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You're Breaking Up: The Faulty Connection Between Congressional Intent and Supreme Court Interpretation in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013)

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Note*

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TABLE OF CONTENTS

I. Introduction	518
II. Background	519
A. Legislative History of ICWA	519
1. Indian Child Removal Pre-ICWA	519
2. Factors Driving Removal Rates	520
a. Physical Abuse	520
b. Ethnocentrism	520
c. Institutional Structure	523
B. Overview of ICWA	524
C. Existing Indian Family Exception	525
D. <i>Mississippi Band of Choctaw Indians v. Holyfield</i> ..	528
III. <i>Adoptive Couple v. Baby Girl</i>	529
A. Facts	529
B. Opinions Below	531
C. Supreme Court Opinion	532
IV. Analysis	532
A. Birth Father Is a Parent Under ICWA and Should Have Been Afforded Its Protections	533
B. ICWA Does Not Support the Interpretation the Court Gave It	537

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1. Congress Did Not Intend to Require a Parent to Have Had Prior Custody in Order to Invoke ICWA's Protections	537
2. The Court's Construction of "Continued" Amounted to an Amendment of the Statute, Expanding the Types of Parents Excluded from ICWA	538
3. ICWA's Idea of "Breakup" Connotes Far More than the Court Allowed It To	539
4. What Place for the Existing Indian Family Exception?.....	542
C. Applying ICWA to Noncustodial Parents Does Not Raise Public Policy Concerns	543
V. Conclusion	546

I. INTRODUCTION

I did not know then how much was ended. When I look back now from this high hill of my old age, I can still see the butchered women and children lying heaped and scattered all along the crooked gulch as plain as when I saw them with eyes still young and I can see that something else died there in the blood mud, and was buried in the blizzard. A people's dream died there. It was a beautiful dream.¹

So spoke Black Elk, a holy man of the Oglala Lakota, as he remembered the Wounded Knee Massacre. Wounded Knee largely marked the end of the U.S. military campaign against the plains tribes.² For Black Elk and the Oglala, it marked the end of much more. Black Elk believed if the dream of his people were ever to be revived, it would be in the seventh generation.³ The calculations of many people living on the Oglala Pine Ridge Reservation say the youth of today are that generation.⁴ But Black Elk spoke of consequence, not just capability. Should the seventh generation fail, Black Elk believed the Lakota race would die out.⁵

1. JOHN G. NEIHARDT, *BLACK ELK SPEAKS* 230 (Pocket Book ed., 1972).
 2. See DEE BROWN, *BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST* (1970).
 3. Collen Kenney, *Ghosts of Whiteclay*, LINCOLN J. STAR, Sept. 23, 2007, http://journalstar.com/special-section/news/the-ghosts-of-whiteclay/article_10e860bc-1b1d-522b-8827-655ce764751f.html, archived at <http://perma.unl.edu/S46T-428K>. There is a saying in Lakota that translates into "building for the seventh generation." Lakota Mowrer, *Building for the Seventh Generation*, TEACH FOR AM.: FEATURED STORIES (Nov. 19, 2012), <http://www.teachforamerica.org/blog/building-seventh-generation>, archived at <http://perma.unl.edu/ZH33-334W>.
 4. Kenney, *supra* note 3. See also Bernie Hunhoff, *Black Elk Was Right*, S. D. MAG., Mar. 23, 2013, <http://southdakotamagazine.com/seventh-generation>, archived at <http://perma.unl.edu/5YBJ-NJ4X> (calculating the mid-19th century as the beginning of the first generation).
 5. Kenney, *supra* note 3.

Charging fifteen to twenty-five-year-olds with the survivorship of an entire people is a lot to ask young shoulders to bear. But that responsibility is not limited to only Lakota youth. In passing the Indian Child Welfare Act of 1978 (ICWA),⁶ Congress found “no resource . . . is more vital to the continued existence and integrity of Indian tribes than their children.”⁷ By creating standards to govern the removal of Indian children from their families, Congress hoped it could promote tribal security and stability.⁸

The chances of fully achieving these goals have been impeded by the Supreme Court decision in *Adoptive Couple v. Baby Girl*.⁹ By holding that an Indian parent who never obtains custody of his child is not privy to the protections offered by ICWA, the Supreme Court has severely limited the Act’s application. Tribal security and stability are hampered when Indian children are raised outside of the Native community because the opportunity to pass on tribal customs, traditions, leadership and culture disappears.¹⁰ This Note begins by exploring the historical facts leading to the passage of ICWA, its key provisions, and its application. Part III discusses *Adoptive Couple v. Baby Girl* and the changes the Supreme Court has made to ICWA. Part IV concludes by arguing how in an effort to do right, the majority of Supreme Court Justices twisted ICWA to arrive at a conclusion the statute, if read plainly, does not support.

II. BACKGROUND

A. Legislative History of ICWA

1. Indian Child Removal Pre-ICWA

ICWA was the product of four years of congressional research, hearings, deliberations and drafting.¹¹ The impetus for the law came from tribes and their allies, motivated by witnessing state child-welfare policies remove Indian children from their families at catastrophic rates.¹² In Minnesota, one out of every four Indian children

6. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1934 (2012).

7. *Id.* § 1901(3).

8. *Id.* § 1902.

9. 133 S. Ct. 2552 (2013).

10. See Christine Metteer, *The Existing Indian Family Exception: An Impediment to the Trust Responsibility to Preserve Tribal Existence and Culture as Manifested in the Indian Child Welfare Act*, 30 *LOY. L.A. L. REV.* 647, 651–52 (1997) (noting Indian children are the only real means of transmitting tribal heritage and that heritage is lost if those children grow up in non-Indian homes).

11. H.R. REP. NO. 95-1386, at 27 (1978).

12. *Indian Child Welfare Program: Hearing Before the S. Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs*, 93d Cong. (1974) [hereinafter 1974 S. Hearing].

under the age of one lived in an adoptive home.¹³ In Washington, Indian parents lost their children at rates nineteen times those of non-Indian parents.¹⁴ In South Dakota, Indian children comprised seven percent of the state's population, but accounted for a little under half of all state adoptees.¹⁵

2. *Factors Driving Removal Rates*

a. *Physical Abuse*

Governments, whether state or tribal, have an obligation to protect children when their home is not safe.¹⁶ But physical violence does not explain the extraordinary high removal rates tribal families experienced. One North Dakota tribe indicated only one percent of their children were removed because of allegations of physical abuse.¹⁷ A northwestern tribe reported similar percentages.¹⁸ An Oregon tribe indicated that all of the 800 tribal children removed from their biological homes were categorized as neglect cases, without physical abuse present.¹⁹ Indeed, physical child abuse was "virtually unknown" in Indian communities.²⁰ This was particularly remarkable at the time because medical doctors were beginning to recognize, diagnosis, and report physical child abuse.²¹

b. *Ethnocentrism*²²

Instead, cultural ignorance, ethnocentrism, or outright prejudice were cited as factors driving the high removal rates.²³ Standards of

13. *Id.* at 3 (statement of William Byler, Executive Director, Association of American Indian Affairs).

14. *Id.*

15. *Id.*

16. *See, e.g.,* *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944) ("[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare . . .").

17. *1974 S. Hearing, supra* note 12, at 3 (statement of William Byler, Executive Director, Association of American Indian Affairs).

18. *Id.* at 18.

19. *Id.* at 101 (statement of Dr. James H. Shore).

20. *Id.* at 110. Dr. Score believed this was a culture difference, which ironically worked against Indian communities. Traditional Indian practices frowned upon physical discipline of children, which led non-Indian outside observers to conclude Indian parents did not actively or competently raise their children. *Id.* at 103-04 (statement of Dr. James H. Shore).

21. *Id.* at 103 (question by Sen. Abourezk).

22. Meaning "characterized by or based on the attitude that one's own group is superior." WEBSTER'S NEW COLLEGIATE DICTIONARY 393 (3d ed. 1973).

23. *1974 S. Hearing, supra* note 12, at 4; Russell Lawrence Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 HASTINGS L.J. 1287, 1294 (1980). *But see Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs*, 95th Cong. 52 (1977) [hereinafter *1977 S. Hearing*] (statement of Raymond V. Butler, Acting Deputy Comm'r, Bureau of Indian Af-

child abuse and neglect were based upon white, middle-class, suburban values.²⁴ The Senate subcommittee heard testimony that a few caseworkers believed simply living on a reservation was evidence enough to remove a child because “an Indian reservation is an unsuitable environment for a child.”²⁵

Caseworkers classified leaving children with individuals outside the immediate nuclear family as neglect,²⁶ despite the fact that extended family is a fundamental part of Native culture.²⁷ Ella Deloria²⁸ noted tribes spent hundreds of years living in close communal groups where making everyone family preserved peace and harmony.²⁹ She explained:

[T]he ultimate aim of . . . life . . . was quite simple: one must be a good relative In the last analysis, every other consideration was secondary—property, personal ambition, glory, good times, life itself. Without that aim and the constant struggle to attain it, the people would no longer be Dakotas in truth. They would no longer even be human.³⁰

If the whole point of life is to be a good relative, labeling someone an unfit one had catastrophic consequences for parents and, by extension, tribes. As the chairwoman of the Puyallup Tribe put it: “[I]f you

fairs, Dep’t of the Interior) (noting the majority of BIA employees working with Indian families were themselves Indian).

24. 1974 S. Hearing, *supra* note 12, at 4 (statement of William Byler, Executive Director, Association of American Indian Affairs).

25. *Id.* at 19–20. The irony of this, Byler commented, was apparent. “[T]ribes that were forced onto reservations at gunpoint and prohibited from leaving without a permit, are now being told that they live in a place unfit for raising their children.” *Id.* at 20; *see also* Janet L. Wallace and Lisa R. Pruitt, *Judging Parents, Judging Place: Poverty, Rurality, and Termination of Parental Rights*, 77 MO. L. REV. 95 (arguing that while courts have stated poverty is an impermissible basis for termination of parental rights, many make rural places a proxy for poverty and terminate on that basis instead).

26. *See* Barsh *supra* note 23, at 1294.

27. *See, e.g.,* ELLA DELORIA, *SPEAKING OF INDIANS* 17, 19 (Dakota Press 1979). For instance, in Dakota (Sioux) culture, one had many fathers (all the men someone’s own father called brother or cousin) and mothers (all the women someone’s mother called sister or cousin). *Id.* at 18. When an individual married, all the newlywed’s newly acquired relatives became relatives of their consanguine family as well. *Id.*

28. Deloria was born in 1889 on the Yankton Sioux Reservation and was member of that tribe. Fluent in both English and the Dakota dialectics and holding a degree from Columbia University, she dedicated much of her life to authoring assorted manuscripts and books about Dakota culture and traditions in the hopes of conveying this knowledge to a predominately white readership. AGNES M. PICOTTE & PAUL N. PAVICH, *INTRODUCTION TO SPEAKING OF INDIANS* xi–xix (Dakota Press 1979).

29. Deloria, *supra* note 27, at 17, 19.

30. *Id.* at 17–18.

lose your children, you are dead; you are never going to be rehabilitated . . . the whole family unit is not ever going to get well.”³¹

Some argued the high rates of child removal lead Indian parents to *expect* their children to be taken from them.³² Coupled with the crippling emotional effects of losing a child, this expectation created a self-fulfilling prophecy where fear of emotional attachment led to poor parental behavior and ultimately, removal.³³

Inevitably, stereotypical views about Indian communities and perceived alcohol abuse were trotted out as a justification for the high removal rates.³⁴ Tribes have frequently been typecast as locked in a constant battle against alcohol.³⁵ Yet, studies show alcohol plays a role in the majority of child abuse incidents, regardless of race.³⁶ Testimony at the hearings suggested this fact was frequently ignored.³⁷ While alcohol abuse would likely result in the removal of a child from an Indian family, white families battling alcohol addictions were more

31. 1977 S. Hearing, *supra* note 23, at 164 (statement of Puyallup Tribe Chairwoman Ramona Bennett); *see also* Barsh, *supra* note 23, at 1291 (citing a psychiatric study noting the removal of a child “effectively destroyed the family as an intact unit”).

32. Barsh, *supra* note 23, at 1292.

33. *Id.*

34. 1974 S. Hearing, *supra* note 12, at 4 (statement of William Byler, Executive Director, Association of American Indian Affairs); Barsh, *supra* note 23, at 1295.

35. Scholars have floated forty-two different theories to explain alcoholism among Indian populations. *See* GARY L. FISHER & THOMAS G. HARRISON, SUBSTANCE ABUSE: INFORMATION FOR SCHOOL COUNSELORS, SOCIAL WORKERS, THERAPISTS, AND COUNSELORS 54 (4th ed., Pearson 2009). Much less attention is paid to alcohol abstinence in Indian communities. For instance, the percent of Indian mothers abstaining from alcohol preconception (45%) is nearly identical to that of their white peers (46.5%). *Alcohol Abstinence, Preconception*, HEALTHINDICATORS.GOV, http://www.healthindicators.gov/Indicators/Alcohol-abstinence-preconception-percent_1181/Profile/ClassicData (last visited Oct. 16, 2013), *archived at* <http://perma.unl.edu/94ZY-P4YE>. Some argue the dominant approach to alcohol in Indian communities has been abstinence for the past two hundred years. Raul Caetano et al., *Alcohol Consumption Among Racial/Ethnic Minorities*, 22 ALCOHOL HEALTH & RES. WORLD 233, 237 (1998), *archived at* <http://perma.unl.edu/TW5Q-9Y27>.

36. Substance abuse plays a role in approximately 50–80% of all child maltreatment cases. In almost two out of every three cases where parental substance abuse was the leading cause of maltreatment, the drug of choice was alcohol. Bridget Freisthler, *A Spatial Analysis of Social Disorganization, Alcohol Access and the Rates of Child Maltreatment in Neighborhoods*, 26 CHILD. AND YOUTH SERVICES REV. 803, 804 (2004). Physical abuse was not a leading cause of Indian child removal, anyway. *See* 1974 S. Hearing, *supra* note 12, at 3 (statement of William Byler, Executive Director, Association of American Indian Affairs).

37. *See, e.g.,* 1974 S. Hearing, *supra* note 12, at 20 (written statement of William Byler, Executive Director, Association of American Indian Affairs); *id.* at 42 (statement of Margaret Townsend); *id.* at 102 (statement of Dr. James H. Shore).

likely to be provided with support services and allowed to keep their children with them than were Indian parents.³⁸

c. Institutional Structure

Institutional factors further contributed to the high rates of removal of Indian children. As the availability of birth control and abortions increased, the number of healthy white children available for adoption decreased, and private agencies found more couples seeking newborns of any race.³⁹ Bertram Hirsch, an attorney with the Association of American Indian Affairs, argued a “gray market” for Indian children existed.⁴⁰ The testimony of many Indian mothers supported this theory.⁴¹

Many families at risk of losing their children lacked access to effective attorneys or the courts.⁴² Parents were frequently never notified about case hearings or general progress.⁴³ Sometimes, they were never told where their children were because, once placed with a foster or adoptive family, social workers told them their own child’s information was “confidential.”⁴⁴

Some thought the overall institutional goal was Indian assimilation by tribal destruction and taking children was the quickest means to achieve this.⁴⁵

I think it’s a copout when people say it’s poverty that’s causing [child removal]. I think perhaps the chief thing is the detribalization and deculturalization, Federal and State and local efforts to make Indians white. It hasn’t

38. *Id.*

39. Barsh, *supra* note 23, at 1299.

40. “I think it is more accurately described as a gray market [not black market]. [Local welfare workers] have long lists of non-Indian applicants for Indian children, and they feel obliged for a whole variety of social reasons to comply with the orders that they received for children.” 1974 *S. Hearing*, *supra* note 12, at 70 (statement of William Byler, Executive Director, Association of American Indian Affairs).

41. *Id.* at 51–53 (statement of Mrs. Alex Fournier) (describing an incident where welfare workers literally dragged a two-year-old child out of the courtroom kicking and screaming in order to place him for adoption); *id.* at 68 (statement of Cheryl DeCoteau) (relating how she was pressured to place her child up for adoption on a weekly basis while still pregnant); *id.* at 5 (statement of William Byler, Executive Director, Association of American Indian Affairs) (discussing financial incentives for adopting Indian children).

42. Barsh, *supra* note 23, at 1300.

43. 1974 *S. Hearing*, *supra* note 12, at 66 (statement of Mrs. Cheryl DeCoteau); *id.* at 4 (statement of William Byler, Executive Director, Association of American Indian Affairs); Barsh, *supra* note 23, at 1300.

44. *See* 1974 *S. Hearing*, *supra* note 12, at 8 (1974) (statement of William Byler, Executive Director, Association of American Indian Affairs); *id.* at 66 (statement of Mrs. Cheryl DeCoteau).

45. *Id.* at 377 (written testimony of Ed Howes); 1977 *S. Hearing*, *supra* note 23, at 81–82 (written statement of National Congress of American Indians); 124 CONG. REC. H38,102 (daily ed. Oct. 11, 1978) (statement of Rep. Udall).

worked and it will never work and one of the most vicious forms of trying to do this is to take their children.⁴⁶

After decades of watching school-aged Indian children forcibly separated from their families and marched off to boarding schools or religious institutions, it was not surprising the government would eventually get around to collecting infants.⁴⁷

B. Overview of ICWA

Armed with this testimony, Congress went to work under its constitutional authority “to regulate Commerce with . . . the Indian tribes.”⁴⁸ The resulting law was enacted in 1978.⁴⁹ Congress declared it national policy “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.”⁵⁰ ICWA contains two major prongs to fulfill this policy. First, it sets forth minimal procedural protections for Indian child custody proceedings to discourage child removal unless absolutely necessary.⁵¹ Second, it authorizes special grants for programs to strengthen tribes and families, thereby removing the need—real or perceived—for intervention in the first place.⁵²

This Note focuses on the procedural protections offered in the first prong. These protections are extended to child custody proceedings, which encompass foster care placements, termination of parental rights, and preadoptive and adoptive placements.⁵³ ICWA gives tribes a leading role in deciding what happens to their children. Tribal

46. 1974 S. Hearing, *supra* note 12, at 13 (statement of William Byler, Executive Director, Association of American Indian Affairs).

47. See Kim Laree Schnuelle, *When the Bough Breaks: Federal and Washington State Indian Child Welfare Law and Its Application*, 17 PUGET SOUND L. REV. 101, 101–04 (1993) (discussing early assimilation tactics). For more on the assimilation tactics used in Indian boarding schools and their long term effects, see Charla Bear, *American Indian Boarding Schools Haunt Many*, NPR (May 12, 2008, 12:01AM), <http://www.npr.org/templates/story/story.php?storyId=16516865> archived at <http://perma.unl.edu/4C2X-L79M>; Andrea Smith, *Soul Wound: The Legacy of Native American Schools*, AMNESTY INT'L (Mar. 26, 2007), <http://www.amnestyusa.org/node/87342>, archived at <http://perma.unl.edu/M3M5-HWJV>.

48. U.S. CONST. art. I, § 8, cl. 3. Not everyone agrees that Congress had the power to enact ICWA in the first place. “Because adoption proceedings . . . involve neither ‘commerce’ nor ‘Indian tribes,’ there is simply no constitutional basis for Congress’ assertion of authority over [child custody proceedings].” *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2571 (2013) (Thomas, J., concurring).

49. Indian Child Welfare Act of 1978, Pub. L. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–63 (2012)); see also H.R. REP. NO. 95-1386, at 27–28 (1978) (outlining legislative history of bill).

50. 25 U.S.C. § 1902.

51. *Id.* §§ 1911–23; Barsh, *supra* note 23, at 1287.

52. 25 U.S.C. §§ 1931–34; Barsh, *supra* note 23, at 1287.

53. 25 U.S.C. § 1903(1).

courts have exclusive jurisdiction over any child custody proceeding where the child resides or is domiciled on the reservation.⁵⁴ Absent good cause, state courts must transfer child custody proceedings to tribal courts when the child is living outside the reservation.⁵⁵ Tribes may intervene in state court proceedings involving foster care placement or termination of parental rights at any point⁵⁶ and must be given notice, as must a parent, of pending foster care placement or termination decisions.⁵⁷ Standards of proof are also higher under ICWA. To terminate parental rights, the moving party must prove beyond a reasonable doubt continued custody by an Indian parent is likely to result in serious emotional or physical damage to the child.⁵⁸ The typical burden is clear and convincing evidence.⁵⁹ Efforts to prevent removal or rehabilitate parents protected by ICWA must be active,⁶⁰ not just reasonable.⁶¹ Parents of Indian children also are entitled to longer time frames in which to withdraw consent for voluntary foster care placements or termination proceedings.⁶² Finally, Congress created adoptive and foster care placement preferences, starting with the child's extended family and concluding with any other Indian family⁶³ before opening the door to other options.

C. Existing Indian Family Exception

Four years after ICWA was adopted, the statute was judicially tested by the Supreme Court of Kansas in *In re Adoption of Baby Boy L.*⁶⁴ Baby Boy L. was born to an unwed, non-Indian mother, who promptly placed him with an adoptive couple (also non-Indian).⁶⁵ Baby Boy L.'s biological father was an enrolled member of the Kiowa Tribe and answered the complaint seeking to terminate his parental

54. *Id.* § 1911(a).

55. § 1911(b).

56. § 1911(c).

57. *Id.* § 1912(a).

58. § 1912(f).

59. *Santosky v. Kramer*, 455 U.S. 745, 770 (1982); ANN M. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 15.11 (2d ed. 1987); Catherine M. Brooks, *The Indian Child Welfare Act in Nebraska: Fifteen Years, a Foundation for the Future*, 27 CREIGHTON L. REV. 661, 670 (1994).

60. § 1912(d).

61. Adoption and Safe Families Act, 42 U.S.C. § 671(a)(15)(B) (2013). Active efforts have to go beyond letting parents know that services are available. Service providers should actually walk troubled parents through a rehabilitation plan, step by step, and efforts on the part of service providers must be "aggressive," even if the recipient is reluctant or disinterested. HARALAMBIE, *supra* note 59, at § 15.11; NATIVE AMERICAN RIGHTS FUND, A PRACTICAL GUIDE TO THE INDIAN CHILD WELFARE ACT 94 (2007).

62. 25 U.S.C. § 1913; Brooks, *supra* note 59, at 670.

63. 25 U.S.C. § 1915.

64. 643 P.2d 168 (Kan. 1982).

65. *Id.* at 172.

rights by asserting that ICWA applied.⁶⁶ The trial court refused to apply ICWA because the child had never been in the father's,⁶⁷ or his family's, care or custody.⁶⁸ After studying the legislative history of ICWA,⁶⁹ the Supreme Court of Kansas affirmed, reasoning ICWA 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 environment over the express objections of its non-Indian mother."⁷⁰ In short, ICWA protected existing Indian families; it was not designed to create them. Three years later, Oklahoma reached the same conclusion on nearly identical facts.⁷¹

Critics assail the exception as a court created end-run of the statute's express and implied intent.⁷² Under the doctrine, courts ask what it means to be Indian, and answer using, usually, a white standard of "Indian-ness."⁷³ Allowing courts to make this call intrudes upon tribal sovereignty.⁷⁴ Allowing state courts to decide on a case-by-case basis who to apply ICWA to destroys the uniformity Congress intended by enacting a federal statute.⁷⁵ Ultimately, critics fear the

66. *Id.* at 173.

67. It appears Father was incarcerated when Baby Boy L. was born, or shortly thereafter. *Id.* at 172–173.

68. *Id.* at 175.

69. The Court likely had abundant evidence about ICWA's legislative history as the same Bertram Hirsch who had testified at the congressional hearings with the Association of American Indian Affairs was allowed to counsel and advise the lawyers appearing on behalf of the father during the proceedings. *Id.*

70. *Id.*

71. *In re Adoption of Baby Boy D.*, 742 P.2d 1059 (Okla. 1985).

72. Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 632 (2002); Cheyanna L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 734 (2006); Suzianne D. Painter-Thomas, *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, 367 (2008).

73. See Jaffke, *supra* note 72, at 751–52. See also *State ex rel. D.A.C.*, 933 P.2d 993, 999 (Utah Ct. App. 1997) ("Engrafting a new requirement into ICWA that allows the dominant society to judge whether the parent's cultural background meets its view of what 'Indian culture' should be puts the state courts right back into the position from which Congress has removed them.").

74. Lorie M. Graham, *"The Past Never Vanishes": A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 36 (1998) (stating tribes alone have the authority to set membership requirements).

75. See B.J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts*, 73 N.D. L. REV. 395, 421–22 (1997) (discussing the different ways states have seemed to "redraft" federal legislation and noting ICWA has no financial component Congress can use to threaten states to tow the line); See also *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989) (reasoning Congress

existing Indian family exception will return tribes to their precarious, pre-ICWA, position.⁷⁶

The doctrine has created a split among state courts, although the majority reject it. Kansas and Oklahoma, pioneers in creating the exception, have abandoned it.⁷⁷ Alaska,⁷⁸ Arizona,⁷⁹ Colorado,⁸⁰ Idaho,⁸¹ Iowa,⁸² Michigan,⁸³ New Jersey,⁸⁴ New York,⁸⁵ North Dakota,⁸⁶ South Dakota,⁸⁷ Utah,⁸⁸ and Washington⁸⁹ also reject the doctrine. Arkansas⁹⁰ and Pennsylvania⁹¹ appear to have rejected the exception as well. The doctrine is good law in Alabama,⁹² Indiana,⁹³ Kentucky,⁹⁴ Louisiana,⁹⁵ Missouri,⁹⁶ Nevada,⁹⁷ and Tennessee.⁹⁸

had not intended to leave the word “domicile” in ICWA up to state law definition because it would leave nationwide uniformity nonexistent).

76. See Painter-Thomas, *supra* note 72, at 332.

77. *In re A.J.S.*, 204 P.3d 543, 549–51 (Kan. 2009); *Leatherman v. Yancy (In re Baby Boy L.)*, 103 P.3d 1099, 1108 (Okla. 2004). Oklahoma has also statutorily rejected the doctrine. See OKLA. STAT. tit. 10, § 40.3(B) (2013).

78. *In re Adoption of T.N.F.*, 781 P.2d 973, 977–78 (Alaska 1989).

79. *Michael J. v. Michael J.*, 7 P.3d 960, 963 (Ariz. Ct. App. 2000).

80. *In re N.B.*, 199 P.3d 16, 21–22 (Colo. App. 2007).

81. *Indian Tribe v. Doe*, 849 P.2d 925, 927 (Idaho 1993).

82. See IOWA CODE § 232B.5(2) (2012) (upheld and applied in *In re D.S.* 806 N.W.2d 458, 465 (Iowa Ct. App. 2011)).

83. *In re Elliott*, 554 N.W.2d 32, 35 (Mich. Ct. App. 1996).

84. *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 931 (N.J. 1988).

85. *Baby Boy C. v. Tohono O’odham Nation*, 805 N.Y.S.2d 313, 322–23 (N.Y. App. Div. 2005).

86. *Hoots v. K.B. (In re A.B.)*, 663 N.W.2d 625, 636 (N.D. 2003).

87. *In re Adoption of Baade*, 462 N.W.2d 485, 489–90 (S.D. 1990) (overturning the adoption of the doctrine in *Claymore v. Serr*, 405 N.W. 2d 650, 653 (S.D. 1987)).

88. *State ex rel. D.A.C.*, 933 P.2d 993, 999 (Utah Ct. App. 1997).

89. Wash. Rev. Code § 26.33.040(1)(a) (2013) (superseding *Adoption of Crews*, 825 P.2d 305 (Wash. 1992)); *In re Parenting & Support of Beach*, 246 P.3d 845, 848 (Wash. App. Ct. 2011).

90. See *Stephens v. Ark. Dep’t of Human Servs.*, 2013 Ark. App. 249, at 5 (applying ICWA requirement of an expert witness even though mom was non-Indian and dad was Indian but apparently uninvolved and “completely non-compliant”).

91. *In re Adoption of K.L.R.F.*, 515 A.2d 33, 34 (Pa. Super. Ct. 1986) (rejecting, apparently, doctrine by returning a child who had lived with a non-Indian adoptive mother to her adoptive Indian mother because the “Act is based on the fundamental assumption that it is in the Indian child’s best interest that its relationship to the tribe be protected”).

92. *Ex parte C.L.J.*, 946 So. 2d 880, 888–89 (Ala. Civ. App. 2006) (applying doctrine only in limited circumstances where the child is illegitimate, surrendered by non-Indian mother and never involved in tribal culture. If the mother is Indian, even if she feels she has no tribal affiliation, the exception does not apply).

93. *In re Adoption of T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988).

94. *Rye v. Weasel*, 934 S.W.2d 257, 261 (Ky. 1996) (relying on Oklahoma’s lead, citing the state’s high Indian population and role as a leader “in developing this doctrine”). The case remains good law, even though Oklahoma has subsequently rejected the doctrine.

95. *Hampton v. J.A.L.*, 658 So.2d 331, 334–35 (La. Ct. App. 1995).

Minnesota⁹⁹ and Nebraska¹⁰⁰ have avoided deciding whether or not to adopt the existing Indian family exception. South Carolina attempted to reject the doctrine,¹⁰¹ but the case upon which it relied was overturned by the Supreme Court, leaving unresolved questions about ICWA's scope and the families and children it applies to.

D. *Mississippi Band of Choctaw Indians v. Holyfield*

As the existing Indian family exception began to percolate among the states, the Supreme Court agreed to hear its first ICWA case, *Mississippi Band of Choctaw Indians v. Holyfield* in 1989.¹⁰² While *Holyfield* did not speak to the existing Indian family exception, it did present the Supreme Court with its first chance to interpret key provisions of the statute. The case involved an unwed Choctaw mother who traveled 200 miles to a hospital off the reservation to deliver twins. She immediately placed the babies up for adoption. Her purpose in delivering off the reservation was to evade ICWA and its tribal jurisdiction provisions, believing a state court would make the adoption process quicker and smoother.¹⁰³ The twins' father, also an enrolled Choctaw, accompanied her and consented to the adoption.¹⁰⁴

Two months later, the Tribe moved to vacate the adoption on the grounds ICWA granted it exclusive jurisdiction.¹⁰⁵ The case turned on the word "domicile," undefined by the statute, but determinative to the jurisdiction provisions.¹⁰⁶ Justice Brennan, writing for the majority, reasoned Congress had not intended to leave the legally loaded word up to state law. If state law governed, nationwide uniformity would be nonexistent.¹⁰⁷

96. *In re* of S.A.M., 703 S.W.2d 603, 608–09 (Mo. Ct. App. 1986). Application of the doctrine may be weakening. See *C.E.H. v. R.H.*, 837 S.W.2d 947, 951–52 (Mo. Ct. App. 1992) (considering what would happen if ICWA applied, "being exceedingly sensitive to the valuable purposes of the Act").

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

98. *In re* Morgan, 1997 Tenn. App. LEXIS 818, 43–44 (1997).

99. *In re* Welfare of Children of S.W., 727 N.W.2d 144, 152 (Minn. Ct. App. 2007) (argument ICWA did not apply because there was no existing Indian family was not appealed and therefore not addressed).

100. *Meaghan H. v. Mark J.*, 272 Neb. 846, 857, 725 N.W.2d 548, 557 (2007).

101. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 558 n.17 (S.C. 2012), *rev'd*, 133 S. Ct. 2552 (2013).

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

103. *Id.* at 37.

104. *Id.* at 38.

105. *Id.*

106. 25 U.S.C. § 1911(a) (2012); *Holyfield* 490 U.S. at 32.

107. *Holyfield*, 490 U.S. at 45–46.

Justice Brennan was also adamant ICWA was enacted out of concern not just for Indian children and families, but entire tribes.¹⁰⁸ “Tribal jurisdiction . . . was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves”¹⁰⁹ The dissent grudgingly conceded this point.¹¹⁰ The Court held the twins had “inherited” their mother’s reservation domicile. ICWA applied and the tribal, not state, court had jurisdiction to determine custody.¹¹¹

III. ADOPTIVE COUPLE *v.* BABY GIRL

A. Facts

The Supreme Court addressed ICWA a second time in 2013’s *Adoptive Couple v. Baby Girl*.¹¹² Like *Holyfield*, *Adoptive Couple* is an adoption case. Baby Girl’s birth father is an enrolled member of the Cherokee Nation¹¹³ and her birth mother identifies as Hispanic.¹¹⁴ The couple dated on and off for over ten years and were engaged at the time of Baby Girl’s conception.¹¹⁵ After learning of the pregnancy, Birth Father pressured Birth Mother to move up the wedding date.¹¹⁶ Without a wedding, Birth Father refused to financially support Birth Mother.¹¹⁷ Six months into the pregnancy, Birth Mother broke off the engagement.¹¹⁸

Birth Mother was a single mother twice over and financially struggling. She eventually texted Birth Father to ask whether he wanted

108. *Id.* at 49.

109. *Id.*

110. *Id.* at 57 (Stevens, J., dissenting) (“The Act gives Indian tribes certain rights, not to restrict the rights of parents of Indian children, but to complement and help effect them”).

111. *Id.* at 53 (majority opinion).

112. 133 S. Ct. 2552 (2013).

113. Brief for Appellee-Respondent at 18, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12-399). The trial court found that Birth Father’s heritage and culture were very important to him, that he and his extended family reflected their culture at home, and that Birth Father had strong cultural ties to the Cherokee Nation. *Id.*

114. Brief for Petitioners at 17, *Adoptive Couple*, 133 U.S. 2552 (No. 12-399).

115. Suzette Brewer, *The Fight for Baby Veronica, Part I*, INDIAN COUNTRY TODAY MEDIA NETWORK (May 6, 2013), <http://indiancountrytodaymedianetwork.com/2013/05/06/fight-baby-veronica-part-i-149219>, archived at <http://perma.unl.edu/FA6B-NUX9>.

116. Brief of Birth Mother, as Amicus Curiae Supporting Petitioners, at 5, *Adoptive Couple*, 133 U.S. 2552 (No. 12-399).

117. Brief for Petitioners, *supra* note 114; Brief of Birth Mother, *supra* note 116.

118. Brief for Appellee-Respondent, *supra* note 113, at 7; Brief for Petitioners, *supra* note 114, at 21.

to pay child support or relinquish his rights.¹¹⁹ He agreed to relinquish, assuming he would be relinquishing to her.¹²⁰ But Birth Mother had decided to place Baby Girl up for adoption.¹²¹ She selected Adoptive Couple of South Carolina.¹²² In the final months of pregnancy, Adoptive Couple frequently spoke with and financially supported Birth Mother.¹²³ They were present at Baby Girl's birth in September of 2009.¹²⁴ The next day, Birth Mother relinquished her parental rights and three days later, Adoptive Couple filed adoption papers in South Carolina.¹²⁵

Birth Mother was aware that Birth Father was an enrolled member of the Cherokee Nation and this could affect the adoption.¹²⁶ About a month prior to the birth, Birth Mother's attorney contacted the Nation about Birth Father's enrollment status.¹²⁷ The letter misspelled Birth Father's first name.¹²⁸ It also provided the wrong birth date and year for him.¹²⁹ The Nation responded it could not identify Birth Father as a member, with the caveat any incorrect information could "invalidate this determination."¹³⁰

Although adoption papers were filed days after Baby Girl's birth, Birth Father was not notified until January of 2010.¹³¹ He signed the Acceptance of Service notice presented to him, stating he would not contest the adoption, and almost immediately realized he would not be relinquishing to Birth Mother, but to strangers.¹³² The next day, he

119. Brief for Appellee-Respondent, *supra* note 113, at 7; Brief of Birth Mother, *supra* note 116.

120. Brief for Appellee-Respondent, *supra* note 113.

121. Brief of Birth Mother, *supra* note 116.

122. *Id.*

123. *Id.*

124. *Id.*

125. Brief for Appellee-Respondent, *supra* note 113, at 10.

126. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 554 (S.C. 2012), *rev'd*, 133 S. Ct. 2552 (2013) ("[S]he testified she knew that if the Cherokee Nation were alerted to Baby Girl . . . 'some things were going to come into effect, but [she] wasn't for [sic] sure what.'" (alterations in original)).

127. Brief for Petitioners *supra* note 114, at 8.

128. *Id.* at 19–20.

129. Brief for Appellee-Respondent, *supra* note 113, at 9.

130. *Adoptive Couple*, 731 S.E.2d at 554. Whether these "mistakes" were intentional remains a contentious point. Birth Mother states she notified her attorney the letter was inaccurate. *Id.* Birth Father believes the misrepresentations were purposeful because "[they] were essential to the progress of the adoption." Brief for Appellee-Respondent, *supra* note 113, at 10. The South Carolina Supreme Court concluded, "[T]here were some efforts to conceal [Birth Father's] Indian status." *Adoptive Couple*, 731 S.E.2d at 554.

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

132. *Id.* Birth Father appeared genuinely shocked that Baby Girl was being adopted. He attempted to grab the paper he had just signed, with the intent to destroy it. Birth Father testified the process server told him, "I would be going to jail if I was to do any harm to the paper." *Id.*

requested a stay of the adoption proceedings and three days later, filed a summons and complaint to establish paternity and custody.¹³³ Eight days after being notified his child was up for adoption, Birth Father deployed to Iraq.¹³⁴ Also in January of 2010, the Cherokee Nation correctly identified Birth Father as a registered member and determined Baby Girl was an Indian child for the purposes of ICWA.¹³⁵

B. Opinions Below

In November of 2011, the case came before the Charleston County Family Court. The judge found Adoptive Couple had failed to prove Birth Father's parental rights should be terminated, given the heightened standards employed by ICWA.¹³⁶ The court granted custody of Baby Girl to Birth Father.¹³⁷ She returned to Oklahoma while Adoptive Couple started the appeal process.¹³⁸

The South Carolina Supreme Court affirmed the lower court.¹³⁹ The majority agreed Birth Father qualified as a parent under ICWA¹⁴⁰ and was entitled to its protections. Under ICWA, his voluntary consent to the termination of his parental rights had to be executed in writing, and recorded before a judge, not just texted.¹⁴¹ In addition, ICWA gave Birth Father the ability to withdraw his consent at any time prior to the entry of a final adoption decree.¹⁴² Since Birth Father never signed anything other than the Acceptance of Service and his subsequent legal campaign was evidence of withdrawn consent, the court found any termination of parental rights would have to be involuntary.¹⁴³ ICWA's high standards made this task impossible. No active efforts were taken to prevent the termination of Birth Father and Baby Girl's relationship,¹⁴⁴ nor could Adoptive

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 556.

137. *Id.*

138. *Id.*

139. *Id.* at 564.

140. Under ICWA, a parent is "any biological parent of an Indian child" excluding unwed fathers whose paternity has not been acknowledged or established. 25 U.S.C. § 1903(9) (2012). An "Indian child" is any unmarried individual under eighteen who is either a member of an Indian tribe or eligible to be and the biological child of a member. § 1903(4).

141. *Id.* § 1913(a).

142. § 1913(c).

143. *Adoptive Couple*, 731 S.E.2d at 561.

144. 25 U.S.C. § 1912(d) (2012).

Couple prove Birth Father's custody of Baby Girl would result in serious emotional or physical harm to her.¹⁴⁵

C. Supreme Court Opinion

The Supreme Court of the United States disagreed, reversing in a five-to-four decision. In the Court's opinion, the "mischief" ICWA was designed to combat "was the unwarranted *removal* of Indian children from Indian families."¹⁴⁶ ICWA's provisions regarding involuntary termination of parental rights mean "Indian parents who are already part of an 'Indian family' are provided with access to 'remedial services . . . under § 1912(d) so that their 'custody' might be 'continued' in a way that avoids . . . termination of parental rights under § 1912(f)."¹⁴⁷ They mean nothing to a father who never had custody of his child.

IV. ANALYSIS

It is difficult, if not impossible, to be charged with the task of deciding who a little girl should call "mommy" and "daddy" and remain completely objective. The Supreme Court opinion made clear the Justices were concerned about Baby Girl's welfare. As the majority told her story, Baby Girl was "taken, at the age of 27 months, from the only parents she had ever known"¹⁴⁸ and given to her biological father who had never made any "meaningful attempts to assume his responsibility of parenthood,"¹⁴⁹ indeed, had "abandoned" her.¹⁵⁰ Concern about allowing other fathers to "play [their] ICWA trump card at the eleventh hour"¹⁵¹ to the detriment of their children, comfortably settled in other families, compelled the Court to its conclusion. However, its means of getting there trampled Congress's deliberate and careful construction of a statute that required the opposite result.

145. § 1912(f); *Adoptive Couple*, 731 S.E.2d at 564. The court believed Baby Girl would be pained by her separation from Adoptive Couple, the only parents she had ever known, but recognized the issue was whether she would be harmed by being given to her Birth Father. The court noted Birth Father had attempted to intervene early and the bonding between Baby Girl and Adoptive Couple had taken place mostly during the course of litigation, so that bond should not be held against him. *Id.*

146. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2561 (2013) (emphasis in the original).

147. *Id.* at 2563.

148. *Id.* at 2556.

149. *Id.* at 2558.

150. *Id.* at 2557. The dissent agreed that removing Baby Girl from Adoptive Couple's home would be upsetting to her. *Id.* at 2585 (Sotomayor, J., dissenting) ("I have no wish to minimize the trauma of removing a 27-month-old child from her adoptive family.").

151. *Id.* at 2565.

A. Birth Father Is a Parent Under ICWA and Should Have Been Afforded Its Protections

The Court began its analysis by remarking, “[w]e need not—and therefore do not—decide whether Biological Father is a ‘parent.’”¹⁵² In a case revolving around termination of *parental* rights, this statement is absurd. ICWA defines a parent as “any biological parent . . . of an Indian child . . . [excluding] the unwed father where paternity has not been acknowledged or established.”¹⁵³ Since Birth Father both acknowledged his paternity and requested a test to establish it, neither exclusion applied.¹⁵⁴ Under the statute, an “Indian child” is an unmarried person under eighteen, eligible for tribal membership and “the biological child of a member of an Indian tribe.”¹⁵⁵ Baby Girl met these conditions. By virtue of being a biological parent of an Indian child, Birth Father should have been privy to ICWA’s protections, such as its requirements of active reunification efforts¹⁵⁶ and heightened burdens of proof.¹⁵⁷

The Court argued this reading undermines a mother’s rights by creating a “trump card” that allows a biological father to override a birth mother’s decision to place their child up for adoption.¹⁵⁸ It does not. First, Birth Mother could have invoked ICWA herself should she have chosen to revoke her consent for the adoption because ICWA’s protections flow from the child, not through the parents.¹⁵⁹ In other words, the fact that Baby Girl is an Indian child under ICWA means both Birth Father and Birth Mother could have relied on ICWA, even though Birth Mother is not herself Indian. Second, mothers have a relationship with their children that fathers do not and cannot, simply by virtue of carrying and delivering a baby.¹⁶⁰ In this sense, ICWA attempts to level the playing field, ensuring the biological relationship between mother and child does not preclude father from being involved. This is especially important in cases like this, where the evi-

152. *Id.* at 2560.

153. 25 U.S.C. § 1903(9) (2012).

154. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 555–56 (S.C. 2012), *rev’d*, 133 S. Ct. 2552 (2013).

155. § 1903(4).

156. *Id.* § 1912(d).

157. § 1912(f).

158. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2564 (2013).

159. See § 1903(9) (using the biological or legal connection to an Indian child as the foundation for defining “parent”).

160. See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 71 (1976) (holding when a potential mother and father disagree as to whether to terminate a pregnancy, the woman’s decision trumps because she is most “directly and immediately affected”); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894–95 (1992) (striking down a provision of a law requiring a wife to notify her husband of her decision to seek an abortion because it imposes a “substantial obstacle” on what a woman’s choice is).

dence suggests Birth Mother concealed from, or at least misled, Birth Father in what she was doing with their baby.¹⁶¹ Finally, the Supreme Court has recognized that fit and capable biological fathers should have the option of raising their own children.¹⁶² Exercising this option is key; the Court looks for a substantial relationship between parent and child.¹⁶³ If an unwed biological father fails to cultivate a relationship with his child while the mother does, no one is obligated to listen to his opinions about the child's upbringing.¹⁶⁴ But where the mother and father are similarly situated in their parent-child relationship, states cannot mute unwed fathers' voices.¹⁶⁵

Birth Mother and Birth Father were similarly situated since neither played any role in the first four months of Baby Girl's life.¹⁶⁶ As a result, her voice should not have been the only one relevant in Baby Girl's adoption.¹⁶⁷ This case is also easily distinguishable from prior Supreme Court father's-rights cases in terms of timing,¹⁶⁸ the presence of a federal statute, and the fact Birth Father faced an extended war-time deployment overseas days after learning of his daughter's pending adoption.¹⁶⁹ Under these circumstances, if a biological mother decides at birth to sever all her ties to a child, a capable biological father should have the first opportunity to step in.

If Congress meant to exclude unwed fathers no longer involved with an Indian child's mother at birth from ICWA, it would have. The testimonial history of ICWA gave Congress ample opportunity to con-

161. *See supra* note 130.

162. *See, e.g.*, *Lehr v. Robertson*, 463 U.S. 248, 262 (1983) ("[T]he biological connection . . . 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 . . ."); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . .").

163. *Lehr*, 463 U.S. at 266.

164. *Id.* at 262-267; *see also* *Quilloin v. Walcott*, 434 U.S. 246 (1978) (holding an unwed father who had no contact with his eleven-year-old daughter and sought custody of her could not block her adoption by her mother and her mother's husband by refusing to consent to it).

165. *Caban v. Mohammed*, 441 U.S. 380, 394 (1979).

166. Full disclosure of Birth Mother's action would have likely changed Birth Father's role, however. *See supra* notes 131-34 and accompanying text.

167. *Caban*, 441 U.S. at 394.

168. The father in *Lehr* was not identified as the child's father until one month after the adoption petition was filed, by which time the child was already two. Nor did he bother to register on New York's putative father registry, which would have entitled him to notice of any adoption proceeding. *Lehr*, 463 U.S. at 250-253. In *Quilloin*, the father waited eleven years to claim his son as his own in the hopes of stopping his adoption, although he did not seek custody of his child or object to his continued placement with his adoptive parents. *Quilloin*, 434 U.S. at 247. It should also be noted that both cases involved formal adoption of the children by their biological mothers' husbands.

169. *See supra* note 134 and accompanying text.

template unwed, absent fathers and broken relationships.¹⁷⁰ Congress undoubtedly considered interracial relationships and how those ought to be treated, too.¹⁷¹ Census data indicated interracial relationships were on the rise. In 1960, the Census found 29,000 American Indian/white couples.¹⁷² By 1970, that number had grown to 85,000 and by 1980, two years after the passage of ICWA, interracial American Indian/white couples numbered 245,000.¹⁷³

Congress even had warning ICWA could lead to undesirable consequences because of the protections it afforded unwed and (potentially) uninvolved parents. The National Congress of American Indians cautioned the bill diminished the ability of a biological parent to make decisions regarding adoptive placements without court involvement.¹⁷⁴ In effect, every time an Indian child's parent, whether Indian or not, decided to do something with that child, the court, the tribe, and the other parent would all be parties to the action, with the ability to derail it or at least substantially hinder it. In words particularly accurate considering Baby Girl's case, the National Congress wrote: "A parent's wish should not be the sole controlling element in the overturning of a placement. Because [a] placement is technically invalid or legally defective, it does not follow that return to the parent . . . is to the child's advantage. Again, the paramount standard must be the child's best interest" ¹⁷⁵

170. Several (perhaps even the majority of) women testifying before congressional committees represented themselves as single mothers. *See 1974 S. Hearing, supra* note 12, at 42, 51 (Sen. Abourezk questioning the involvement of a father); *id.* at 224; *1977 S. Hearing, supra* note 23, at 423 (statement of Charlotte Tsoi Goodluck and Flo Eckstein) (observing many fathers tended to be casual, not close, friends of the mother with little interest in assuming paternal responsibility).

171. *See 1974 S. Hearing, supra* note 12, at 118 (statement of Mel Sampson) (discussing the adoption of a biracial child); *id.* at 125, 154; *see also Indian Child Welfare Act of 1978: Hearing on S. 1214 Before the H. Subcomm. on Indian Affairs and Public Lands of the Comm. on Interior and Insular Affairs, 95th Cong. 87* (1978) (statement of Sister Mary Clare, director of Catholic Social Services of Anchorage Alaska) ("This bill gives priority to the preservation of a culture. While we strongly support such preservation, we urge that the interests of the natural parents and the welfare of the child be given priority in any circumstances where those goals clash."). In response, one Congressman proposed amending the bill to allow unwed mothers to waive notice being tendered to the tribe. *Id.* at 89. That proposed amendment is not reflected in the enacted version of ICWA. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–63 (2012).

172. U.S. Census Bureau, *Race of Wife by Race of Husband*, INTERRACIAL TABLES, <http://www.census.gov/population/www/socdemo/interrace.html> (last visited Sept. 6, 2014), *archived at* <http://perma.unl.edu/DZC9-SFKN>.

173. *Id.*

174. *1977 S. Hearing, supra* note 23, at 90 (written testimony of the National Congress of American Indians).

175. *Id.* at 99.

The warning did not lead to Congress changing any rights of unwed parents. Instead, Congress limited ICWA's scope by exempting only divorce custody proceedings¹⁷⁶ and unwed fathers whose paternity has not been established or acknowledged.¹⁷⁷

Congress has declined to amend the statute to require some form of contact beyond biology between a parent, a tribe, and an Indian child. It has held this position even in the face of evidence ICWA's presence creates problems when ICWA children have little or no contact with their Indian parent and his or her tribe. Most frequently, these problems are raised in adoption cases, where, as here, the proceedings are nearly complete but interrupted by ICWA sanctioned interventions. Rep. Deborah Pryce proposed limiting ICWA¹⁷⁸ by applying it only if at least one biological parent was of Indian descent and maintained "significant social, cultural, or political affiliation with the tribe."¹⁷⁹ The proposal received strong condemnation from the Native community¹⁸⁰ and was voted down.¹⁸¹ The law as left should include Birth Father in its protections. But this did not take the majority where it believed the case ought to have gone. Ignoring the message in *Holyfield* that ICWA should be applied uniformly,¹⁸² the Court appeared to content itself with using state definitions of "parent"¹⁸³ and moved on.

176. 25 U.S.C. § 1903(1).

177. § 1903(9).

178. Her motivation came from a family in her district, engaged in a heated tribal court battle, because it was discovered the twin girls they had raised for nearly three years and were adopting had a great-great-great-grandparent identified as a Pomo Indian and the tribe sought jurisdiction. 142 CONG. REC. H4166 (daily ed. Apr. 30, 1996) (statement of Rep. Pryce).

179. H.R. REP. NO. 104-542, pt. 1, at 2 (1996).

180. *Id.* The consensus was ICWA generally worked and the amendment would put state courts back in their pre-ICWA position of managing Indian adoptions and ignoring cultural relationships that extend beyond immediate families. Twenty-two tribes, the National Congress of American Indians (representing 201 tribes), and multiple associations all wrote letters in opposition. *Id.* at n.1.

181. 104 CONG. REC. H4821 (daily ed. May 10, 1996).

182. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 44–45 (1989) (“[M]ost fundamentally, the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term; quite the contrary. It is clear from the very text of the ICWA, not to mention its legislative history and the hearings that led to its enactment, that Congress was concerned about the rights of Indian families and Indian communities vis-à-vis state authorities.”).

183. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2559 (2013) (“Biological Father would have had no right to object to her adoption under South Carolina law.”). The Court also references Birth Father's rights, or lack thereof, under Oklahoma law. *Id.* at 2562.

B. ICWA Does Not Support the Interpretation the Court Gave It

Because the Court could not make a strong argument for ICWA's inapplicability by questioning Birth Father's status as a parent, it framed its entire argument around two words, "continued" and "breakup." The Court reasoned § 1912(f) and its requirement of evidence beyond a reasonable doubt that continued custody by the parent is likely to result in serious emotional or physical damage to the child was inapplicable because Birth Father never had custody of Baby Girl.¹⁸⁴ Likewise, § 1912(d), providing for active efforts to prevent the breakup of the Indian family, was inapplicable because, the Court concluded, Birth Father and Baby Girl never had a relationship; there was nothing to "breakup."¹⁸⁵ Justice Sotomayor, writing in dissent, criticized this method. "[T]he majority begins its analysis by plucking out of context a single phrase from the last clause of the last subsection of the relevant provision, and then builds its entire argument upon it. That is not how we ordinarily read statutes."¹⁸⁶ Even if the Court did interpret statutes by focusing on a few words and phrases, the words here still do not support the outcome.

1. Congress Did Not Intend to Require a Parent to Have Had Prior Custody in Order to Invoke ICWA's Protections

As the Court saw it, "[t]he adjective 'continued' plainly refers to a preexisting state."¹⁸⁷ Justice Scalia rejected this definition, seeing "no reason that 'continued' must refer to custody in the past rather than custody in the future."¹⁸⁸ There is no basis in the statute for this conclusion, either. Congress has explicitly rejected any requirement that a child have a preexisting connection with his or her Indian heritage in order to be subject to the statute's requirements.¹⁸⁹ A draft version of ICWA required, as a prerequisite to tribal-court jurisdiction, that an Indian child have "significant" contacts with the tribe,¹⁹⁰ but that requirement does not appear in the enacted version.¹⁹¹ It makes little sense for Congress to have explicitly rejected, numerous times, a requirement for preexisting ties with an entity, yet indirectly intend to require them for a relationship between individuals as closely related as father and daughter.

184. *Id.* at 2560.

185. *Id.* at 2562.

186. *Id.* at 2572 (Sotomayor, J., dissenting).

187. *Id.* at 2560 (majority opinion).

188. *Id.* at 2571 (Scalia, J., dissenting).

189. See H.R. REP. NO. 104-542, pt. 1 (1996) (proposing an amendment to ICWA requiring significant connections between an Indian child and tribe, but voted down); 104 CONG. REC. H4821 (daily ed. May 10, 1996).

190. Indian Child Welfare Act, S. 1214, 95th Cong. § 102(c) (1977).

191. 25 U.S.C. §§ 1901-34 (2012).

Comparing the word “continued” with the word “returned” further demonstrates what Congress had in mind. In § 1913(c), Congress allows a biological parent to withdraw voluntary relinquishment of parental rights at any time prior to the entry of a final decree of adoption.¹⁹² If the parent does withdraw consent, the child is “returned” to him or her.¹⁹³ This provision is a response to testimony Congress heard regarding biological mothers who delivered Indian babies and immediately relinquished custody to a set of adoptive parents, then regretted that decision.¹⁹⁴ These mothers could have had no contact with their newborn; never touched or held them, much less named or cared for them. Yet, Congress believed sheer biology established a strong enough preexisting bond between these women and their children that there was something to *return* the infant to. Certainly, the bond established in these cases is no greater than established between Birth Father and Baby Girl,¹⁹⁵ further undermining the majority’s attempt to make the word “continued” a focal point. Even if Birth Father never had physical custody of Baby Girl, prior Supreme Court jurisprudence holds biological fathers have a connection with their children based on biology alone.¹⁹⁶

2. *The Court’s Construction of “Continued” Amounted to an Amendment of the Statute, Expanding the Types of Parents Excluded from ICWA*

The Supreme Court opinion in *Adoptive Couple* effectively amended the statute by adding to the list of parents not eligible for ICWA protections. Congress purposely did not extend ICWA’s protections to fathers who have not acknowledged or established their paternity.¹⁹⁷ Now, that list includes parents who never have custody of their child. The Court’s action is particularly concerning considering the impact it will have on parents, predominately fathers, who are never given the opportunity to have a custodial relationship with their child. The majority “conclude[d] that ICWA’s *substantive* protections are available only to a subset of ‘parent[s]’: those who have previously had physical or state-recognized legal custody of his or her child.”¹⁹⁸

192. *Id.* § 1913(c).

193. *Id.*

194. Several witnesses recounted stories of young girls being hounded by welfare workers to place their infants up for adoption while still in the hospital. *See 1974 S. Hearing, supra* note 12, at 154 (statement of Mary Ann Lawrence); *id.* at 68 (statement of Cheryl Spider DeCoteau).

195. By the time the case reached the Supreme Court, Baby Girl had been in Birth Father’s physical custody for over a year. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 556 (S.C. 2012), *rev’d*, 133 S. Ct. 2552 (2013).

196. *See supra* note 162 and accompanying text.

197. 25 U.S.C. § 1903(9).

198. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2575 (2013) (Sotomayor, J., dissenting) (second alteration in original).

What of biological fathers who are unaware of their child's existence because it is concealed from them, or fathers who are in prison, or like Birth Father, absent overseas, serving their country? What of noncustodial fathers who pay child support and routinely visit? Suppose the custodial parent places the child, for whatever reason, up for adoption, or the child is involuntarily removed from the custodial home. Under the majority's construction of the statute, these parents would not be privy to ICWA's heightened protections because, although they participate in their child's upbringing, they never have custody. The majority admitted as much, but dismissed such concerns as likely limited to a "relatively small" number of cases.¹⁹⁹ The Court ignored the many relationships worth preserving that do not take custodial form—sibling, grandparent, friendship, communal ties, to name a few. Instead, the Court interpreted the law to reflect what five people think a family should act like. Justice Sotomayor, dissenting, believed this was wrong:

In an ideal world, perhaps all parents would be perfect. They would live up to their parental responsibilities by providing the fullest possible financial and emotional support to their children. . . . In an ideal world parents would never become estranged and leave their children caught in the middle. But we do not live in such a world. Even happy families do not always fit the custodial-parent mold for which the majority would reserve ICWA's substantive protections; unhappy families all too often do not. They are families nonetheless. Congress understood as much.²⁰⁰

The requirement of previous custody in order to qualify for ICWA protections is circular, especially in this case. Birth Father fought to have custody of his daughter from the day he learned she was no longer living with Birth Mother.²⁰¹ Because he was never given the opportunity to have custody, he has no custody that can be continued and is therefore denied custody forever.

3. *ICWA's Idea of "Breakup" Connotes Far More than the Court Allowed It To*

In light of the statute's history and stated purpose, the Court's construction of the word "breakup" is even more troubling. Relying on the American Heritage Dictionary, the Court defined breakup as a "discontinuance of a relationship,"²⁰² and concluded when an Indian child has never been in the parent's custody, there is no relationship to be

199. *Id.* at 2563, n.8 (majority opinion). Why the interests of a small group should or can be sacrificed for convenience is not addressed and is particularly ironic given ICWA's purpose of protecting the interests of a minority from the actions of the majority.

200. *Id.* at 2584 (Sotomayor, J., dissenting).

201. *See Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 555 (S.C. 2012), *rev'd*, 133 S. Ct. 2552 (2013).

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

discontinued.²⁰³ “Says who? Certainly not the statute,” the dissent countered.²⁰⁴ ICWA’s vision of termination of parental rights is broad, meaning any action resulting in the termination of the parent–child relationship.²⁰⁵ Likewise, interpretations from the Bureau of Indian Affairs advance a broad construction of the word breakup.²⁰⁶ A parent–child relationship goes beyond physical or legal custody. In the words of an earlier Court, “[t]he tangible fibers that connect parent and child have infinite variety.”²⁰⁷

The entire history of ICWA makes apparent this is even more so in Indian culture. Congress specifically found ICWA was necessitated by the fact administrative and judicial bodies “failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”²⁰⁸ As the congressional committees heard time and time again, applying a white standard of what constitutes a parent–child relationship ignores tribal culture and custom and fails Indian parents and their children.²⁰⁹ From an Indian cultural perspective, the question of whether a relationship exists between parent and child at birth is answered with a simple yes. The perplexing question is how such a relationship can be severed. “The spiritual bonds between . . . child and family, as acknowledged in native peoples’ cultural beliefs, make severance incomprehensible.”²¹⁰ Even in traditional Indian adoptions, ties between a child and his or her biological parents were not terminated²¹¹ and biological parents frequently continued to be involved in the child’s life.²¹²

Considering ICWA was enacted because of the application of white, middle class cultural standards, it is ironic the majority turned to the

203. *Id.*

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

205. 25 U.S.C. § 1903(1)(ii) (2012). Note that the idea of a parent–child relationship is not defined in the statute by the presence or absence of custody. *Id.*

206. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,592 (Nov. 26, 1979) (not codified) (stating breakup is not synonymous with divorce alone).

207. *Lehr v. Robertson*, 463 U.S. 248, 256 (1983).

208. 25 U.S.C. § 1901(5) (2012).

209. *See generally* 1974 S. Hearing, *supra* note 12; 1977 S. Hearing, *supra* note 23.

210. Brooks, *supra* note 59, at 665 (footnotes omitted).

211. Barbara A. Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577, 615 (2000) (describing “a more fluid concept of child rearing in which biology and formal adoption are not the only routes to the obligations and responsibilities of parenthood”).

212. *Id.* at 616; *see also* Brooks, *supra* note 59, at 665 nn.31–32 (noting the words “orphan,” “illegitimate” and “adoption” are unrecognized in any of the 252 living Native languages and that adoption, tribally speaking, is the child choosing a substitute parent) (citing Manuel P. Guerrero, *Indian Child Welfare Act of 1978: A Response to the Threat to Indian Culture Caused by Foster and Adoptive Placements of Indian Children*, 7 AM. INDIAN L. REV. 51, 52–56 (1979)).

American Heritage Dictionary to define breakup. But even in plain, Anglo-American English, to conclude a breakup is simply a discontinuance of a relationship is to stop short of the word's full meaning and connotation. A breakup goes beyond the relationship. It severs one from family and friends, from places, belongings, traditions, and stories.²¹³ ICWA is a congressional attempt to prevent exactly this, recognizing tribal continuance depends on children.²¹⁴

There are some things a breakup does not sever. Baby Girl and Birth Father will always have a relationship that runs skin deep. Of course, this is true of any birth parent and child relationship. But in a society that has moved closer to, but has yet to achieve, judgment solely on character content and not color, that concern is particularly acute here. Part of ICWA's purpose was to protect Indian children themselves from the crippling effects of being raised in a majority cultural setting and then denied that identity upon reaching adolescence.²¹⁵ A psychiatrist testified that adult Indian adoptees remembered when they were children "seeing cowboys and Indians on TV and feeling that Indians were a historical figure."²¹⁶ But when these same children reached adolescence, their skin color became their identification. Parents of white children discouraged interracial dating; job opportunities and bank loans were mysteriously less available than they were for white peers.²¹⁷ "[S]ociety was putting on them an identity which they didn't possess and . . . which they really [didn't] know how to behave in."²¹⁸ This identity confliction manifested itself in long-term emotional problems in adulthood.²¹⁹ Adult Indian adoptees have been found to have higher rates of chemical dependence, social disability and psychological problems, including schizophrenia, and post traumatic stress disorder.²²⁰

213. For a discussion of the effects of family breakups on children, see, for example, Nekima Levy-Pounds, *Children of Incarcerated Mothers and the Struggle for Stability*, 2 AM. U. MODERN AM. 14 (2006); Phillip R. Shaver et al., *What's Love Got to Do with It? Insecurity and Anger in Attachment Relationships*, 16 VA. J. SOC. POL'Y & L. 491 (2009).

214. 25 U.S.C. § 1901(3) (2012); Metteer, *supra* note 10, at 651–52.

215. 1974 S. Hearing, *supra* note 12, at 46–49 (statement of Dr. Joseph Westermeyer, Dept. of Psychiatry, University of Minnesota); *id.* at 6 (statement of William Byler, Executive Director, Association of American Indian Affairs) ("In our efforts to make Indian children white, I think it's clear that we're destroying them.").

216. 1974 S. Hearing, *supra* note 12, at 46 (statement of Dr. Joseph Westermeyer, Dept. of Psychiatry, University of Minnesota).

217. *Id.*

218. *Id.* at 46–49

219. Felicia Bertin Rocha, *Iowa ICWA: Practical Considerations for Practitioners, Social Workers and Service Providers*, THE IOWA LAW., July 2005, at 5–6 archived at <http://perma.unl.edu/A9ZH-HHP9>. Collectively, these problems are referred to as Split Feather Syndrome.

220. See *ICWA from the Inside Out: 'Split Feather Syndrome,'* MINN. DEPT. OF HUMAN SERVS. (July 2005), <http://www.dhs.state.mn.us/main/groups/children/documents/>

Concerns about the impact of interracial adoptions are not limited to Indian-child, white-parent relationships. But ICWA is a specific instance of Congress recognizing and regulating the effects of cross-cultural adoptions. The majority argued allowing Indian parents greater protection to foster relationships with their biological children, solely on the basis of race, raised equal protection concerns.²²¹ The Court however has a long history of recognizing federal legislation specifically singling out Indians and tribes as “expressly provided for in the Constitution.”²²² Such classification is not racial, but rather recognizes tribes as separate quasi-sovereigns.²²³

Prior Supreme Court jurisprudence makes clear the Court here was not casting its net wide enough in identifying the parties of the supposed breakup. By making the Indian family consist of just Baby Girl and Birth Father, the Court ignored its own precedent. In *Holyfield*, the Court found Congress in enacting ICWA was concerned not only with the interests of Indian children and families, but the tribes themselves.²²⁴ Fundamentally, it is impossible to envision a law that both forbids two consenting parents from breaking up any relationship between the tribe, themselves and their babies (*Holyfield*), and denies a willing biological father, backed by the tribe, the right to continue a relationship with his child (*Adoptive Couple*). ICWA is that law.

4. *What Place for the Existing Indian Family Exception?*

The Court’s interpretation of ICWA is further weakened by the fact it never mentioned the existing Indian family doctrine.²²⁵ Factually, this case is representative of the types of cases state courts that recognize the exception have applied the doctrine to.²²⁶ Both parties brought up the existing Indian family exception in their briefs.²²⁷ While state court decisions and interpretations of federal law are by no means binding on the Supreme Court, the Court ignored an already existing doctrine that reached the place it wanted to get to. State

pub/dhs16_180049.pdf, archived at <http://perma.unl.edu/4XBA-CB9E>; Peter Menzies, Clinic Head, Aboriginal Services Centre for Addiction and Mental Health, Address at University of Toronto: Overview Aboriginal Mental Health (June 17, 2009).

221. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013).

222. *United States v. Antelope*, 430 U.S. 641, 645 (1977).

223. See, e.g., *Morton v. Mancari*, 417 U.S. 535, 554–55 (1974) (upholding federal hiring standards preferring Native Americans in the filling of Bureau of Indian Affairs vacancies).

224. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49 (1989).

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

226. See, e.g., *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982); *In re Adoption of Baby Boy D.*, 742 P.2d 1059 (Okla. 1985).

227. Brief for Appellee-Respondent, *supra* note 113, at 27; Brief for Petitioners, *supra* note 114 at 51–53.

courts have debated the doctrine for over thirty years.²²⁸ They have decided hundreds of cases on similar facts, while this is a case of first impression for the Supreme Court.²²⁹ Over three decades, these state courts have fashioned opinions that thoroughly address the justifications for accepting or rejecting the doctrine. Stating ICWA only applies to existing Indian families and justifying this statement the same way the state courts have would have been much simpler than the complex, and ultimately unsuccessful, dance revolving around “continued” and “breakup.”

C. Applying ICWA to Noncustodial Parents Does Not Raise Public Policy Concerns

Lastly, the Court argued the interpretation of ICWA given by South Carolina's Supreme Court would raise grave public policy concerns by essentially rendering Indian children unadoptable.²³⁰ The Court feared that if an Indian child adoption could be derailed “at the eleventh hour” by a parent playing an “ICWA trump card,” prospective adoptive parents would think twice before considering an Indian child.²³¹ In light of ICWA's history, Congress undoubtedly did intend to make Indian child adoptions more difficult.²³² If adoption was necessary, then Congress specified it preferred children remain in the Indian community.²³³ While the Court may have felt these were bad public policies, and indeed they may be, Congress, not the Court, is charged with creating them.²³⁴ Besides, characteristics other than race tend to be bigger “deal breakers” for potential adoptive parents. Age and disability are the biggest obstacles to a child seeking adoption. Only thirty percent of potential adoptive mothers would consider adopting a child with a severe disability or older than thirteen.²³⁵ In contrast, nearly ninety-five percent of potential adoptive mothers would be willing to adopt a child of another race, not white or black.²³⁶

228. Kansas was the first jurisdiction to recognize the existing Indian family exception, in 1982. *In re Adoption of Baby Boy L.*, 643 P.2d 168.

229. *See, e.g.*, cases cited *supra* notes 77–101 and accompanying text.

230. *Adoptive Couple*, 133 S. Ct. at 2565.

231. *Id.*

232. *See supra* text accompanying notes 40 and 41.

233. 25 U.S.C. § 1915(a) (2012) (“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.”).

234. U.S. CONST. art. I, § 1.

235. U.S. DEP'T OF HEALTH & HUMAN SERVS., ADOPTION EXPERIENCES OF WOMEN AND MEN AND DEMAND FOR CHILDREN TO ADOPT BY WOMEN 18–44 YEARS OF AGE IN THE UNITED STATES, 2002, at 33 tbl.15 (2008), archived at <http://perma.unl.edu/9RA9-957Y>.

236. *Id.*

The Court should have been more concerned with the policy its holding impliedly endorses. By making ICWA applicable only if there is some form of custodial relationship, the Court encourages miscommunication and perhaps even fraud in ICWA adoption cases. Defeating a birth father's attempts to disrupt an adoption with ICWA, the Court whispers, can be done. Just hold out as long as possible before notifying him because the courts will not and, in fact, now cannot, recognize he has any relationship, save custodial, with his child, regardless of *why* that is.

After *Adoptive Couple*, should rates of Indian child adoptions fall, the most likely cause will be potential adoptive parents hesitant to wade into the mess the Court has created of ICWA. *Adoptive Couple* focused on one part of ICWA, making clear § 1912(d) and (f) no longer apply if the parent never had custody of the child.²³⁷ The Court did not clarify how its holding impacts other sections. For instance, how does this case interact with § 1921, which provides that “[i]n any case where State . . . law . . . provides a higher standard of protection to the rights of the parent[,] . . . apply [that] standard”?²³⁸ Does this mean *Adoptive Couple* is irrelevant in states where fathers of children born out of wedlock have more rights than they do in Oklahoma or South Carolina?²³⁹ If the protections afforded a parent under ICWA depend on state law, *Holyfield's* vision of ICWA being applied uniformly disappears.²⁴⁰ Parents of Indian children and, by extension, tribes, are once again placed in the position Congress sought to remove them from, where protection depends on luck of location.

Even if codified state law does not extend protections to noncustodial parents, judicial law still might, at least in ICWA cases. By failing, again, to address the existing Indian family exception, the Court left open the possibility states could circumvent the Court's holding by rejecting the doctrine, thereby providing a higher standard of protection to Indian parents.²⁴¹ Even if *Adoptive Couple* foreclosed the possibility of rejecting the exception (unlikely, since the opinion makes no mention of it²⁴²), what of states that have already rejected it? Are those precedents overturned, the statutes struck down as conflicting

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

238. 25 U.S.C. § 1921 (2012).

239. For instance, in Nebraska, a biological mother placing a child for adoption has a statutory obligation to inform any possible biological fathers of their right to relinquish and consent to the adoption, or to fight it. NEB. REV. STAT. § 43-104.12 (Reissue 2008). The dissent notes several other states have similar requirements. *Adoptive Couple*, 133 S. Ct. at 2581 (Sotomayor, J., dissenting).

240. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 44–45 (1989).

241. Rejecting the doctrine means parents do not have to have any prior contact with their children or their tribe to invoke ICWA. See, e.g., *In re A.J.S.*, 204 P.3d 543, 549–51 (Kan. 2009); *Leatherman v. Yancey*, 103 P.3d 1099, 1108 (Okla. 2004).

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

with federal law? Many questions linger, but the huge financial and emotional costs of litigating the answers are incentives for both adoptive parents and tribes to not ask them.

Baby Girl herself is evidence of the mess the Court has left. The highest Court had supposedly decided her case, but the path forward proved anything but clear or easy. On remand, the South Carolina Supreme Court stated since ICWA did not apply, state law, which did not require Birth Father's consent to Baby Girl's adoption, did.²⁴³ There was no need to terminate Birth Father's rights because he had none, and the family court was given the green light to finalize the adoption.²⁴⁴ The Oklahoma Supreme Court waded in, issuing a stay to delay a county court order requiring Birth Father to return Baby Girl to Adoptive Couple.²⁴⁵ South Carolina Governor Nikki Haley responded by signing a warrant for Birth Father's extradition to South Carolina to face custodial interference charges and up to five years in prison.²⁴⁶ The United Nations weighed in, commenting on the importance of respecting the rights of indigenous people.²⁴⁷ Oklahoma eventually lifted the stay, allowing Adoptive Couple to regain physical custody of Baby Girl.²⁴⁸ Two weeks later, Birth Father, stating he loved Baby Girl "too much to continue to have her in the spotlight," announced he would drop all pending litigation.²⁴⁹ The tribe agreed to do the same, effectively making Adoptive Couple Baby Girl's forever family.²⁵⁰

243. *Adoptive Couple v. Baby Girl*, 746 S.E.2d 51, 53 (2013), *rev'd*, 133 S. Ct. 2552 (2013).

244. *Id.* at 54.

245. Han Si Lo Wang, '*Baby Veronica*' Custody Battle Continues, Blog post in *Code Switch*, NPR (Sept. 11, 2013, 7:19 PM), <http://www.npr.org/blogs/codeswitch/2013/09/11/221402527/baby-veronica-custody-battle-continues>, archived at <http://perma.unl.edu/59Y-NBMX>. The stay was lifted September 24th without explanation. *Sheriff: No Timeline on Arrival of Capobiancos, Veronica in Lowcountry*, ABC NEWS 4 (Charleston) (Sept. 24, 2013, 12:25 PM), <http://www.abcnews4.com/story/23506646/oklahoma-supreme-court-lifts-stay>, archived at <http://perma.unl.edu/ZR38-LND6>.

246. Michael Overall, *Q&A on 'Baby Veronica' Legal Battles*, TULSA WORLD (Sept. 26, 2013, 1:38 PM), http://www.tulsaworld.com/news/local/q-a-on-baby-veronica-legal-battles/article_9df60fd2-2bee-55c0-b5a8-72dd72ac7f1c.html, archived at <http://perma.unl.edu/BRC5-QDHC>.

247. Ariane de Vogue, '*Baby Veronica*' Custody Case Rages On, blog post in *The Note*, ABC NEWS (Sept. 11, 2013, 2:12 PM), <http://abcnews.go.com/blogs/politics/2013/09/baby-veronica-custody-case-rages-on/>, archived at <http://perma.unl.edu/SM5H-58PH>.

248. *Sheriff: No Timeline on Arrival of Capobiancos*, *supra* note 245.

249. 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, archived at <http://perma.unl.edu/A6PV-3SDQ>.

250. *Id.*

V. CONCLUSION

As they say, hard cases make bad law. *Adoptive Couple* is indicative of this. In an effort to reach what the majority deemed the best outcome, the Justices missed the mark when it came to applying ICWA as Congress intended. The convoluted interpretations the Court gave to words plucked out of the statute severely limit its application and threaten to return Indian tribes to their pre-ICWA position of having their children siphoned away. Congress could respond by explicitly listing whom ICWA's protections flow to, or define the word "breakup" and address what it means by continued custody. Given the current state of Washington affairs, this seems unlikely.²⁵¹ As the aftermath of the Supreme Court decision demonstrates, cases involving ICWA are now likely to remain in limbo, as different courts wrestle with what to do next. Caught in the middle of the storm will be Baby Girls and Boys.

It is also said it takes a village to raise a child. *Adoptive Couple* have promised to keep Baby Girl in contact with her Birth Father and his extended family.²⁵² Cherokee Nation has vowed to hold them to that promise.²⁵³ How much of this is rhetoric in the face of a high-profile case remains to be seen.²⁵⁴ But in the face of language from the Supreme Court discussing breakups, and endings, and narrow ideas of what constitutes a family, the promise of surrounding children with many individuals who love, educate, and care for them should be encouraged and fostered. That is a dream all races and generations should consider worth working towards.

251. The 112th Congress (2011–2012) managed to do more with less, passing the smallest amount of legislation while recording the fifth highest recorded votes total since such statistics have been collected. Chris Cillizza, *The Least Productive Congress Ever*, blog post in *The Fix*, WASH. POST, July 17, 2013, <http://www.washingtonpost.com/blogs/the-fix/wp/2013/07/17/the-least-productive-congress-ever/>, archived at <http://perma.unl.edu/5UAE-FS7A>. The 113th Congress, sitting when this case was decided, looks on track to beat that record, enacting 104 bills two-thirds of the way through its session, the lowest number since data began being tracked. Josh Tauberer, *More on Congressional Productivity, 2/3rds into the 113th Congress*, GOVTRACK (May 24, 2014), <https://www.govtrack.us/blog/2014/05/24/more-on-congressional-productivity-23rds-into-the-113th-congress/>, archived at <http://perma.unl.edu/LH9X-VDEY>.

252. *Sheriff: No Timeline on Arrival of Capobiancos*, *supra* note 245.

253. *Id.*

254. Although it could have been the emotion of the moment, at the press conference announcing he would no longer place his child's life at the center of litigation, Birth Father did not appear too optimistic. Part of his statement was addressed to his daughter in the future. He told her: "One day you will read about this time in your life. Never, ever for one second . . . doubt how much I love you, how hard I fought for you or how much you mean to me." *See generally, supra* note 249.