Adoptive Couple v. Baby Girl: The Creation of Second-Class Native American Parents Under the Indian Child Welfare Act of 1978

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For us as Indians, much is at stake, because it is about nurturing community and culture, while honoring our traditions. After all, we are fond of saying: "The children are our future."[1]

Introduction

In June 2013, the U.S. Supreme Court found that an absentee biological Native American father could have his parental rights terminated without triggering the greater procedural protections afforded to Native American parents under the Indian Child Welfare Act of 1978 (ICWA).[2] In finding that absentee Native American parents are not entitled to the same federal protection under the ICWA regarding the involuntary termination of parental rights, the Court, through judicial fiat, wrote a whole segment of Native American parents out of the ICWA's protection. The Court's justification for reading absentee Native American parental rights out of the statute's protection was the mere speculation that Congress could not have meant to give parents who abandoned their children the same amount of

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1. Michael D. Petoskey, Grand Traverse Band of Ottawa and Chippewa Indians Tribal Member and Tribal Judge, *Foreword* to FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT AT 30, at vii (Matthew L. M. Fletcher et al., eds., 2009) [hereinafter FACING THE FUTURE].

2. Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013); Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–1963 (1983)) [hereinafter the ICWA].

protection of parental rights as those parents who maintain a custodial relationship with their children.[3]

In an historic moment, the U.S. Supreme Court handed down its second of only two decisions construing the ICWA since the statute's enactment.[4] While the media waited with bated breath for two U.S. Supreme Court decisions relating to gay marriage,[5] Native Americans and others in the legal community watched to see whether the U.S. Supreme Court would find the ICWA unconstitutional or severely limit its application.[6] Though the Court's decision in *Adoptive Couple* did not find the ICWA unconstitutional for exceeding Congress's authority under the Indian Commerce Clause or for perpetuating racial discrimination, the majority opinion did unleash a new form of invidious hostility toward Native Americans. The essence of *Adoptive Couple*'s holding is the creation of two classes of Native American parents.[7]

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3. *Adoptive Couple*, 133 S. Ct. at 2561 ("[I]t would be absurd to think that Congress enacted a provision that *permits* termination of a custodial parent's rights, while simultaneously *prohibiting* termination of a noncustodial parent's rights. If the statute draws any distinction between custodial and noncustodial parents, that distinction surely does not provide greater protection for noncustodial parents.").

4. *See* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) (holding that Congress did not intend for state law to define "domiciled" in 25 U.S.C. § 1911(a) and that while the mother gave birth to twin babies off of the Choctaw Reservation, the twin babies' domicile was the Choctaw Reservation because both mother and father were domiciled on the reservation).

5. *See, e.g.*, Richard Wolf, *Supreme Court Gay Marriage Rulings: Anything but Simple*, USA TODAY (June 16, 2013, 8:03 AM), http://www.usatoday.com/story/news/nation/2013/06/16/supreme-courts-gay-marriage-rulings-to-raise-more-questions/2426553/ (describing the potential legal implications of pro-gay-marriage decisions in *Hollingsworth* and *Windsor* an entire ten days before the Court announced those decisions).

6. *See* Marcia Zug, Adoptive Couple v. Baby Girl: *Two-and-a-Half Ways to Destroy Indian Law*, 111 MICH. L. REV. FIRST IMPRESSIONS 46, 49–50, 52 (April 2013), *available at* http://www.michiganlawreview.org/assets/fi/111/Zug.pdf (predicting that the U.S. Supreme Court might find the ICWA unconstitutional because of the Roberts Court's repugnancy toward statutes with racial preferences due to said statutes allegedly perpetuating racism, that the ICWA might be found to exceed Congress' authority under the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, or that the ICWA unconstitutionally invades the residuum of sovereignty historically reserved to the states under the Tenth Amendment of the U.S. Constitution in regulating child custody and adoption proceedings).

7. *See* Transcript of Oral Argument at 19–20, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12-399) (Kagan, J.) ("[W]hat your argument seems to be suggesting is that there are really two classes of parents under the statute, right, that everybody is labeled a parent, but then there are the parents who get the protections of—of the termination of rights provision and the parents who don't."). *See generally*, Leading Cases: *Indian Child Act—Termination of Parental Rights*—Adoptive Couple v. Baby Girl, 127 HARV. L. REV. 368, 373 (2013) (describing *Adoptive Couple* as another development in the Court's parental rights jurisprudence and "the Court's trend toward provisional prioritization of family over biology").

The first class of Native American parents is comprised of those who remain in stereotypical, Anglo-American marital relationships, financially support their children, and exercise parental care over them. This class receives the heightened protection under the ICWA from involuntary termination of their parental rights. The other class of Native American parents ("second-class" parents) is comprised of those absent in a child's life—an amorphous group of parents deemed to have forfeited the parental rights deserving protection under the ICWA merely because of their absence.

In *Adoptive Couple*, the Court failed to differentiate between Native American parents who abandoned their children and those Native American parents absent from a child's life for a period of time, but who might want to be reunited with the child. In 2011, sixty-six percent of all Native American and Alaska Native births were outside of the marriage relationship.[8] In light of this statistic, the Court's decision in *Adoptive Couple* promises to affect more than those parents who society pejoratively labels "deadbeat parents." Moreover, the Court in *Adoptive Couple* removed the federal barrier Congress created to curtail states from vitiating tribal identity and heritage through systemic, state-sanctioned removal of Native American children from Native American homes. *Adoptive Couple* eviscerates the congressional intent of the ICWA, which never distinguishes between the parental rights of custodial Native American parents and noncustodial Native American parents in the context of an involuntary termination of those rights. The decision also re-opens the pathway for hostile state laws and state judicial decisions to work adversely against tribal interests in the Native American parent-child-tribe relationship.[9] This Comment's contention is that Native American children of absentee Native American parents are no less valuable to the preservation of tribal identity than those children of custodial Native American parents.

This Comment argues that the U.S. Supreme Court erred in holding that the ICWA does not apply when a Native American

8. Joyce A. Martin et al., *Births: Final Data for 2011*, 61 Nat'l Vital Statistics Reports 1, at 12 (June 28, 2013), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_01.pdf.

9. *See generally* Robert A. Williams, Jr., *"The People of the States Where They Are Found Are Often Their Deadliest Enemies: " The Indian Side of the Story of Indian Rights and Federalism*, 38 ARIZ. L. REV. 981, 987 (1996) ("History teaches Indian peoples that in a federal system of government, the [W]hite racial power organized through state governments represents the gravest and most persistent threat to Indian rights and cultural survival on this continent.").

parent never had legal or physical custody of his or her child. Part I of this Comment provides the factual background and statutory framework leading up to *Adoptive Couple*, including a synopsis of the South Carolina's state court proceedings and decisions leading to the *Adoptive Couple* decision and a brief overview of the ICWA provisions in controversy. Part II provides a detailed description of the *Adoptive Couple* holding and reasoning. Part III analyzes and critiques the *Adoptive Couple* holding and reasoning through the prism of the ICWA's statutory scheme, with a focus on congressional intent behind enacting the ICWA and the Court's disregard of the Indian law canons of construction in interpreting the federal statute. A crucial component of Part III is the juxtaposition of the *Adoptive Couple* holding and the rationale behind the "Existing Indian Family" exception, a state-created common law exception to the application of the ICWA. This juxtaposition identifies the similarities between the reasoning in *Adoptive Couple* and the "Existing Indian Family" exception and highlights the latter's recent repudiation among state courts for not comporting with the ICWA's legislative purpose and scheme.

Part IV examines how the *Adoptive Couple* holding creates a legal vacuum in determining whether a Native American possesses the *sine qua non* parental status requisite to invoke the ICWA. Unfortunately, if an absentee Native American biological parent is deemed not to fit within the ambit of the ICWA, the individual is not able to object to a child custody or adoption proceeding under the statute. Naturally, since the U.S. Supreme Court found that the ICWA could not have contemplated the federal statute to protect absentee Native American parents, state family law, which is inherently adverse to absentee parents and is insensitive to the federal creation of a unique enclave of protection for Native American parent-child-tribal relationships, will fill that legal vacuum. Part V addresses proposed solutions for this problem. Part V suggests that Congress either amend the ICWA to expressly protect the parental rights of absentee Native American parents or amend the statute to permit the exclusive use of tribal law in determining when to involuntarily terminate Native American parental rights. The bulk of the analysis in Part V focuses on the nature of tribal laws governing tribal courts in the judicial process of terminating Native American parental rights due to abandonment. This Comment argues that permitting exclusive use of tribal law is preferred, as it promotes tribal prerogatives, especially tribal self-determination and sovereignty. As this Comment will demonstrate, tribal laws generally provide greater protections and opportunities for

absentee Native American parents to reunite with their children before termination of their parental rights, and thus, comport more fully with the statutory scheme of the ICWA than the rule enunciated in *Adoptive Couple*.

I. South Carolina: The Battle Ground State

A. The Factual Background for Adoptive Couple

The child at the center of the *Adoptive Couple* decision is a little girl named Veronica. She received the moniker "Baby Girl" throughout the course of the state and federal court proceedings.[10] The child was "born in Oklahoma on September 15, 2009."[11] In December 2008, the father, Dusten Brown, and the biological mother got engaged.[12] The next month, January 2009, the mother announced to the father that she was pregnant.[13] During December 2008 and January 2009, the biological father was serving in active duty for "the United States Army and stationed at Fort Sill, Oklahoma" close to "his hometown of Bartlesville, Oklahoma, where his parents" and Veronica's mother lived.[14]

After the father discovered the mother was pregnant with Veronica, he urged the mother to move the wedding up sooner than originally planned.[15] Throughout the first several months of 2009, the father continued to speak with the mother daily, but the relationship deteriorated around April 2009.[16] During the family court proceedings, the mother testified that she officially broke off the engagement with Veronica's father via text message in May 2009.[17] The mother's reason for the dissolution of the engagement was because Veronica's father kept "pressuring her to get married."[18] The father claimed in family court that he continued to make "post-breakup attempts to call and text message [the] [m]other," but the family court record indicated that the father did not make much of an effort to keep in contact with Veronica's mother after the dissolution of the engagement.[19] Consequently, Veronica's parents never lived together and Veronica's father

10. Adoptive Couple v. Baby Girl, 731 S.E.2d 550, 552 (S.C. 2012).
11. *Id.*
12. *Id.* at 552–53.
13. *Id.*
14. *Id.* at 553.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*

never financially supported Veronica's mother during the pregnancy.[20]

In June 2009, the mother contacted Veronica's father via text message and asked him if he would financially support Veronica or be willing to relinquish parental rights over her.[21] During the family court proceedings, the father testified that he relinquished parental rights only to grant Veronica's mother sole custody, and did not intend to consent to Veronica's adoption.[22] The father admitted under cross-examination that "his behavior was not conducive to being a father."[23] The mother said she placed Veronica up for adoption because she already had two children from a prior relationship, and she could not afford a third child.[24] Veronica's mother found adoption to be in Veronica's best interest because it would provide a stable home and the financial support Veronica needed.[25]

In June 2009, Veronica's mother turned to the Nightlight Christian Adoption Agency to help initiate and facilitate the adoption proceedings for Veronica.[26] Through this adoption agency, Veronica's mother selected the Capobianco family in South Carolina. The Capobiancos are a married couple: a wife with "a Master's Degree and a Ph.D in developmental psychology" and her husband, who is "an automotive body technician currently working for Boeing."[27] After several weeks of talking on the phone with the Capobiancos, the potential "[a]doptive [m]other visited [Veronica's] [m]other in Oklahoma in August 2009."[28] After the visitation, the Capobiancos provided financial support to Veronica's mother during the latter part of the pregnancy and after Veronica was born.[29]

During the adoption proceedings, Veronica's mother knew there was legal significance attached to the fact that Veronica's father is a member of the Cherokee Nation.[30] A pre-placement

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20. *Id.*

21. *Id.*

22. *Id.* ("Father explained: '[i]n 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.'").

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* The Capobiancos "have no other children." *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 554.

form revealed a measure of intentional concealment of the father's relationship to the Cherokee Nation.[31] As a result, the Capobiancos hired an attorney for Veronica's mother for the duration of the adoption proceedings. This attorney sent a letter to the Child Welfare Division of the Cherokee Nation and "inquire[d] about [the] [f]ather's status as an enrolled Cherokee Indian."[32] The Cherokee Nation could not verify that Veronica's father was an enrolled member of the tribe because the attorney misspelled the father's name and did not include the correct birthdate of the father.[33] The Cherokee Nation informed the mother's attorney of its inability to verify Veronica's father as a member of the tribe, but the Cherokee Nation did point out that "'[a]ny incorrect or omitted family documentation could invalidate this determination.'"[34] During the family court proceedings, Veronica's mother "testified she told her attorney that the letter was incorrect and that [the] [f]ather was an enrolled member, but that she did not know his correct birthdate."[35] Nevertheless, Veronica's mother testified that she relied upon the attorney's investigation with the Child Welfare Division of the Cherokee Nation.[36] Therefore, when Veronica was born, her mother believed that Veronica's father was not a member of the Cherokee Nation.[37]

The morning after Veronica's birth, Veronica's mother signed the necessary documentation "relinquishing her parental rights and consenting to the adoption."[38] In accordance with the Oklahoma Interstate Compact on Placement of Children,[39] the adopting parents signed the necessary paperwork and remained in the state to meet the statutory requirements for removing Veronica from Oklahoma to South Carolina.[40] In all of the signed

31. *Id.* ("Initially the birth mother did not wish to identify the father, said she wanted to keep things low-key as possible for the [Appellants], because he's registered in the Cherokee tribe. It was determined that naming him [the father] would be detrimental to the adoption.").

32. *Id.*

33. *Id.*

34. *Id.* (internal quotations omitted).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* ("Appellants were required to receive consent from the State of Oklahoma pursuant to the Oklahoma Interstate Compact on Placement of Children (ICPC) as a prerequisite to removing Baby Girl from that state."). *See also* Interstate Compact on Placement of Children, OKLA. STAT. tit. 10, § 577 (2013) (establishing orderly procedure and setting responsibilities for interstate placement of children).

40. *Id.*

documentation for relinquishing parental rights and removing Veronica from Oklahoma, Veronica's mother "reported Baby Girl's ethnicity as 'Hispanic' instead of 'Native American.'"[41] During the family court proceedings, a specialist for the Child Welfare Division of the Cherokee Nation testified that if "the Cherokee Nation [had] known about Baby Girl's Native American heritage, Appellants would not have been able to remove Baby Girl from Oklahoma."[42]

While the Capobiancos initiated the adoption proceedings in South Carolina a mere three days after Veronica's birth, they did not "serve or otherwise notify [the] [f]ather of the adoption action until January 6, 2010, approximately four months after Baby Girl was born and days before [the] [f]ather was scheduled to deploy to Iraq."[43] On that day, Veronica's father received legal papers, which he signed under the impression that he was relinquishing his parental rights to his daughter's biological mother.[44] However, after he realized that the paperwork terminated his parental rights and provided consent for adoption, Veronica's father consulted with an attorney and "requested a stay of the adoption proceedings under the Servicemember's Civil Relief Act ("SCRA")."[45] A few days later, Veronica's father "filed a summons and complaint in an Oklahoma district court to establish paternity, child custody, and support of Baby Girl."[46] On January 18, 2010, the U.S. military deployed Veronica's biological father to Iraq and he did not return to the United States until December 26, 2010.[47]

On March 16, 2010, the Capobiancos and the biological mother filed a motion to dismiss the father's summons and complaint.[48] The Oklahoma district court granted the motion to dismiss.[49] Nevertheless, in January 2010, the Cherokee Nation discovered that Veronica's father was "a registered member [of the tribe] and determined that Baby Girl was an 'Indian Child,' as defined under the [ICWA]."[50] As a result, the Capobiancos and the

41. *Id.*
42. *Id.* at 554–55.
43. *Id.* at 555 (noting that the Capobiancos notified the biological father of the adoption a mere twelve days before his deployment to Iraq).
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*

mother "amended their South Carolina pleadings to acknowledge [the] [f]ather's membership in the Cherokee Nation."[51] Consequently, "on April 7, 2010, the Cherokee Nation filed a Notice of Intervention in the South Carolina action."[52] On May 6, 2010, the South Carolina family court mandated paternity testing that identified Veronica's father to be Dusten Brown.[53] The family court also established its jurisdiction over the case and lifted the stay under the SCRA.[54] On May 25, 2010, Veronica's father "answered Appellants' amended complaint, stating he did not consent to the adoption of Baby Girl and [was] seeking custody."[55] As a result, the family court "set a hearing date for the case, and found separately that the ICWA applied to the case."[56]

B. The South Carolina Family Court's Judgment

On September 12 through September 15, 2011, the South Carolina family court held a trial to determine whether it needed to terminate the adoption proceeding and enter an order returning Veronica back to her father, or whether Veronica's adoption could proceed.[57] On November 25, 2011, the family court rendered a final judgment in the *Adoptive Couple* case, and gave four reasons for terminating the proceedings.[58] First, the court found that "the ICWA applied and it was not unconstitutional."[59] Second, the court determined that the "Existing Indian Family" exception did not apply "as an exception to the application of the ICWA in this case" because of "the clear modern trend" away from that doctrine.[60] Third, the court found that the father "did not voluntarily consent to the termination of his parental rights or the adoption."[61] Finally, the court concluded that the Capobiancos "failed to prove by clear and convincing evidence" that the father's "parental rights should be terminated" or that granting custody to

51. *Id.*
52. *Id.*
53. *Id.* at 555–56.
54. *Id.* at 556.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* (finding that the ICWA applied to Veronica and that the ICWA was not facially or as-applied unconstitutional).
60. *Id.*; *see* discussion *infra* Part III(C) and note 131.
61. *Id.*

her father "would likely result in serious emotional or physical harm" to Veronica.[62]

On December 28, 2011, the family court entered a final decree that denied the Capobiancos' adoption petition and required Veronica's return to her father.[63] After the adoptive couple failed to get the father's family to reconsider the matter, they appealed the family court decision.[64] The court of appeals initially granted a writ of supersedeas, but lifted it on December 30, 2011.[65] Consequently, "[o]n December 31, 2011, Appellants transferred Baby Girl to [her biological] [f]ather, and [the] [f]ather and his parents immediately traveled with Baby Girl back to Oklahoma."[66]

C. The South Carolina Supreme Court Judgment

On April 17, 2012, the Supreme Court of South Carolina heard oral arguments for the *Adoptive Couple* case.[67] The court rendered its decision and final judgment on August 22, 2012.[68] The South Carolina Supreme Court reviewed the congressional findings and the legislative intent which culminated in the enactment of the ICWA.[69] The court found that it had to review the appeal of the family court's decision through the "lens" of the ICWA "[b]ecause the ICWA establishes 'minimum Federal standards for the removal of Indian children from their families' and applies to *any* child custody proceeding involving an Indian child."[70] The court agreed with the family court that Veronica's father satisfied the statutory definition of "parent" in the ICWA,[71] because he "both acknowledg[ed] his paternity through the pursuit of court proceedings as soon as he realized Baby Girl had been

62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 550.
68. *Id.*
69. *Id.* 557–58.
70. *Id.* at 558 (emphasis added). At this juncture, the Supreme Court of South Carolina did not find any statutory justification for excluding an absentee Native American father from the heightened protections afforded to Native American parental rights in termination proceedings under the ICWA.
71. 25 U.S.C. § 1903(9) (1978) (defining "parent" as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established.").

placed up for adoption and establish[ed] his paternity through DNA testing."[72]

The court found that even though the "ICWA incorporates state law termination grounds, it also clearly mandates state courts consider heightened federal requirements to terminate parental rights as to ICWA parents."[73] The court's decision provided an important observation supported from the statutory scheme of the ICWA that was later ignored by the U.S. Supreme Court with mere statutory speculation:

> While state termination grounds play a part in custody proceedings under the ICWA, we believe, unlike the dissent, that state law cannot operate to frustrate the clear purposes of the ICWA, as 'Congress perceived the States and their courts as partly responsible for the problem [the ICWA] intended to correct'. . . . [State] abandonment law cannot be used to frustrate the federal legislative judgment expressed in the ICWA that the interests of the tribe in custodial decisions made with respect to Indian children are as entitled to respect as the interests of the parents.[74]

The Supreme Court of South Carolina found that Veronica's father did not voluntarily terminate his parental rights because he signed the "Acceptance of Service" document without knowledge that it relinquished his parental rights, and that even if he did consent, his "subsequent legal campaign to obtain custody of Baby Girl has rendered any such consent withdrawn."[75] The court concluded that since the father did not voluntarily terminate his parental rights, the adoptive couple needed to demonstrate by evidence beyond a reasonable doubt that his parental rights over the Native American child should be terminated.[76] After conducting an involuntary termination analysis of the father's parental rights, the court rejected the adoptive couple's argument that active remedial measures to reunite the father with Veronica were futile. The court came to this conclusion because, despite the father's initial lack of interest in parenting Veronica at her birth, upon learning of the adoption he immediately attempted to

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

73. *Id.*

74. *Id.* at 561 n.21 (internal citations omitted).

75. *Id.* at 561; *see* 25 U.S.C. § 1913(c) (1978) ("[T]he consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.").

76. 25 U.S.C. § 1912(f) (1978) ("No termination of parental rights may be ordered in such proceeding in the absence of a determination . . . 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."); *Adoptive Couple*, 731 S.E.2d at 561.

establish a physical and legal presence in his daughter's life. He also continued to assert his desire to parent Veronica throughout the adoption proceedings and legal battles in state court.[77]

The court also rejected the adoptive couple's argument that Veronica would suffer serious emotional or physical damage if returned to her father.[78] During the family court proceedings, the court considered expert testimony given by a specialist for the Child Welfare Division of the Cherokee Nation.[79] The expert witness put forth evidence that revealed Veronica's father's "home was clean, safe, and appropriate and that there were many acres of land surrounding the home for outdoor play."[80] The specialist further attested to the fact that Veronica's father was "a good father who enjoyed a close relationship with his other daughter" and that children Veronica's age "tended to thrive when reunited with their Indian parents."[81] Moreover, the court found that the ICWA's "best interests of the child" analysis did not stop with the child because "[i]n making this determination, the child's relationship with his or her tribe is an important consideration."[82] Ultimately, the court found that by "transferring custody to [the] [f]ather and his family, Baby Girl's familial and tribal ties may be established and maintained in furtherance of the clear purpose of the ICWA, which is to preserve American Indian culture by retaining its children within the tribe."[83] Finally, the South Carolina Supreme Court determined that even if it terminated the father's parental rights, the ICWA recommends a hierarchical preference given to "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."[84] The court concluded that the federal standard of the ICWA precluded termination of the father's parental rights.[85]

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77. *Adoptive Couple*, 731 S.E.2d at 562.

78. *Id.* at 563.

79. *Id.*

80. *Id.*

81. *Id.* at 564.

82. *Id.* at 565 ("[T]he ICWA is 'based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected.'" (internal citations omitted)).

83. *Id.* at 566.

84. *Id.* (quoting 25 U.S.C. § 1915(a)).

85. *Id.* at 567 ("Adoptive Couple are ideal parents who have exhibited the ability to provide a loving family environment for Baby Girl. . . . [W]e simply see this case as one in which the dictates of federal Indian law supersede state law where the adoption and custody of an Indian child is at issue.").

II. *Adoptive Couple v. Baby Girl*

In the 2013 case *Adoptive Couple v. Baby Girl*, the U.S. Supreme Court found that the ICWA §1912(f),[86] which prohibits an involuntary termination of Native American parental rights over a Native American child except where there has been a heightened showing that serious harm to the Native American child is likely to result from the parent's "continued custody" of the child, does not apply where the Native American parent never had physical or legal custody of the child.[87] The Court also held that the ICWA §1912(d),[88] which requires a showing that remedial efforts were made to prevent the "breakup of the Indian family" before involuntarily terminating Native American parental rights, does not apply where the Native American parent never had an active relationship with the child that would be disrupted by the termination of parental rights.[89] Finally, the Court found that the ICWA §1915(a),[90] which provides placement preferences for the adoption of Native American children to extended family in the child's tribe, other members of the child's tribe, and other Native American families, does not apply where the parent failed to formally seek adoption, even though that parent operated under the belief that he or she retained interminable parental rights, and no other family or tribal member or Native American formally attempted to adopt the child.[91]

The majority decision in *Adoptive Couple* is predicated upon a construction of the ICWA in the most literal terms. The Court held that the ICWA's protection of Native American parental rights is not implicated for noncustodial Native American

86. 25 U.S.C. §1912(f) (1978).

87. *Adoptive Couple*, 133 S. Ct. 2552, 2561 (2013) ("In sum, when, as here, the adoption of an Indian child is voluntarily and lawfully initiated by a non-Indian parent with sole custodial rights, the ICWA's primary goal of preventing the unwarranted removal of Indian children and the dissolution of Indian families is not implicated.").

88. 25 U.S.C. §1912(d) (1978).

89. *Adoptive Couple*, 133 S. Ct. at 2562 ("Consistent with the statutory text, we hold that §1912(d) applies only in cases where an Indian family's 'breakup' would be precipitated by the termination of the parent's rights. . . . But when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody, there is no 'relationship' . . . . In such a situation, the 'breakup of the Indian family' has long since occurred, and §1912(d) is inapplicable.").

90. 25 U.S.C. §1915(a) (1978).

91. *Adoptive Couple*, 133 S. Ct. at 2564 ("§1915(a)'s preferences are inapplicable in cases where no alternative party has formally sought to adopt the child. This is because there simply is no 'preference' to apply if no alternative party that is eligible to be preferred under §1915(a) has come forward.").

parents.[92] The Court came to this interpretation of the ICWA by defining *"continued* custody" from *Webster's Third New International Dictionary* as meaning "stretching out in time or space esp. without interruption" and also "resumed after interruption."[93] The Court also held that the ICWA's greater protections of Native American parental rights apply only where there is a literal breakup of the Native American family.[94] The Court looked to the American Heritage Dictionary to define "breakup" as "[t]he discontinuance of a relationship."[95] Finally, the Court held that the preferential hierarchy for Native American adoptions found in the ICWA is inapplicable when, as in *Adoptive Couple*, the child's extended tribal family, the tribe itself, or another preferential party does not formally initiate adoption proceedings.[96]

The Court announces in the majority opinion that its main concern is a situation where "a biological Indian father could abandon his child *in utero* and refuse any support for the birth mother . . . then could play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests."[97] Nevertheless, on remand from the U.S. Supreme Court, the South Carolina Supreme Court exchanged any thorough and meaningful analysis of Veronica's best interests for a conclusory analysis that made assumptions that inherently contradict the purpose of the ICWA. On remand, the South Carolina Supreme Court stated: "Birth Father is precluded from challenging the adoption. Moreover, in light of the urgent need for this matter to be concluded, we determine, upon review of the record, that the adoption of Baby Girl by the Adoptive Couple is in the best interests of Baby Girl."[98] Since the U.S. Supreme Court

92. *Id.* at 2560 ("As a result, § 1912(f) does not apply in cases where the Indian parent *never* had custody of the Indian child.").

93. *Id.*

94. *Id.* at 2562 ("Consistent with the statutory text, we hold that § 1912(d) applies only in cases where an Indian family's 'breakup' would be precipitated by the termination of the parent's rights.").

95. *Id.*

96. *Id.*at 2564 ("In this case, Adoptive Couple was the only party that sought to adopt Baby Girl in the Family Court or the South Carolina Supreme Court.").

97. *Id.* at 2565.

98. Adoptive Couple v. Baby Girl, 746 S.E.2d 346, 347 (S.C. 2013). Some commentators predicted this holding, assuming that on remand the South Carolina family court would take into consideration that Veronica had been in the care of her biological father for two years during the legal proceedings before terminating Brown's parental rights. *See, e.g.*, Marcia Zug, *The Court Got Baby Veronica Wrong*, SLATE (June 26, 2013, 9:50 AM),

concocted a statutory interpretation of the ICWA that makes the heightened protections against termination of parental rights of the ICWA inapplicable to absentee Native American parents, the Supreme Court of South Carolina was free not to consider the goals of the ICWA when determining what is in the best interests of Veronica (e.g., preserving Native American culture and life, tribal sovereignty, and input over the adoption of Native American children). Instead, the South Carolina Supreme Court merely desired to end litigation over the matter and assumed that Veronica's best interests were met by returning her to her adoptive parents.[99]

III. The Statutory Framework of the ICWA: The Confluence of Legislative History, the Canons of Indian Law Construction, and the Rejection of a State-Created Common Law Exception to the ICWA

A. Adoptive Couple's *Creation of Two Classes of Native American Parents Fails to Comport with the Legislative History of the ICWA*

Before Congress passed the ICWA into law, the congressional record reflected a disturbing trend among Native American children. The "[c]ongressional hearings preceding the adoption of ICWA documented an alarmingly high percentage of Indian children removed from their families through state court proceedings."[100] The House Report framed the detrimental effect

http://www.slate.com/articles/double_x/doublex/2013/06/baby_veronica_indian_adoption_case_the_supreme_court_got_it_wrong.html.

99. At the time this case was remanded back to the South Carolina Supreme Court from the U.S. Supreme Court, Veronica had been reunited with her Native American father for almost one and one-half years. How was it in Veronica's best interest to have her relationship with her father severed after being in his care for that length of time? *See Adoptive Couple*,133 S. Ct. at 2586 (2013) (Sotomayor, J., dissenting) ("However difficult it must have been for her to leave Adoptive Couple's home when she was just over 2 years old, it will be equally devastating now if, at the age of 3 ½, she is again removed from her home and sent to live halfway across the county.").

100. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 831 (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK]. The House Report found that in Minnesota, Native American children were per capita 5 times more likely than non-Native American children to be placed in foster care or in an adoptive home, at least 13 times more likely to be placed in foster care in Montana, nearly 16 times more likely to be placed in foster care in South Dakota, 19 times more likely to be placed in an adoptive home and 10 times more likely to be placed in foster care in Washington, and that there was nearly a 1600% greater chance that a Native American child would be separated from its biological parents in Wisconsin. H.R. REP. NO. 95-1386, at 9 (1978).

flowing from the disparate and unusually high termination of Native American parental rights, adoption placements, and foster care placements in that "[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today."[101] Congress found that state agencies, due to ignorance of "Indian cultural values and social norms," often misinterpreted leaving children "outside the nuclear family" with Native American extended families as "socially irresponsible," "neglect," and "grounds for terminating parental rights."[102]

As a result of years of investigation, which included a compiled record with a common theme that state courts were "abusing their authority,"[103] Congress found that "25% to 35% of all Indian children had been removed from their families and placed in foster, adoptive, or institutionalized care."[104] A central concern for tribes expressed before Congress focused on how the high removal rate for Native American children from tribal homes eviscerated tribal culture, tribal self-determination, and tribal sovereignty:

> Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.[105]

Congress expressed two overarching concerns with the high removal rate of Native American children: "the importance of sensitivity to tribal culture in rendering Indian child welfare

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101. H.R. REP. NO. 95-1386, at 9.

102. *Id.* at 10.

103. COHEN'S HANDBOOK, *supra* note 100.

104. *Id. See also* H.R. REP. NO. 95-1386, at 9 ("Surveys of States with large Indian populations conducted by the Association on American Indian Affairs (AAIA) in 1969 and again in 1974 indicate that approximately 25–35% of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions. In some States the problem is getting worse: in Minnesota, one in every eight Indian children under 18 years of age is living in an adoptive home; and, in 1971–72, nearly one in every four Indian children under 1 year of age was adopted.").

105. *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs*, 95th Cong. 154, 157 (1977) (statement of Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians).

decisions and respect for tribal sovereignty."[106] Throughout the congressional debates, the Senate and House emphasized the need to restore tribal sovereignty over Native American child welfare.[107] The focus on tribal sovereignty arises from the recognition that the welfare of Native American children is intertwined with tribal self-identity and self-preservation.[108] Thus, Congress' concern for tribal sovereignty over matters of Native American child welfare and the acknowledgement that tribes possess a similar amount of interest in Native American children as their biological parents culminated with the ICWA's opening declaration enshrining the factual findings from the congressional investigations preceding the passage of the statute.[109] Even the U.S. Supreme Court has

106. COHEN'S HANDBOOK, *supra* note 100, at 832; *see also* S. REP. NO. 95-597, at 12 (1977) ("Two basic concepts surfaced at the hearings. . . . [T]he need for . . . a deeper cultural sensitivity toward the Indian people . . . [and] that Indian tribes were recognized as [sic] by the United States as sovereign governmental units and as such the final decision making powers in areas as basic as child welfare should rest within the relm [sic] of tribal jurisdiction.").

107. 124 CONG. REC. 38,102 (1978) (statement of Rep. and Chairman Morris Udall) ("Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy."); 124 CONG. REC. 38,103 (1978) (statement of Minority sponsor Rep. Robert Lagomarsino) ("For Indians generally and tribes in particular, the continued wholesale removal of their children by nontribal government and private agencies constitutes a serious threat to their existence as on-going, self-governing communities."). Representative Lagomarsino added that the federal government's responsibility "as trustee for Indian tribal lands and resources" is "to act to assist tribes in protecting their most precious resource, their children. . . . [This legislation] is . . . designed to prevent the unnecessary and unjustifiable separation of Indian children from their families and tribal communities by providing for effective due process and equal protection under the law." 124 CONG. REC. 38,103 (1978).

108. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 37 (1989) ("The ICWA . . . 'seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.'"); Chester Cnty. Dep't of Soc. Serv. v. Coleman, 372 S.E.2d 912, 914 (S.C. App. 1988) ("The Act is based on the assumption that protection of the Indian child's relationship to the tribe is in the child's best interest."); Yavapai-Apache Tribe v. Mejia, 906 S.W.2d 152, 169 (Tex. Ct. App. 1995) ("Under the ICWA, what is best for an Indian child is to maintain ties with the Indian Tribe, culture, and family." (internal citations omitted)); *see* H.R. REP. NO. 95-1386, at 17 (1978) (expressing a federal government obligation under the plenary power of Congress over Native American affairs to ensure minor Native American children receive an opportunity to access the benefits of his or her tribal identity). *See generally* COHEN'S HANDBOOK, *supra* note 100, at 833–34 (describing tribal cultural experiences like hunting, fishing, and land rights distinct to any one particular tribe as the nexus between Native American children's best interest and tribes' interest in retaining Native American children within their tribal communities).

109. Congress articulated the concerns of a weakened tribal self-determination over Native American children welfare, the high rate of removal of Native American children, and state judicial and agency biases against tribes in the ICWA's congressional findings. 25 U.S.C. § 1901(3)–(5) (1978) ("[T]hat there is no

recognized that tribal interest in a child of the tribe, though distinctly different from the parents, is no less important.[110]

Beyond tribal interests in curtailing the massive removal of Native American children from tribal communities and the resulting destruction of tribal existence, the ICWA addressed the need for greater protection of Native American parental and custodial rights.[111] The statute permits a Native American parent who voluntarily terminates his or her parental rights or consents to an adoption to be able to withdraw that termination of parental rights or rescind the consent at any time up to a court's final decree of termination or adoption.[112] In pursuit of advancing its goals of uniformity as described in the legislative history, Congress did not make state law the standard in the ICWA for termination of parental rights or child placement proceedings.[113]

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resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children . . . and 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.").

110. *Holyfield*, 490 U.S. at 49 ("The numerous prerogatives accorded the tribes through the ICWA's substantive provisions . . . must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves."). Tribal interests in member Native American children are a central protection of the ICWA, so much so that only in narrow situations does the ICWA give priority to parental preferences over tribal interests. 25 U.S.C. § 1911(b) (1978) (allowing a parent to object to the transfer of a foster care placement or termination of parental rights proceeding for a non-reservation Native American child to tribal court from state court). *But see* 25 U.S.C. § 1911(a) (1978) (granting tribal courts exclusive jurisdiction over any child custody proceeding where the Native American child resides or is domiciled within the tribe's reservation unless federal law grants state jurisdiction).

111. *See, e.g.*, 25 U.S.C. § 1912(e)–(f) (1978) (requiring heightened evidentiary standards to be met in involuntary proceedings before foster care placement or termination of parental rights are ordered); 25 U.S.C. § 1913 (1978) (providing the framework for various safeguards against abuse of voluntary termination of parental rights and consent to adoptive or foster care placements).

112. 25 U.S.C. § 1913(c) (1978); *see also* 25 U.S.C. § 1913(d) (1978) (allowing a parent to withdraw consent to an adoption within two years of a final court decree if the adoption occurred under fraud or duress).

113. COHEN'S HANDBOOK, *supra* note 100, at 835; *see* 25 U.S.C. § 1902 (1978) (describing that the federal government's protection of Native American children and promotion of tribal security will be accomplished by establishing a minimum federal standard for the removal of Native American children); 25 U.S.C. § 1921 (1978) (permitting the application of state law only where it provides greater protections than the ICWA); *see also* Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2574 (2013) (Sotomayor, J., dissenting)(describing *Holyfield*'s recognition "that Congress intended the critical terms of the statute to have uniform federal definitions").

In *Adoptive Couple*, the majority opinion placed most of its legal analysis on a selective reading of the legislative history of the ICWA. The Court's analysis is representative of a results-oriented legal analysis with the purpose of depreciating the parental rights of an absentee Native American parent.[114] After turning to the *Oxford English Dictionary*, *Webster's Dictionary*, and *American Heritage Dictionary* to reach the conclusion that the ICWA § 1912(f)'s use of "continued" custody presumed a "preexisting" parental relationship at some point in the past,[115] the Court argued that this dictionary-driven interpretation comports with the statute's legislative history in curtailing "the unwarranted removal of Indian children from *intact* Indian families."[116] The Court never explains what it meant by "intact" Native American families, but the Court's selective incorporation and construction of the ICWA's legislative history reveals a value judgment about absentee Native American parents not found operating in the background history of the ICWA.[117]

Additionally, the legislative history of the ICWA does not define parental rights in terms of legal custody or physical custody of the Native American child. The House Report defines "parent" to mean "any biological parent or parents of an Indian child or any

114. *See Adoptive Couple*, 133 S. Ct.at 2572 (Scalia, J., dissenting) ("The Court's opinion . . . needlessly demeans the rights of parenthood. It has been the constant practice of the common law to respect the entitlement of those who bring a child into the world to raise that child."); *Id.* at 2573 (Sotomayor, J., dissenting) ("[N]otwithstanding the majority's focus on the perceived parental shortcomings of Birth Father, its reasoning necessarily extends to *all* Indian parents who have never had custody of their children, no matter how fully those parents have embraced the financial and emotional responsibilities of parenting.").

115. *Id.* at 2560.

116. *Id.* at 2561 (emphasis added).

117. The ICWA's definitional section connects the "termination of parental rights" with "any action resulting in the termination of the parent-child relationship." 25 U.S.C. § 1903(1)(ii). Thus, "the necessary conclusion is that the word 'custody' does not strictly denote a state-recognized custodial relationship. . . . In keeping with § 1903(1) and the structure and language of § 1912 overall, the phrase 'continued custody' is most sensibly read to refer generally to the continuation of the parent-child relationship that an ICWA 'parent' has with his or her child." *Adoptive Couple*, 133 S Ct. at 2577–78 (Sotomayor, J., dissenting). In Brown's situation, a lack of a state-recognized custodial relationship does not remove him from the procedural safeguards of the ICWA or divest him of the substantive rights of his parental status. The ICWA protects a Native American child's relationship with his or her Native American parent regardless of physical presence or legal custody. The overarching emphasis of the statute is the preservation of the biological tribe-parent-child relationship and not the mere preservation of parental rights contingent upon state-recognized custodial relationships. Otherwise, the multitude of divergent state law standards defining a parent-child custodial relationship would defeat the ICWA's goal of providing *minimum federal* standards for the removal of Indian children from their families.

Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom."[118] The *Adoptive Couple* majority claims that it did not need to address whether Dusten Brown is a "parent" under the ICWA. But the Court's holding in essence is a finding that Brown is not a parent because while he does fit the technical definition of "parent" under the statute, he cannot enjoy the benefits of his parental status protected by the ICWA.[119] In contradiction to the majority's rationale, the House Report for the ICWA indicates that the only person who is technically a "parent," but is not entitled to the heightened parental protections of the ICWA, are unwed fathers who do not claim or establish paternity.[120] In *Adoptive Couple*, Veronica's father underwent paternity testing and conclusively established his paternity during the family court proceedings.[121] Furthermore, the congressional records and the ICWA define the termination of parental rights as the termination of the parent-child relationship.[122]

B. Adoptive Couple*'s Creation of Two Classes of Native American Parents Fails to Comport with the Canons of Indian Law Construction*

The canons of Indian law construction are court-created rules of construction to initially deal with the "unequal bargaining position" of Native American tribes in making treaties with the U.S. federal government and the federal government's habit of reneging on and abrogating terms of treaties.[123] As a result, federal courts have generated three rules that provide a generous and liberal reading of Native American rights in treaties.[124] The three rules of construction are as follows: "ambiguous expressions

118. H.R. REP. NO. 95-1386, at 2 (1978); *see* 25 U.S.C. § 1903(9).

119. *Adoptive Couple*, 133 S. Ct. at 2575 (Sotomayor, J., dissenting) ("But the majority gives with one hand and takes away with the other. Having assumed a uniform federal definition of 'parent' that confers certain procedural rights, the majority then illogically concludes 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."). Moreover, "[t]he majority chooses instead to focus on phrases not statutorily defined that it then uses to exclude Birth Father from the benefits of his parental status." *Id.* at 2578.

120. H.R. REP. NO. 95-1386, at 2; *see also* 25 U.S.C. § 1903(9) (codifying in the ICWA the legislative history's recommended definition).

121. Adoptive Couple v. Baby Girl, 731 S.E.2d 550, 555 (S.C. 2012).

122. H.R. REP. NO. 95-1386, at 2.

123. Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows Upon the Earth"—How Long a Time is That?* 63 CALIF. L. REV. 601, 617 (1975).

124. *Id.*

must be resolved in favor of the Indian parties concerned; Indian treaties must be interpreted as the Indians themselves would have understood them; and Indian treaties must be liberally construed in favor of the Indians."[125] While initially utilized in federal government-tribal treaty relations, these canons of construction have also been extended to "non-treaty sources of positive law" similarly to statutes.[126]

While these canons of Indian law construction are only triggered when a statute is ambiguous,[127] the *Adoptive Couple* Court admits that the ICWA is ambiguous on how to deal with absentee Native American fathers.[128] Due to this silence and the fact that the ICWA never expressly takes away parental rights from a Native American parent as an *ante hoc* assumption without procedural due process,[129] the majority's rationale fails to adhere to a liberal and favorable reading of the ICWA, violating Indian law precedent. As observed from the legislative history and statutory scheme of the ICWA, the ICWA's congressional purpose is concerned with more than keeping the Anglo-American traditional version of the family intact (i.e., mother, father, and children), but focused equally, if not primarily, on tribal self-determination and preservation of Native American tribes. The majority's cherry-picking of some language (e.g., "removal of Indian children from their families") from the ICWA's legislative history and text is an

125. *Id.*

126. COHEN'S HANDBOOK, *supra* note 100, at 114–15 (explaining that the canons of construction have been used to interpret "agreements, statutes, executive orders, and federal regulations"); *see, e.g.*, Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 269 (1992) (quoting Mont. v. Blackfeet Tribe, 471 U.S. 759, 766 (1985)) ("When we are faced with these two possible constructions [of a statute], our choice between them must be dictated by a principal deeply rooted in this Court's Indian jurisprudence: 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'"); Rincon Band of Luiseno Indians v. Schwarzenegger, 602 F.3d 1019, 1032 (9th Cir. 2010) (finding a judicial obligation to construe the Indian Gaming Regulatory Act "most favorably towards tribal interests"); Citizens Exposing the Truth About Casinos v. Kempthorne, 492 F.3d 460, 471 (D.C. Cir. 2007) ("[A]s [the Indian Game Regulatory Act] is designed to promote the economic viability of Indian Tribes, the Indian canon of statutory construction requires the court to resolve any doubt in favor of the Band.").

127. *Cnty. Of Yakima*, 502 U.S. at 269 (quoting Mont. v. Blackfeet Tribe, 471 U.S. 759, 766 (1985)).

128. Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2571 (2013) (Breyer, J., concurring) ("[T]he statute does not directly explain how to treat an absentee Indian father who had next-to-no involvement with his child in the first few months of her life.").

129. *See* United States v. Winans, 198 U.S. 371, 381 (1905) (arguing for the robust presumption that Native American rights not exclusively ceded in a legal instrument (e.g., treaty) is not deemed to be forfeited, but remains retained rights).

attempt to support its interpretation of the ICWA as primarily addressing the destruction of Native American families.[130] This cherry-picking is a near-sighted interpretation that glosses over the pervasive emphasis in the ICWA and its legislative history of tribal sovereignty over Native American children welfare.

C. The "Existing Indian Family" Exception and Adoptive Couple*'s "Continued Custody" Exception: Doctrines with a Common Ancestor of Thought*

The "Existing Indian Family" exception is a common law exception created by state courts to avoid the application of the ICWA to adoption or foster care proceedings for Native American children. It applies when a state court finds that a Native American child has never been a part of any Native American family.[131] In the *Matter of Adoption of Baby Boy L.*, the Kansas Supreme Court found that the ICWA did not apply to the child of an unwed non-Native American woman and a man belonging to the Kiowa Tribe.[132] The Kansas Supreme Court argued that the Native American child could not be *removed* from a Native American family or the Kiowa Tribe because the child's father was incarcerated, the child was born in Wichita, Kansas, off the reservation, and the non-Native American mother signed adoption consent forms expressly naming the adoptive couple in the forms on the day the child was born.[133] Nevertheless, twenty states have

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130. *Adoptive Couple*, 133 S. Ct. at 2583–84 (Sotomayor, J., dissenting) ("We may not, however, give effect only to congressional goals we designate 'primary' while casting aside others classed as 'secondary;' we must apply the entire statute Congress has written. . . . Congress also recognized that 'there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children,' [25 U.S.C.] § 1901(3). As we observed in *Holyfield*, ICWA protects not only Indian parents' interests but also those of Indian tribes. A tribe's interest in its next generation of citizens is adversely affected by the placement of Indian children in homes with no connection to the tribe, whether or not those children were initially in the custody of an Indian parent." (citation omitted)).

131. *In re Adoption of Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982) (articulating for the first time the "Existing Indian Family" doctrine by arguing that the ICWA and its legislative history reveals a congressional will to prevent "the *removal* of Indian children from their Indian environment" and that the ICWA does not apply in cases where the Native American child was not a member of a Native American home or culture (emphasis added)).

132. *Id.* at 174–76 (denying the Kiowa Tribe's motion to intervene on behalf of the child to keep the child from being removed from the tribal community by the trial court).

133. *Id.* at 172–73, 175 ("[The 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." (emphasis added)).

rejected the "Existing Indian Family" exception since its creation, including the judiciary that created the doctrine, the Kansas Supreme Court.[134] After nearly three decades, the Kansas Supreme Court acknowledged the "Existing Indian Family" exception did not comport with the ICWA and its legislative history's main concern of preserving a Native American child's heritage with his or her tribe and tribal sovereignty over Native American child welfare.[135] The movement toward repudiating and

134. *See* COHEN'S HANDBOOK, *supra* note 100, at 866 n.1 (summarizing state court decisions rejecting the "Existing Indian Family" exception and state court decisions adopting the exception). *See also In re* Adoption of T.N.F., 781 P.2d 973, 977 (Alaska 1989) (finding an application of the "Existing Indian Family" doctrine exception to mother of Native American child would undermine tribe's interest and the children as well as contradict the ICWA's plain language); *In re* Baby Boy Doe, 849 P.2d 925, 931–32 (Idaho 1993) (finding the ICWA applicable to the termination of parental rights because the *Holyfield* case has effectively undermined the imposition of the "Existing Indian Family" doctrine and the doctrine conflicts with express provisions of the ICWA); *In re* Adoption of S.S. & R.S., 657 N.E.2d 935, 953 (Ill. 1995) (McMorrow, J., dissenting) ("There is no provision in the ICWA requiring that an Indian child be born into or be living in an Indian family unit to be subject to its provisions."); *In re* Welfare of S.N.R., 617 N.W.2d 77, 81 (Minn. Ct. App. 2000) (holding that a Band's determination of eligibility is conclusive); *In re* Adoption of Riffle, 922 P.2d 510, 513 (Mont. 1996) (finding Native American child's enrollment not required and Tribe's determination child is a member sufficient); Hoots v. K.B. (*In re* A.B.), 663 N.W.2d 625, 636 (N.D. 2003) (rejecting the "Existing Indian Family" exception to termination of parental rights because it is contrary to the plain language of the ICWA and thwarts the tribe's interest); *In re* Adoption of a Child of Indian Heritage, 543 A.2d 925, 932 (N.J. 1988) (finding the ICWA applied to voluntarily relinquished child for adoption regardless of whether the child ever lived in a Native American environment or with a Native American family); *In re* Baby Boy L., 103 P.3d 1099, 1103 (Okla. 2004) (holding the existing Indian family exception to application of the ICWA for a Native American child proceeding no longer viable); *In re* Adoption of Baade, 462 N.W.2d 485, 489–90 (S.D. 1990) (rejecting prior opinion applying the "Existing Indian Family" doctrine because it was inconsistent with the ICWA).

135. *In re* A.J.S., 204 P.3d 543, 546–47 (Kan. 2009) ("The validity of the existing Indian family doctrine has been called into repeated question by a variety of courts and commentators over the course of the 27 years since *Baby Boy L.* was decided.... [The U.S. Supreme Court in] its 1989 decision in [*Holyfield*], underscored the central importance of the relationship between an Indian child and his or her tribe, independent of any parental relationship.... [W]e hereby overrule *Baby Boy L.*, and abandon its existing Indian family doctrine.... ICWA's overall design ... ensures that all interests—those of both natural parents, the tribe, the child, and the prospective adoptive parents—are appropriately considered and safeguarded." (citation omitted)); *see* Aliza G. Organick, *Holding Back the Tide: The Existing Indian Family Doctrine and Its Continued Denial of the Right to Culture for Indigenous Children*, *in* FACING THE FUTURE, *supra* note 1, at 221, 229 ("What remains so troubling about the ["Existing Indian Family" exception] is that it allows these courts to define whether a particular child is an Indian. This clearly takes that determination out of the hands of tribes. In addition, it allows these courts to decide whether and to what degree a particular parent is Indian enough, and whether and to what degree an Indian family is Indian enough for ICWA to apply. This not only runs afoul of congressional intent in enacting this legislation,

abandoning the "Existing Indian Family" exception suggests that numerous state courts find the state-created exception to the ICWA repugnant to the congressional intention of the statute even though these state courts previously adopted the exception.[136] Even some state legislatures have found it necessary to overturn the exception through statutory repeal by restoring the greater protections embedded within the ICWA and similar state ICWAs.[137]

While the *Adoptive Couple* majority opinion did not adopt outright the "Existing Indian Family" exception,[138] the rationale of the majority opinion reflects a similar thought process as those state courts who adopted the "Existing Indian Family" exception to

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but it also allows for these courts to make decisions that clearly only the tribes themselves are allowed to make.").

136. Dan Lewerenz & Padraic McCoy, *The End of "Existing Indian Family" Jurisprudence:* Holyfield *at 20,* In the Matter of A.J.S., *and the Last Gasps of a Dying Doctrine*, 36 WM. MITCHELL L. REV. 684, 723 (2010) (arguing that the numerous states codifying "the doctrine's rejection, and the substantive repudiation of the rationales used to support it" indicates that the doctrine's acceptance as a viable exception to the ICWA is on the decline).

137. CAL. FAM. CODE § 175(c) (West Supp. 2004) ("A determination by an Indian tribe that an unmarried person, who is under the age of 18 years, is either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and a biological child of a member of an Indian tribe shall constitute a significant political affiliation with the tribe and shall require the application of the federal Indian Child Welfare Act to the proceedings."); IOWA CODE ANN. § 232B.5(2) (West 2006) ("A state court does not have discretion to determine the applicability of the federal Indian Child Welfare Act or this chapter to a child custody proceeding based upon whether an Indian child is part of an existing Indian family."); MINN. STAT. § 260.771(2) (2012) ("A court shall not determine the applicability of this chapter or the federal Indian Child Welfare Act to a child custody proceeding based upon whether an Indian child is part of an *existing Indian family* or based upon the level of contact a child has with the child's Indian tribe, reservation, society, or off-reservation community." (emphasis added)); OKLA. STAT. ANN. tit. 10, § 40.3(B) (West 2009) (applying the Oklahoma Indian Child Welfare Act to all state voluntary and involuntary child custody proceedings involving Native American children "regardless of whether or not the children involved are in the physical or legal custody of an Indian parent or Indian custodian at the time state proceedings are initiated"); WASH. REV. CODE ANN. § 13.34.040(3) (West 2013) (predicating the application of Washington's state Indian Child Welfare Act merely on whether the child is Native American as defined by the statute and nothing more); WIS. STAT. ANN. § 938.028(3)(a) (2014) ("[The Wisconsin Indian Child Welfare Act] and the federal Indian Child Welfare Act, 25 USC 1901 to 1963, apply to any Indian juvenile custody proceeding regardless of whether the Indian juvenile is in the legal custody or physical custody of an Indian parent, Indian custodian, extended family member, or other person . . . and whether the Indian juvenile resides or is domiciled on or off of a reservation.").

138. ASS'N ON AMERICAN INDIAN AFFAIRS & NAT'L INDIAN CHILD WELFARE ASS'N, A GUIDE TO THE SUPREME COURT DECISION IN *ADOPTIVE COUPLE V. BABY GIRL* 7 (2013), *available at* http://turtletalk.files.wordpress.com/2013/10/analysisofadoptivecouplevbabygirl-final-1.pdf.

the ICWA. What the *Adoptive Couple* majority opinion and state courts adopting the "Existing Indian Family" exception share is the belief that where statutory silence is present on a nuanced jurisdictional or definitional issue, the ICWA is inapplicable, and the federal statute should not be read in favor of protecting tribal interests, preserving Native American heritage, or providing heightened procedural safeguards before depriving Native American parents of their parental rights. Instead, the Court endorsed the creation of a federal common law exception to the federal statute.[139] In creating this federal common law exception, the *Adoptive Couple* majority's rationale contradicts the ICWA's legislative history,[140] the text of the statute,[141] and canons of Indian law construction.[142] Moreover, the majority opinion accepts a similar justification like that found in the repudiated legal analysis of the "Existing Indian Family" exception: a state-created, common law doctrine that is on the decline in popularity among state courts and state legislatures on the basis that such a justification is incongruent with congressional intent behind enacting the ICWA.

IV. *Adoptive Couple*'s Evisceration of the ICWA's Protections of Absentee Native American Parents Creates a Legal Vacuum to be Filled by Adverse State Laws

The *Adoptive Couple* majority opinion creates a statutory vacuum for determinations on whether a Native American possesses the parental rights requisite to invoke the ICWA,

139. The *Adoptive Couple* decision is an example of creating federal common law. The ICWA did not mandate on its face the inapplicability of the statute's heightened protections to absentee Native American parents. From the Court's perspective, it needed to fill in the gaps of the federal statute by engaging in a stilted dictionary approach to a statutory construction of the ICWA. This resulted in the creation of a federal rule of decision in the field of federal Indian law pertaining to absentee Native American parents and their parental rights under the ICWA. *See generally* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985) ("'Federal common law' . . . means any federal rule of decision that is not mandated on the face of some authoritative federal text—whether or not that rule can be described as the product of 'interpretation' in either a conventional or unconventional sense."); Marta A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890 (1986) ("'[F]ederal common law' refer[s] to any rule of federal law created by a court . . . when the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional.").

140. *See supra* Part III(A).

141. *See supra* Part III(A).

142. *See supra* Part III(B).

allowing her or him to object to a child custody or adoption proceeding. Thus, state family law, which is inherently adverse to absentee parents and is insensitive to the federal creation of a unique enclave of protection for Native American parent-child-tribal relationships, will fill that legal vacuum to the detriment of Native American parents.[143] Moreover, the application of state family law will be a contradiction of the ICWA's congressional intent to provide a uniform federal standard in terminating Native American parental rights.[144] Without the application of the ICWA's procedural protections for parental rights, the default law to govern will be state laws. Some states provide only the minimum protection for parental rights. For example, in some states, consent for an adoption is forfeited if the parent fails to financially support the child and fails to be physically present in the child's life.[145] However, other states provide greater protections before parental rights are terminated.[146]

Given the high stakes in preserving tribal heritage, the parent-child relationship should not hinge on residence in a state which provides robust protections for parental rights. The ICWA

143. *See* B. J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts*, 73 N.D. L. REV. 395, 396 n.7 (1997) (explaining that Congress enacted the ICWA as "remedial legislation" to address the "inherent weaknesses of state courts to adjudicate child custody proceedings involving Indian children").

144. *See Id.* at 421 (describing the U.S. Supreme Court's implication in *Holyfield* that Congress intended to provide uniformity in the application of the ICWA).

145. *See, e.g.*, Roe v. Reeves, 708 S.E.2d 778, 785 (S.C. 2011) (holding that a father's one-time offer to contribute $100 for the mother's support during the pregnancy was not a sufficient effort to "make the sacrifices fatherhood demands," and therefore, "not sufficient compliance with the [state] statute to establish his right to consent to the adoption of [his] minor child"); *In re* Adoption of G.L.V., 163 P.3d 334, 340 (Kan. App. 2007) (finding that an adoption without a biological parent's consent is only permissible if the biological parent failed to fulfill the parental duties of financially supporting the child and failed to communicate and visit the child according to state law); *In re* B.S.R., 965 S.W.2d 444, 449 (Mo. Ct. App. 1998) (finding that "willful neglect," [failure to contribute to a child's financial support and lack of contact enough to establish willful neglect], alone is sufficient to allow an adoption of a child without the consent of the biological parent(s) according to state law).

146. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 8-106(G) to (J) (2007) (requiring notice of an adoption petition be given to all "potential father[s]" and that they be informed of their "right to seek custody"); WASH. REV. CODE §§ 26.33.020(1), 26.33.160(1)(b) (2012) (requiring that "alleged father['s]" consent to adoption is required absent the termination of his parental rights); WASH. REV. CODE § 26.33.120(2) (permitting the termination of parental rights only "upon a showing by clear, cogent, and convincing evidence" not only that termination is in the best interest of the child and that the father is withholding his consent to adoption contrary to the child's best interest, but also that the father "has failed to perform parental duties under circumstances showing a substantial lack of regard for his parental obligations").

was passed to provide a uniform, minimum federal standard for a Native American child's rights in relation to the tribe. Protection of Native American parental rights is just one method to that end.[147] Allowing various state laws to be dispositive in the termination of parental rights ignores the ICWA's general rule that the best interest of the Native American child is to remain with his or her tribe.[148] Application of various state standards without regard to the ICWA standards creates inequality for Native American children residing in states with less robust protections for parental rights.

V. A Legislative Remedy: Congressional Amendment of the ICWA Explicitly Permitting the Exclusive Use of Tribal Law in Determinations of Termination of Parental Rights

Some Native American children live in states with weak protection of parental rights. They have unequal rights compared to Native American children living in states with stronger protection of parental rights because the likelihood of not remaining a part of their tribe is higher. These Native American children are more vulnerable to removal from their Native American heritage and culture, especially if the child's parent is an absentee parent. One solution to this protective inequality is for Congress to amend the ICWA to directly repudiate *Adoptive Couple*'s "continued custody" exception to the application of the statute in protecting the parental rights of absentee Native American parents. However, since Congress has not passed several proposed federal bills which would repudiate the "Existing Indian Family" exception, it is unlikely that Congress will be able to enact legislation directly addressing the newly created "continued custody" exception.[149] An alternative solution is for

147. Lorinda Mall, *Keeping It in the Family: The Legal and Social Evolution of ICWA in State and Tribal Jurisprudence*, *in* FACING THE FUTURE, *supra* note 1, at 164, 186; *see* COHEN'S HANDBOOK, *supra* note 100, at 861 ("These narrow state interpretations [like the "Existing Indian Family" exception, and now the U.S. Supreme Court's "continued custody" interpretation,] disregard the fact that the Indian child, not the nonmarital father, is the trigger for ICWA's application. Moreover, the child's and the tribe's rights are independent of the parent's or Indian custodian's. They continue to exist despite the father's disqualification as a parent or his objection to applying the ICWA.").

148. Mall, *supra* note 147, at 186 (arguing that the ICWA "does not provide for many of these [state] standards.").

149. COHEN'S HANDBOOK, *supra* note 100, at 868; *see generally* Jones, *supra* note 143, at 422 (arguing that a lack of congressional intervention and repudiation of state-created common law exceptions to the application of the ICWA is because Congress does not directly fund implementation of the statute, and therefore, states

Congress to amend the ICWA to allow tribal law to govern adoption or foster care proceedings. This solution would strengthen tribal self-governance by granting tribes authority to determine if a Native American parent's parental rights have been terminated, and allows the tribe to decide whether that parent's absence or abandonment of the child are relevant. Alternatively, if the U.S. Congress lacks the political will to act, state legislatures are free to pass or amend state ICWAs to allow for tribal law to control in termination of parental rights proceedings.

Generally speaking, tribal laws provide greater protections for parental rights.[150] In *In re J.J.S.*, a case involving maternal neglect of a Native American child, the Navajo Supreme Court stressed that "[a]doption is merely a case of taking the children into the home for a limited time, or permanently, by extending family or parental agreement."[151] The Navajo Supreme Court's decision is based on a communal approach with an emphasis on the child's relationship to tribal members with the expectation of shared responsibility in nurturing the child.[152] Moreover, Navajo common law "deemphasizes the termination of parental rights," which makes Navajo adoption an "informal [proceeding] . . . based upon community expectations."[153] This view of adoption provides an opportunity for biological parents to retain a connection with their children, and their children retain a connection with their parents through the tribal community. It also allows for more robust tribal sovereignty over child welfare than the holding in *Adoptive Couple*.

Conclusion

The *Adoptive Couple* majority went against the legislative history and the text of the ICWA in its holding.[154] The Court ignored the canons of Indian law construction, which would have required a more generous and liberal reading of the ICWA in favor of Dusten Brown's termination of parental rights, receiving the rigorous procedural due process protections provided for in the ICWA, which are often greater protections than those provided in

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cannot be easily nudged into compliance with the statute by Congress exerting leverage against the states with its power over the purse).

150. An exhaustive analysis of Native American parental rights under tribal laws is beyond the scope of this Comment.

151. *In re* J.J.S., 4 Nav. R. 192 (1983).

152. Mall, *supra* note 147, at 193.

153. *Id.*

154. *See supra* Part III(A).

most state courts applying state family law.[155] In spite of the eroding rationale that once justified the "Existing Indian Family" exception to the ICWA, the Court created a twin exception through federal common law.[156] The only feasible solution that will strengthen tribal self-determination and sovereignty over Native American child welfare is for either Congress to amend the ICWA to allow the use of tribal law or states to amend their state ICWAs to allow tribal law to control in termination proceedings of parental rights.

155. *See supra* Parts III(B) and IV.
156. *See supra* Part III(C).