biological Father argued that he qualified as a "parent" under the ICWA because he "'acknowledged' his paternity by declaring that he is Baby Girl's father and bringing suit to establish that fact . . . [and,] he 'established' it through a conclusive DNA test" in conformity with the plain meaning of the statute.<sup>174</sup> Second, Biological Father brushed aside Petitioners' argument that the existing Indian family doctrine should bar applicability in the dispute because the "text makes no reference to any such doctrine, and the manifest congressional intent—apparent in the statutory language, structure, and background—precludes any such 'pre-existing custody' requirement."<sup>175</sup> As a result, Biological Father argued, the ICWA's provisions governing termination of parental rights over an Indian child should apply.<sup>176</sup> Third, Biological Father contended that § 1915, which provides placement preferences for Indian children, should independently block petitioners' attempted adoption.<sup>177</sup> Fourth, Biological Father rejected each of the constitutional challenges to the ICWA noting that the law does not run afoul of equal protection principles because "Congress properly acted on the basis of sovereignty rather than race to bolster Tribes as political entities," the ICWA as applied to Baby Girl does not upset federalism given "Congress' plenary power with respect to Indian Tribes," and "the Court has never recognized the extravagant substantive due process rights" claimed by Petitioners on behalf of Biological Mother and Baby Girl.<sup>178</sup>

#### 4. Respondent Cherokee Nation<sup>179</sup>

The Cherokee Nation's arguments mirrored closely, in substance, those of Biological Father. Briefly, the Cherokee Nation argued the ICWA applied because Baby Girl is an Indian child under the ICWA, which applies to child custody proceedings involving such children and, in the alternative, that the ICWA's substantive placement preferences in

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174. *Id.* at \*18; *see also id.* at \*21-27.

175. *Id.* at \*19; *see also id.* at \*18-19.

176. *Id.* at \*28-46.

177. *Id.* at \*46-49.

178. *Id.* at \*20; *see also id.* at \*49-54.

179. Chrissi Ross Nimmo, Assistant Attorney General of the Cherokee Nation was Counsel of Record for Respondent Cherokee Nation. *See* Brief for Respondent Cherokee Nation, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 831 (2013) (No. 12-399), 2013 WL 1225770.

§ 1915 would require placement with Biological Father.<sup>180</sup> They also suggested that the Court not follow the existing Indian family doctrine, which the Cherokee Nation characterized as inconsistent with both the text and purpose of the ICWA.<sup>181</sup> Lastly, relying on Congress' broad power over Indian affairs and the uniquely sovereign status of Indian tribes, the Cherokee Nation rejected any equal protection or substantive due process challenges to the ICWA.<sup>182</sup>

5. United States as Amicus Curiae<sup>183</sup>

Highlighting the importance of the case to relations between the federal government and Indian tribes, the United States filed an amicus brief supporting affirmance of the South Carolina Supreme Court's decision to award custody to Biological Father.<sup>184</sup> Relying on the "substantial interest [of the United States] in the case because Congress enacted ICWA in furtherance of 'the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people,'"<sup>185</sup> the United States made a five-pronged argument in support of affirmance.<sup>186</sup>

First, the United States argued that the ICWA is applicable to Baby Girl's adoption proceeding, thereby rejecting the existing Indian family doctrine because the "ICWA's plain language forecloses any such exemption, and vague appeals to statutory purpose cannot surmount that barrier."<sup>187</sup> Second, arguing that Biological Father "established" and "acknowledged" his paternity by submitting to a DNA test and pursuing state court avenues, the United States suggested that the ICWA did not incorporate state law and, even if it did, Biological Father had nonetheless complied with South Carolina's paternity procedures.<sup>188</sup> Third, the United States contended that Biological Father's parental rights could not be terminated because no remedial efforts had been

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180. *Id.* at \*12-22.

181. *Id.* at \*22-27.

182. *Id.* at \*27-53.

183. Solicitor General Donald B. Verrilli, Jr. was Counsel of Record for the United States. *See* Brief for the United States as Amicus Curiae Supporting Affirmance, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 831 (2013) (No. 12-399), 2013 WL 1099169.

184. *Id.* at \*8.

185. *Id.* at \*1 (quoting 25 U.S.C. § 1901 (2012)).

186. *Id.* at \*8.

187. *Id.* at \*8; *see also id.* at \*10-14.

188. *Id.* at \*8; *see also id.* at \*14-19.

undertaken as required by 25 U.S.C. § 1912(d).<sup>189</sup> Fourth, suggesting that the South Carolina Supreme Court's holding could be affirmed based solely on section 1912(d), the United States argued that the Court should not address the South Carolina Court's erroneous conclusion that section 1912(f) also barred termination of Biological Father's parental rights because "[c]ontinued custody is a predicate to application of" section 1912(f) and the lower court never determined whether Biological Father had the requisite custody.<sup>190</sup> Fifth, the United States dismissed any of the constitutional challenges to the ICWA and its application to Baby Girl by referencing Congress's plenary authority over Indian affairs; rejecting equal protection arguments by pointing to the political distinctions, rather than racial ones, rooted in tribal sovereignty at play in the ICWA; and disregarding any substantive due process right on the part of either Baby Girl or Biological Mother to escape Congress's best interests determinations with respect to Indian children.<sup>191</sup>

#### IV. The Court's Missed Opportunity in *Adoptive Couple*

It should come as no surprise that the Court in *Adoptive Couple* avoided addressing the elephant in the room—ICWA's obvious equal protection problem—by stretching and shaping ICWA's text and purpose to suit the Court's needs. Indeed, the Roberts Court's legacy may very well be characterized by its willingness to apply the canon of constitutional avoidance with both rigor and frequency.<sup>192</sup> This kind of judicial humility and restraint is certainly worthy of praise in many contexts, but ICWA's constitutional flaws are so profound and inherent

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189. *Id.* at \*8-9; *see also id.* at \*20-23; *cf.* 25 U.S.C. § 1912(d) ("Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts 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.").

190. Brief for United States as Amicus Curiae Supporting Affirmance, *supra* note 183; *Id.* at \*9; *see also id.* at \*23-26.

191. *See id.* at \*9-10; *see also id.* at \*26-33.

192. For instance, in the Court's recent opinion in *Bond v. United States*, the Roberts Court again adopted a strained textual interpretation of a statute in order to avoid the obvious constitutional problem central to the case. *See Bond v. United States*, 134 S. Ct. 2077, 2090-93 (2014). Justice Scalia's concurrence, which embraced Nicholas Quinn Rosenkranz's work in *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005), lamented the majority's decision to avoid the constitutional question. *Bond*, 134 S. Ct. at 2094-97, 2098 ("Since the Act is clear, the *real* question this case presents is whether the Act is constitutional as applied to petitioner.").

in the law's substantive provisions that the Court's refusal to address them in *Adoptive Couple* was lamentable.

This Part will first summarize and discuss the Court's decision in *Adoptive Couple*, identifying briefly what issues the Court declined to resolve and, while building on the doctrines examined *supra*, criticizing the *Adoptive Couple* Court's result. Then, this Part concludes with a short epilogue describing the ultimate resolution of Baby Girl's adoption proceedings.

#### A. *What the Court Decided*

The Court, in a 5-4 decision, reversed the decision of the South Carolina Supreme Court and held that ICWA did not bar the termination of Biological Father's parental rights.<sup>193</sup> Justice Alito wrote the majority opinion and was joined by Chief Justice Roberts and Justices Breyer, Kennedy, and Thomas.<sup>194</sup> Justices Thomas and Breyer filed concurring opinions,<sup>195</sup> while Justices Scalia and Sotomayor (joined by Justices Ginsburg, Kagan, and Scalia, in part) filed dissenting opinions.<sup>196</sup>

The majority opinion turned on the Court's interpretation of two provisions of ICWA: section 1912(f), which creates a heightened threshold for terminating the parental rights of an Indian child,<sup>197</sup> and section 1912(d), which requires remedial efforts as a precondition to breaking up an Indian family.<sup>198</sup> The Court also clarified the meaning of

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

194. *Id.* at 2556.

195. *Id.* at 2566-71 (Thomas, J., concurring) (arguing that constitutional avoidance compelled the Court's opinion because of ICWA's regulation of Indians individually, rather than as tribal members, and ICWA's potential scope beyond those powers granted to Congress via the Indian Commerce Clause); *id.* at 2571 (Breyer, J., concurring) (raising policy concerns posed by the Court's decision and expressing his view regarding the limit of the majority opinion).

196. *Id.* at 2571-72 (Scalia, J., dissenting) (offering an alternative definition of "continued custody" and lamenting the Court's demeaning of the rights of parenthood); *id.* at 2572-86 (Sotomayor, J., dissenting) (characterizing the majority's reading of ICWA as "contrary to both its text and stated purpose" on a host of grounds).

197. 25 U.S.C. § 1912(f) (2012) ("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.").

198. *Id.* § 1912(d) ("Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative

section 1915(a), which creates placement preferences for adoptions of Indian children.<sup>199</sup> However, the Court's opinion cannot be understood completely without acknowledging the majority's desire to circumvent any constitutional problems posed by ICWA's unique treatment of Indian children and parents:

The Indian Child Welfare Act was enacted to help preserve the cultural identity and heritage of Indian tribes, but under the State Supreme Court's reading, the Act would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian. As the State Supreme Court read §§ 1912(d) and (f), a biological Indian father could abandon his child *in utero* and refuse any support for the birth mother—perhaps contributing to the mother's decision to put the child up for adoption—and then could play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests. If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA. *Such an interpretation would raise equal protection concerns . . .*

<sup>200</sup>

Thus, the Court recognized ICWA's equal protection problems, but came to a result via textual interpretation in order to avoid tackling head-on the weighty constitutional issues.<sup>201</sup> Justice Sotomayor understood the majority to come to its conclusion based on this justification; although, she pointed to the Court's previous Indian law cases, such as *Mancari*,<sup>202</sup> to argue that ICWA did not pose any constitutional difficulty: "It is

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programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.").

199. *Id.* § 1915(a) ("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.").

200. *Adoptive Couple*, 133 S.Ct. at 2565 (majority opinion) (emphasis added).

201. Justice Alito's opinion, however, purports to identify these equal protection problems while claiming to rely on "the plain text of §§ 1912(f) and (d)" in deciding the dispute. *Id.*

202. *Morton v. Mancari*, 417 U.S. 535, 553-54 (1974); see also *supra* Part II.B.1.

difficult to make sense of this suggestion [that a contrary result would create equal protection problems] in light of our precedents, which squarely hold that classifications based on Indian tribal membership are not impermissible racial classifications.”<sup>203</sup>

Turning back to the meat of the opinion, the Court’s textual analysis focused on section 1912(f) and section 1912(d) of ICWA. The Court found that section 1912(f)’s requirement of a heightened showing of harm as a prerequisite to termination of parental rights applies only to parents with existing custody of an Indian child: “section 1912(f) does not apply in cases where the Indian parent *never* had custody of the Indian child . . . [because ‘continued custody’ in section 1912(f)] refers to custody that a parent already has (or at least had at some point in the past).”<sup>204</sup> Thus, because Biological Father “never had legal or physical custody of Baby Girl as of the time of the adoption proceedings,” Biological Father should not have been able to invoke the protections of section 1912(f) to block Baby Girl’s adoption.<sup>205</sup> Employing similar interpretive tools, the Court found that section 1912(d)’s remedial requirements applied only to termination of parental rights where such termination would actually breakup the existing family.<sup>206</sup> More precisely, the Court held “that section 1912(d) applies only in cases where an Indian family’s ‘breakup’ would be precipitated by the termination of the parent’s rights” and defined “[t]he term ‘breakup’ . . . in this context [as] ‘the discontinuance of a relationship’ or ‘an ending as an effective entity.’”<sup>207</sup> Part I.A.2’s discussion of the “existing Indian family doctrine” is particularly illuminating and relevant given the implicit centrality of the doctrine to the Court’s ultimate holding (with respect to section 1912(f) and section 1912(d)).<sup>208</sup>

#### B. *What the Court Left Unanswered*

The Court’s decision in *Adoptive Couple* is, in a sense, a quintessential Roberts Court opinion. It is written in such a way as to

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203. *Adoptive Couple*, 133 S. Ct. at 2584 (Sotomayor, J., dissenting) (citing *United States v. Antelope*, 430 U.S. 641, 645-47 (1977); *Morton v. Mancari*, 417 U.S. 535, 553-54 (1974)).

204. *Id.* at 2560

205. *Id.* at 2562.

206. *Id.* at 2562-63.

207. *Id.* at 2562 (quoting *AMERICAN HERITAGE DICTIONARY* 235 (3d Ed. 1992) and *WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY* 273 (1961)).

208. *See supra* Part I.A.2.

limit its impact beyond the precise issues before the Court, interpret the meaning of the relevant statutory text in a manner that is both not unreasonable and consistent with the majority's broader goals in the case, and avoid reaching an outcome that would significantly alter precedent and force the Court to decide weighty constitutional questions. Looking back to the parties' arguments, discussed in Part III.C, the Court left unanswered two principal issues raised by the parties: first, the meaning of "parent" under the ICWA<sup>209</sup> and, second, a clear resolution of whether the ICWA—and, more broadly, laws generally benefitting or classifying Indians—trigger the court's strict scrutiny level of review reserved for racial classifications.

### 1. ICWA and Putative Fatherhood

First, the Court explicitly declined to resolve the issue of whether Biological Father is actually a "parent" under the ICWA: "We need not—and therefore do not—decide whether Biological Father is a 'parent.'"<sup>210</sup> This assumption—necessary for the court to undertake its interpretation of § 1912—allowed the Court to avoid a messy discussion of the law of putative fatherhood. Recall that a "parent" under the ICWA is "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom."<sup>211</sup> However, the ICWA's definition of parent "does not include the unwed father where paternity has not been acknowledged or established."<sup>212</sup>

The Court's decision not to resolve this question of what "parent" means is all the more remarkable in light of the fact that this exact issue was one of the two questions presented in the case,<sup>213</sup> and it was a source

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209. *Adoptive Couple*, 133 S. Ct. at 2560 n.4 ("If Biological Father is not a 'parent' under the ICWA, then § 1912(f) and § 1912(d)—which relate to proceedings involving possible termination of 'parental' rights—are inapplicable. Because we conclude that these provisions are inapplicable for other reasons, however, we need not decide whether Biological Father is a 'parent.'").

210. *Id.* at 2560.

211. 25 U.S.C. § 1903(9) (2012).

212. *Id.*

213. See Petition for a Writ of Certiorari at i, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 831 (2013) (No. 12-399), 2012 WL 4502948 at \*i ("(2) [w]hether ICWA defines 'parent' in 25 U.S.C. § 1903(9) to include an unwed biological father who has not complied with state law rules to attain legal status as a parent.").

of disagreement among the parties.<sup>214</sup> Part III.C briefly outlined the parties' arguments on this issue, among others.<sup>215</sup> By declining to resolve this debate surrounding the ICWA's interaction with putative fatherhood doctrine, the Court was also able to sidestep the question, examined in Part I.B of whether the ICWA's definition of parent imported state law paternity requirements or was limited to the ICWA's own statutory meaning.<sup>216</sup> Thus, the majority maintained the *status quo ante* with respect to the Court's putative fatherhood jurisprudence.

There is already wide disagreement among many states, the populations of which account for a significant share of this country's Indian population, about how to interpret ICWA's definition of "parent." These states include Alaska, Arizona, California, Missouri, New Jersey, Oklahoma, South Carolina, and Texas.<sup>217</sup> The Court's decision does nothing to resolve this inconsistency in the state courts. Unfortunately, both America's Indian population of unwed fathers and prospective adoptive parents of this community's children are left to fight these issues in state courts with little hope of consistent application of ICWA across state lines.

## 2. The Equal Protection Problem

Second, and most importantly, the Court completely and purposefully avoided any resolution of the weighty equal protection issues raised in *Adoptive Couple*. Aside from a few sentences alluding to the *potential* constitutional problems that *might* result from application of the ICWA to Baby Girl's adoption,<sup>218</sup> the Court used the ICWA's statutory text as a useful life raft to avoid the choppy waters of ICWA's fundamental equal protection flaws. All of the parties briefed the

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214. Compare Brief for Petitioners at 19-29, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 831 (2013) (No. 12-399), 2013 WL 633597, at \*19-29, and Brief for Guardian *ad Litem* at 31-48, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 831 (2013) (No. 12-399), 2013 WL 633603 at \*31-48, with Brief for Respondent Cherokee Nation at 12-22, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 831 (2013) (No. 12-399), 2013 WL 1225770, at \*12-22, and Brief for the United States as Amicus Curiae Supporting Affirmance at 14-19, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 831 (2013) (No. 12-399), 2013 WL 1099169, at \*14-19.

215. See *supra* Part III.C.

216. See *supra* Part I.B.

217. See *supra* text accompanying notes 40-48.

218. See *supra* text accompanying note 200.

constitutional issues to some degree,<sup>219</sup> and as Part II made abundantly clear, the Court's equal protection jurisprudence with respect to both adoption and laws implicating Indians are in serious need of reevaluation.<sup>220</sup> *Adoptive Couple* was the ideal opportunity for such an undertaking by the Court.

More specifically, the Court's failure to address the obvious equal protection issues at play in ICWA will only perpetuate the legal fiction necessary to justify rational basis of review of Indian classifications: that *tribal* classifications do not act as or implicate *racial* classifications. Recall ICWA's definitions of "Indian Child:" "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."<sup>221</sup> These provisions *explicitly* require a biological link to tribal members by pointing toward tribal membership (or eligibility) to trigger ICWA's application. Given the reality that tribal membership is linked to one's biological ties to previously recognized tribal members,<sup>222</sup> this kind of biological requirement is quite obviously a *racial* one. The Court's failure to acknowledge this reality will only perpetuate the divisive nature of laws, like ICWA, that afford Indians disparate treatment based, at least in part, on their racial heritage.

This Article is not alone in scholarship in recognizing the racial nature of such classifications,<sup>223</sup> and even the Ninth Circuit in *Babbitt*—discussed in Part II.B.2—felt compelled to strike down an agency interpretation of the Reindeer Industry Act in light of the clear racial nature of tribal classifications in order to avoid a constitutionally troubling outcome.<sup>224</sup> Until the Court resolves this contradiction in its increasing embrace of colorblindness in equal protection cases, ICWA and similar laws will perpetuate disparate treatment of Indians under the law and condition application of such legislative measures on one's

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219. See *supra* Part III.C.

220. See *supra* Part II; see also *infra* Part IV.C.

221. 25 U.S.C. § 1903(4) (2012).

222. See, e.g., text accompanying note 105.

223. See *supra* Part II.B.1.

224. *Williams v. Babbitt*, 115 F.3d 657, 666 (9th Cir. 1997) ("The constitutional questions raised by the IBIA's interpretation are grave and, as intervenors and amici point out, implicate an entire title of the United States Code. We see no reason to unnecessarily resolve them when a less constitutionally troubling construction is readily available. We therefore interpret the Reindeer Act as not precluding non-natives in Alaska from owning and importing reindeer." (footnote omitted)).

blood heritage. What could be more anathema to the text and spirit of the Fourteenth Amendment's promise of equality under the law?

### C. *An Epilogue*

Throughout the remarkable and dramatic saga of *Adoptive Couple*, a young child's future was ultimately hanging in the balance. This human element was heart-wrenching and made the case that much more worthy of careful consideration and resolution. The United States Supreme Court's decision did not, however, resolve ultimately what would happen to Baby Girl.

The South Carolina Supreme Court responded to the United States Supreme Court's reversal and remand by ordering the family court to approve and finalize "Adoptive Couple's adoption of Baby Girl, thereby terminating [Biological] Father's parental rights."<sup>225</sup> The South Carolina Supreme Court subsequently denied petitions for rehearing submitted by Biological Father and the Cherokee Nation, leaving only unresolved "[t]he matter of transfer of physical custody" of Baby Girl, to be determined by the family court in accordance with Baby Girl's best interests.<sup>226</sup>

Unfortunately, that transfer was accompanied by further drama: after Biological Father—who was engaged in annual military training with his Oklahoma National Guard unit in Iowa<sup>227</sup>—failed to appear with Baby Girl on August 4, 2013 in South Carolina for a court-ordered meeting with Adoptive Couple as part of the transition of custody plan, South Carolina authorities issued a warrant for the arrest of Biological Father.<sup>228</sup> After legal wrangling, additional lawsuits, and a political

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225. *Adoptive Couple v. Baby Girl*, 746 S.E.2d 51, 54 (S.C. 2013).

226. *Adoptive Couple v. Baby Girl*, 746 S.E.2d 346, 347 (S.C. 2013).

227. A Cherokee tribal court granted temporary custody of Baby Girl to Biological Father's parents and wife while he was attending Oklahoma National Guard training. See Dan Frosch, *Custody Battle Continues Despite Ruling by Justices*, N.Y. TIMES (Aug. 13, 2013), <http://www.nytimes.com/2013/08/14/us/custody-battle-continues-despite-ruling-by-justices.html?module=Search&mabReward=relbias%3Aw%2C%5B%22RI%3A5%22%2C%22RI%3A16%22%5D>.

228. See, e.g., Meg Kinnard, *Adoptive Couple Wants Feds to Bring Girl to SC*, YAHOO! NEWS (Aug. 12, 2013), <http://news.yahoo.com/adoptive-couple-wants-feds-bring-girl-sc-125306465.html>; Dusten Brown, *'Baby Girl' Veronica's Birth Father, Faces Arrest Warrant in Adoption Case*, HUFFINGTON POST (Aug. 10, 2013), [http://www.huffingtonpost.com/2013/08/11/sc-authorities-issue-warrant-dusten-brown\\_n\\_3739674.html](http://www.huffingtonpost.com/2013/08/11/sc-authorities-issue-warrant-dusten-brown_n_3739674.html).

standoff between the governors of Oklahoma and South Carolina,<sup>229</sup> Adoptive Couple finally gained custody of Baby Girl on September 23, 2013.<sup>230</sup> Weeks later, Biological Father announced that he would drop all litigation aimed at gaining custody of Baby Girl, saying that “[i]t was no longer fair for [Baby Girl] to be in the middle of a battle.”<sup>231</sup>

Notwithstanding the United States Supreme Court’s doctrinal failure—and the pain and anguish felt by all parties involved in this case—perhaps the silver lining in this saga is the fact that Baby Girl might have a settled and fulfilling future after all.

### Conclusion

The Supreme Court was presented with the ideal opportunity to both rectify its approach to laws singling out Indian tribal members for disparate treatment and provide clarification regarding the ICWA’s application to putative fathers. On both fronts, the Court failed to provide any meaningful resolution. With respect to the first issue, federal law will regrettably continue to ignore the intrinsic racial nature of any tribal classification, thereby perpetuating the legal fiction necessary to sustain the Court’s deferential approach to resolving equal protection challenges to laws implicating Indian tribes. The ICWA will persist as an awkward exception to the Court’s otherwise steady embrace of colorblindness, in adoption and beyond.

The Court’s refusal to resolve the ICWA’s ambiguity regarding putative fatherhood rights is similarly disappointing and leaves putative fathers, Indian children, and adoptive couples uncertain about the scope of the ICWA’s application. Given the existing conflict among the states—many of which having sizable populations impacted by the ICWA—on this question of the ICWA’s scope, the Court will likely be

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229. See, e.g., Robert Barnes, *Supreme Court’s Ruling in Baby Veronica Case Leads to More Legal Wrangling*, WASH. POST (Sept. 15, 2013), [http://www.washingtonpost.com/politics/supreme-courts-ruling-in-baby-veronica-case-leads-to-more-legal-wrangling-over-adoption/2013/09/15/7207be1c-1caf-11e3-8685-5021e0c41964\\_story.html](http://www.washingtonpost.com/politics/supreme-courts-ruling-in-baby-veronica-case-leads-to-more-legal-wrangling-over-adoption/2013/09/15/7207be1c-1caf-11e3-8685-5021e0c41964_story.html).

230. *Cherokee Girl Is Handed Over to Adoptive Parents*, N.Y. TIMES (Sept. 23, 2013), <http://www.nytimes.com/2013/09/24/us/ Cherokee-girl-is-handed-over-to-adoptive-parents.html?module=Search&mabReward=relbias%3Aw%2C%5B%22RI%3A5%22%2C%22RI%3A16%22%5D>.

231. Michael Overall, *Baby Veronica Case: Dusten Brown To Stop Custody Fight for Veronica*, TULSA WORLD (Oct. 10, 2013), [http://www.tulsaworld.com/news/baby-veronica-case-dusten-brown-to-stop-custody-fight-for/article\\_2d903520-319a-11e3-abf1-0019bb30f31a.html](http://www.tulsaworld.com/news/baby-veronica-case-dusten-brown-to-stop-custody-fight-for/article_2d903520-319a-11e3-abf1-0019bb30f31a.html).

forced to take up this question again soon, as is often the case when the Court leaves tough questions for future resolution.

Judicial restraint and humility are often laudable characteristics of a praiseworthy tribunal, but the Court in *Adoptive Couple* should not have left open these profound questions of constitutional uncertainty.