

IN THE NAME OF THE CHILD: RACE, GENDER, AND  
ECONOMICS IN *ADOPTIVE COUPLE V. BABY GIRL*

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Abstract

On June 25, 2013, the Supreme Court decided *Adoptive Couple v. Baby Girl*, holding that the Indian Child Welfare Act did not permit the Cherokee father in that case to object to termination of his parental rights. The case was ostensibly about a dispute between prospective adoptive parents and a biological father. But this Article demonstrates that it was about a lot more than that. It was a microcosm of anxieties about Indian-ness, race, and the changing nature of parenthood. While made in the name of the child, moreover, the decision supports practices and policies that do not forward and may even undermine children's interests.

Drawing on published and unpublished court records and testimony, this Article reveals that the Court's portrayal of the facts of the case was wrong. Instead of a deadbeat dad acting as a spoiler in the adoption of the daughter he had abandoned, the birth father sought to parent his daughter from the moment he learned his fiancée was pregnant. He was initially prevented from learning of the adoption plan by the actions of the other parties and their attorneys. The decision distorted the law as well, doing violence to long-accepted interpretations of the statute at issue. Why did the Court mischaracterize the facts and the law? This Article examines the narratives of the interests of the child, racial color-blindness, and even women's rights that surrounded the case to reveal that the decision in fact rested on racialization and colonialism of Indian people, condemnation of poor single mothers, economic interests of private adoption facilitators, and the class divides in modern paths to parenthood.

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#### INTRODUCTION

This story starts with a little girl—known legally as Baby Girl, as Baby Veronica in the media frenzy that surrounded her case, as Ronnie Brown to her biological father and his family, and as Veronica Capobianco to the couple that ultimately adopted her—who was removed when she was two years old from the couple that wanted to adopt her and placed with her biological father, then removed from him when she was four years old to go back to the adoptive couple. Although the second removal—unlike the first—occurred without a hearing as to her best interests, it was made primarily in the name of that many-named child. This Article investigates the case to argue that it in fact reflected concerns founded in race, gender, and economics that have little to do with children’s interests.

At birth, Veronica was placed by her mother, Christinna Maldonado, with Melanie Duncan<sup>1</sup> and Matthew Capobianco (the Capobiancos). Although Maldonado had begun negotiating with the Capobiancos months before, it was not until Veronica was almost four months old that anyone

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1. Although usually referred to as Melanie Capobianco by the media, Melanie’s professional name, and the name by which her attorneys referred to her in a recent pleading, is Melanie Duncan. Compare Motion for Attorney Fees and Costs and Brief in Support, Adoptive Couple v. Baby Girl, No. FA-2013-4 (Dist. Ct. Notawa Cnty. Okla. Nov. 1, 2013) (referring to the adoptive mother as Melanie Duncan), with Ariane de Vogue, “Baby Veronica” Custody Case Rages On, ABC NEWS (Sept. 11, 2013, 2:12 PM), <http://abcnews.go.com/blogs/politics/2013/09/baby-veronica-custody-case-rages-on/> (referring to the adoptive mother as Melanie Capobianco).

informed her father, Dusten Brown, of the placement and planned adoption. Brown immediately objected and sought custody. The South Carolina courts found that Brown was a fit and loving father whose parental rights could not be terminated under the Indian Child Welfare Act (ICWA), and ordered Veronica placed in his custody.<sup>2</sup>

Eighteen months later, however, in *Adoptive Couple v. Baby Girl*,<sup>3</sup> the U.S. Supreme Court held that Brown had no right to object to the adoption under ICWA.<sup>4</sup> In July 2013, without a factual hearing, the South Carolina Supreme Court ordered that Veronica be taken from her father and his wife for the adoption to be finalized.<sup>5</sup> In August 2013, Brown turned himself in for criminal custodial interference rather than relinquish her, but the Oklahoma courts issued an emergency stay, and the Governor of Oklahoma initially declined to extradite him. Finally, on September 23, 2013, shortly after her fourth birthday, the Browns reluctantly released Veronica to the Capobiancos.<sup>6</sup>

From many perspectives—including those of parents of any kind, of prospective adoptive parents, and of Native communities scarred by generations of lost children—this is a heartbreaking story. This Article is not another effort to capture that heartbreak. The media has extensively covered it—or versions of it—including on an episode of *Dr. Phil*.<sup>7</sup> This Article instead examines the lenses of race, gender, and economics through which the story has been filtered and understood, and their influence on the opinion of the U.S. Supreme Court. It argues that in the name of the nameless Baby Girl and her interests, the Court participated in a long-standing trend of using children to forward racial, gender, and economic agendas that violate the rights of their birth parents and, ultimately, the interests of the children themselves.

Most striking in this case was the role of race. Before the U.S. Supreme Court, the attorneys for the Capobiancos and the Guardian ad Litem (star Supreme Court litigators Lisa Blatt and Paul Clement)<sup>8</sup> argued that ICWA was unconstitutional, race-based legislation.<sup>9</sup> The majority opinion rested on statutory rather than constitutional arguments, only briefly noting that its interpretation avoided unspecified “equal protection concerns,”<sup>10</sup> but

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2. See *infra* Section I.A.

3. 133 S. Ct. 2552 (2013).

4. *Id.* at 2557.

5. See *Adoptive Couple v. Baby Girl*, 746 S.E.2d 346, 347 (S.C. 2013), *rev'd*, 133 S. Ct. 2552.

6. See *infra* Section I.A.

7. *Adoption Controversy: Battle over Baby Veronica*, DR. PHIL (June 6, 2013), <http://www.drphil.com/shows/show/1895/>.

8. See *infra* Section I.B.

9. *Adoptive Couple*, 133 S. Ct. at 2570 n.3.

10. See *id.* at 2565.

these arguments clearly influenced the judgment. In the first line of the decision, the Court stated that “[t]his case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee.”<sup>11</sup> As discussed below, the statement was untrue on several levels and irrelevant to the legal issues in the case, but it was consistent with an effort that has existed since colonial times to erase Native peoples and their sovereignty by facilitating the assimilation and absorption of Native individuals. In *Adoptive Couple*, however, this longstanding campaign was repackaged in the service of color-blindness. This Article examines this paradox as well as its conflict with constitutional law, which has consistently, if not always coherently, found that federal recognition of descent-based tribal identity does not violate the constitution.

Gender played an important role in the case as well. The case facially pitted the rights of birth mothers against those of birth fathers. The media, moreover, sought to portray Brown as a deadbeat dad standing in the way of Maldonado’s efforts to find a better home for her child. Unpacking this narrative, however, reveals trends far more threatening to both women and their children. The current policies favoring adoption and reducing birth parent rights emerged from the backlash against poor single mothers in the 1980s and 1990s and the proffering of adoption as a solution to both illegitimacy and the increasing numbers of children in foster care.<sup>12</sup> As a result, most states have sharply limited the rights of both birth fathers and birth mothers in adoptions.<sup>13</sup> Before *Adoptive Couple*, ICWA cases were among the few adoptions not subject to this trend.<sup>14</sup>

Although proponents justify these policy shifts with children’s interests, the justification rests on false premises. First, the demand for infants relinquished at birth is so high that it is unaffected by ensuring meaningful consent by birth parents before adoption.<sup>15</sup> Second, the adoption industry has little demand for children in the foster care population, who are mostly not newborns, some of whose development has been affected by mistreatment, and who are more likely to be African American—a group facing significant discrimination in private adoptions.<sup>16</sup> Despite a decades-long policy shift as well as billions of dollars spent on adoption subsidies and adoption promotion, only one in five children exiting foster care leaves through adoption. Of those that do, almost all are adopted by foster parents and a significant fraction by extended-family foster parents.<sup>17</sup> The

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11. *Id.* at 2556.

12. *See infra* Section IV.B.

13. *See infra* Section IV.B.

14. *See infra* Section V.B.

15. *See infra* notes 174–94 and accompanying text.

16. *See infra* notes 189–90, 197–98 and accompanying text.

17. *Infra* notes 396–98 and accompanying text.

determination that Brown had no right to consent, in other words, was connected to policies that denigrate poor single mothers, diminish the ability of both mothers and fathers to contest adoption, and reduce financial and parenting support to poor families—all without meaningfully affecting rates of adoption. Their net effect has been to harm both mothers and children, particularly those of color.

The economic divides resulting from the impact of these policies are also significant. First, class divides the two paths to parenthood presented in the case and shapes the value attached to each path. The situation of the Capobiancos—married, highly educated, seeking adoption after years of unsuccessful treatment for infertility—is familiar and sympathetic to upper-middle-class judges and lawyers. (Chief Justice John Roberts, for example, is an adoptive father himself.)<sup>18</sup> The situation of Dusten Brown—unplanned father of a child whose mother did not want to marry him—is perhaps more common but less familiar to upper-middle-class decision makers,<sup>19</sup> and certainly less valorized in popular media. Are the Capobiancos baby buyers or are they the family any right-thinking biological father would want for his child? Is Brown a deadbeat dad or a thwarted father just trying to make the best of a bad situation? Class may be as important as race or gender in determining the answers to these questions.

Perhaps more important than class are the economic interests of those facilitating private adoptions. Outside of foster care and adoptions by relatives, adoptions are largely conducted through private agencies, attorneys, and facilitators. These entities charge large fees for their services—in 2009, the average cost to adopt an infant was \$32,000,<sup>20</sup> and highs around \$100,000 have long been possible.<sup>21</sup> These private interests depend on a supply of adoptable babies—an increasingly rare commodity in the United States—and on completed adoptions. It is not surprising, therefore, that both the American Academy of Adoption Attorneys and the National Council for Adoption, which represents private adoption agencies,<sup>22</sup> filed amicus briefs on behalf of the Capobiancos.<sup>23</sup>

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18. *Infra* note 471 and accompanying text.

19. *See generally* JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 3–5, 8 (2014) (discussing class-based choices regarding whether to marry).

20. Mariagiovanna Baccara, Allan Collard-Wexler, Leonardo Felli & Leeat Yariv, Gender and Racial Biases: Evidence from Child Adoption 2 (CESifo Working Paper Series, Paper No. 2921, 2010), *available at* <http://ssrn.com/abstract=1545711>.

21. Laura Mansnerus, *Market Puts Price Tag on the Priceless*, N.Y. TIMES (Oct. 26, 1998), <http://www.nytimes.com/1998/10/26/us/market-puts-price-tags-on-the-priceless.html>.

22. NAT'L COUNCIL FOR ADOPTION, FY2013 ANNUAL REPORT 7 (2013), *available at* <http://www.adoptioncouncil.org/files/large/109d5e2bf763e83> (describing membership as largely adoption agencies, but including some adoption attorneys and “advocates”).

Finally, states may have economic interests in having children adopted by upper-middle-class families rather than remaining with low income ones. Because payments from the Temporary Assistance for Needy Families program follow the child,<sup>24</sup> removing children from a poor family greatly reduces the state's obligation to provide such aid. Perhaps recognizing the limited impact of adoption laws on rates of adoption or welfare dependency, however, states did not intervene on behalf of the Capobiancos. Instead, eighteen states submitted an amicus brief agreeing that according full rights to birth fathers under ICWA was in the interests of children and promoted just and stable adoptions.<sup>25</sup>

This Article explores the role that race, gender, and economics played in *Adoptive Couple* and its popular reception. Part I outlines the facts and law of the decision. Part II challenges the idea that the result in this case served the best interests of children, relying on the facts of the case, statistics regarding adoption and foster care, as well as the amicus briefs of eighteen child welfare organizations and another eighteen states who argued that the lower court's ruling furthered the best interests of children. Part III discusses the role of race and the ways that assertions of racial egalitarianism were used to replicate racial colonialism of Indian peoples. Part IV discusses the role of gender, flipping the assertions of the rights of birth mothers to show the connections between undermining Dusten Brown's rights and undermining the rights of poor mothers generally. Part V discusses the role of economics, including both the class divides between adoptive parents and birth parents, and the economic interests of those who facilitate adoptions and states charged with supporting poor families.

## I. FIXING THE FACTS, EXPLAINING THE LAW

This Part first attempts to correct the distortions of fact leading to the decision in *Adoptive Couple*. It then describes the battle between legal superstars in the U.S. Supreme Court and the legal flaws in the resulting decision.

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23. Brief for Am. Acad. of Adoption Attorneys as Amicus Curiae Supporting Petitioners, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12–399); Brief for Nat'l Council for Adoption as Amici Curiae Supporting Petitioners, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12–399).

24. Office of Child Welfare, Dep't of Children & Families, *Maintenance Adoption Subsidy*, CTR. FOR CHILD WELFARE 6 (Mar. 2012), <http://centerforchildwelfare.fmhi.usf.edu/kb/RevMax/AdoptionSubsidyPresentationMar2012.pdf>.

25. Brief of the States of Arizona, Alaska, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Maine, Michigan, Mississippi, Montana, New Mexico, New York, North Dakota, Oregon, Washington, and Wisconsin as Amici Curiae in Support of Respondents Birth Father and the Cherokee Nation at 16, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12–399) [hereinafter Brief of the States].

### A. Facts

Most of the facts in *Adoptive Couple* are undisputed, but they have been frequently misrepresented. This Section therefore presents the facts of the case at some length, trying to the greatest extent possible to rely on those facts presented in judicial opinions and sworn testimony credited by the trial court.

Dusten Brown and Christinna Maldonado had dated on and off since high school, but the off periods were long enough that Brown married, had a child with, and divorced another woman, while Maldonado had two children of her own with another man.<sup>26</sup> They began dating again, however, and in December 2008, Brown and Maldonado got engaged.<sup>27</sup> At that time, Brown—a soldier who received a Bronze Star for his service in Iraq—lived at the Army Base in Fort Sill, Oklahoma, about four hours away from Bartlesville and nearby Notawa, Oklahoma, where Brown grew up and where his family and Maldonado both lived.<sup>28</sup> In January 2009, Maldonado told Brown she was pregnant; he responded by asking her to move up their planned wedding.<sup>29</sup> The family court found that Brown was excited to learn of the pregnancy and “[i]nstead of shirking his responsibilities, he implored [her] to move the wedding date forward” and move into base housing with her two children so that she and the child could “avail [themselves] of the benefits [they] were entitled to as military dependents.”<sup>30</sup>

Maldonado refused, stopped taking Brown’s calls, and in May 2009, broke off their relationship by text message.<sup>31</sup> In June, she sent him another text asking whether he would rather pay child support or relinquish his parental rights; he responded that he would rather relinquish his rights.<sup>32</sup> He later testified that he hoped that this would cause her to rethink the decision not to marry him.<sup>33</sup> The family court found that Brown only intended to agree to Maldonado’s sole custody, and did not find credible Maldonado’s testimony that Brown was trying to avoid paying child support.<sup>34</sup> Maldonado testified that Brown did not contact her after she

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26. See Testimony of Dusten Brown—Direct Examination by Ms. Jones at 477–78, *Adoptive Couple v. Baby Girl*, 2009-DR-10-3803 (S.C. Fam. Ct. Sept. 14, 2011).

27. See *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 552 (S.C. 2012), *rev’d*, 133 S. Ct. 2552.

28. *Id.* at 553 & n.2.

29. *Id.* at 552–53.

30. Transcript of Record at 13, *Adoptive Couple v. Baby Girl*, No. 2009-DR-10-03803 (S.C. Fam. Ct. Sept. 29, 2011); see also Brief in Opposition, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12-399), 2012 WL 5994979, at \*4–5 (citation omitted).

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

32. *Id.*

33. *Id.*

34. Transcript of Record, *supra* note 30, at 15.

texted him in June.<sup>35</sup> Yet Brown testified that Maldonado did not respond to multiple text messages or open the door when he drove to Bartlesville to see her.<sup>36</sup> Further, Brown's mother testified that she called to offer Maldonado money and hand-knitted baby things—twenty-four beaded baby socks—but Maldonado did not reply.<sup>37</sup> The family court found that Brown “attempted to contact her on numerous occasions during her pregnancy, and she denied his attempts,” and that Brown's family had “attempted to provide [the] birth mother with essentials for the minor child, but she refused their efforts as well.”<sup>38</sup>

Financially struggling,<sup>39</sup> Maldonado sought to place the baby for adoption.<sup>40</sup> Through a maze of adoption service providers, Maldonado was connected with the Capobiancos of James Island, South Carolina.<sup>41</sup> The Capobiancos had been through seven unsuccessful rounds of in vitro fertilization and were seeking to adopt.<sup>42</sup> Melanie Duncan Capobianco has a Ph.D. in developmental psychology and works at home, consulting on children's therapies, while Matthew Capobianco is an automotive technician with Boeing.<sup>43</sup> During Maldonado's pregnancy, the Capobiancos paid her “rent, car payments, and utilities,”<sup>44</sup> and allegedly gave Maldonado about \$10,000 in financial assistance, not including her medical fees, which were covered by the state.<sup>45</sup>

The notes from Maldonado's preplacement interview with the Nightlight Christian Adoption Agency report that “[i]nitially the birth

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35. *Adoptive Couple*, 731 S.E.2d at 569.

36. Suzette Brewer, *The Fight for Baby Veronica, Part 2: The Devil's in the Details*, INDIAN COUNTRY TODAY MEDIA NETWORK (May 13, 2013) [hereinafter Brewer, *The Fight for Baby Veronica, Part 2*], <http://indiancountrytodaymedianetwork.com/2013/05/13/fight-baby-veronica-part-2-149336>.

37. *Adoptive Couple*, 731 S.E.2d at 555 n.9; Testimony of Alice Brown—Direct Examination by Ms. Jones at 564, 2009-DR-10-3803 (S.C. Fam. Ct. Sept. 14, 2011); Brewer, *The Fight for Baby Veronica, Part 2*, *supra* note 36.

38. Transcript of Record, *supra* note 30, at 13–14.

39. One (admittedly slanted) news report indicated that she was also paying child support for her two other children. Suzette Brewer, *Some Disturbing Facts About Baby Veronica's Birth Mother*, INDIAN COUNTRY TODAY MEDIA NETWORK (Aug. 12, 2013) [hereinafter Brewer, *Some Disturbing Facts*], <http://indiancountrytodaymedianetwork.com/2013/08/12/selling-christy-maldonado-150831> (discussing court records of child custody and child support disputes showing that the court ordered Maldonado to pay \$252 a month in child support to the father of her other children—children who are being raised by their paternal grandmother).

40. *Adoptive Couple*, 731 S.E.2d at 570.

41. *See infra* notes 439–43 and accompanying text.

42. *Adoptive Couple*, 731 S.E.2d at 570.

43. *See id.* at 553, 579.

44. Transcript of Record, *supra* note 30, at 14.

45. *See* Suzette Brewer, *The Fight for Baby Veronica, Part 1*, INDIAN COUNTRY TODAY MEDIA NETWORK (May 6, 2013) [hereinafter Brewer, *The Fight for Baby Veronica, Part 1*], <http://indiancountrytodaymedianetwork.com/2013/05/06/fight-baby-veronica-part-1-149219>.

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 would be detrimental to the adoption."<sup>46</sup> On August 21, 2009, the attorney the Capobiancos hired to represent Maldonado's interests wrote to the Cherokee Nation of Oklahoma:

My office is working with a South Carolina attorney in the interstate placement of a baby to be born sometime in mid-September. The baby's mother believes she is part-Cherokee, and the baby's father is supposedly enrolled with the Cherokee Nation.

. . . The birth father is: Dustin [sic] Dale Brown

(1/8 Cherokee, supposedly enrolled)

DOB:XX, XX, 1983[sic]

Born and raised in Oklahoma,

Presently in the army at Ft. Sill, Oklahoma

. . . the birth mother chose [the Capobiancos] to adopt her baby and has been working with them for the past four to five months . . . and she believes the father has no objection . . . Could you let me know whether you would object to this adoption by a non-Indian family—and whether the birth mother, Christy, is eligible for a CDIB Card?<sup>47</sup>

The letter misspelled Brown's name as "Dustin" rather than "Dusten," and misstated the day and year—actually 1981—of his birth.<sup>48</sup> Maldonado claimed that she told the attorney this information was incorrect,<sup>49</sup> but the Cherokee Nation did not receive correct information until five months later.<sup>50</sup> The Cherokee Nation responded that they could not find records of Brown's enrollment, but that "[a]ny incorrect or omitted family

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46. *Adoptive Couple*, 731 S.E.2d at 554 (second alteration in original).

47. Letter from Phyllis Zimmerman, Tulsa Attorney, to Myra Reed, Cherokee Nation Indian Child Welfare Div. (Aug. 21, 2009), excerpted in Brewer, *The Fight for Baby Veronica, Part 2*, *supra* note 36 (alterations in original) (internal quotation marks omitted).

48. *Id.*; see also *Adoptive Couple*, 731 S.E.2d at 554; Testimony of Dusten Brown, *supra* note 26, at 475–76.

49. *Adoptive Couple*, 731 S.E.2d at 554.

50. See *id.* at 555.

documentation could invalidate this determination.”<sup>51</sup>

The August 21 letter is also interesting in other ways. First, as the letter shows, although usually described as Hispanic, Maldonado claimed, and later testified to, Cherokee heritage as well.<sup>52</sup> Second, if Maldonado had in fact been working with the Capobiancos for four to five months, she had selected the family even before she ended her relationship with Brown.<sup>53</sup>

On September 15, 2009, Maldonado gave birth to a little girl.<sup>54</sup> She checked herself into the hospital as “strictly no report,” meaning that the hospital would tell anyone who called to inquire about Maldonado that she was not there.<sup>55</sup> Maldonado testified that she had done this with her two previous births to avoid having the father of those children contact her.<sup>56</sup> Brown did not know that Maldonado was in the hospital and did not try to contact her there.<sup>57</sup> The Capobiancos, however, were present at the birth.<sup>58</sup> In fact, Matthew Capobianco cut the umbilical cord<sup>59</sup>—a much-repeated detail.<sup>60</sup> Maldonado relinquished her parental rights the next morning,<sup>61</sup> although ICWA would not permit relinquishment until ten days after birth.<sup>62</sup> After filing papers that did not indicate the baby’s Native American heritage with Oklahoma’s Interstate Compact on Child Placement agency, the Capobiancos received permission to remove her from the state, and took her home to South Carolina later that month.<sup>63</sup>

The Capobiancos filed a petition to adopt Veronica on September 18, 2009, but did not provide notice of the planned adoption to Brown until almost four months later, six days before Brown was scheduled to deploy to Iraq.<sup>64</sup> Although no court made a specific finding that the errors in the notice to the Cherokee Nation or the delay in serving Brown were deliberate, it would not be surprising if they were. Studies have found

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51. *Id.* at 554 (alteration in original) (internal quotation marks omitted).

52. *Id.* at 554 n.5.

53. Melanie Duncan, however, testified that they first got into contact with Maldonado in late June. Testimony of Adoptive Mother—Cross Examination by Ms. Jones at 202, 2009-DR-10-3803 (S.C. Fam. Ct. Sept. 13, 2011).

54. *Adoptive Couple*, 731 S.E.2d at 552.

55. *Id.* at 554 (internal quotation marks omitted).

56. *Id.* at 554 n.7.

57. *See id.*; Brewer, *The Fight for Baby Veronica, Part 2*, *supra* note 36.

58. *Adoptive Couple*, 731 S.E.2d at 554.

59. *Id.*

60. *See, e.g.*, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2558 (2013); *Adoptive Couple*, 731 S.E.2d at 554; *Id.* at 571.

61. *Adoptive Couple*, 731 S.E.2d at 554.

62. 25 U.S.C. § 1913(a) (2012).

63. *Adoptive Couple*, 731 S.E.2d at 554. As discussed below, had the papers indicated Veronica’s Cherokee heritage, the couple would not have been permitted to remove the baby from the state. *See infra* note 69.

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

widespread noncompliance with ICWA.<sup>65</sup> Some of this non-compliance is due to ignorance or carelessness, but there is evidence that it is also part of a common technique to facilitate private adoptions of Indian children by non-Indians.<sup>66</sup> By placing a child with a hopeful family before providing notice to a child's parents or tribe, agencies may create "facts on the ground"<sup>67</sup> that make it less likely that the original illegal placement will be disrupted. Further, although courts disagree, some have held that a long placement with a non-Indian family may provide "good cause" to deviate from ICWA's placement preferences.<sup>68</sup>

The failure to establish the applicability of ICWA until the Capobiancos returned to South Carolina may have been a key legal move as well. Had Oklahoma authorities known that ICWA applied, they would have refused

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65. See, e.g., Margaret Olesnavage et al., *Disproportionate Minority Contact of American Indians/Alaska Natives in the Child Welfare System of Michigan*, MICH. B.J., Jan. 2010, at 32 (providing examples of ICWA non-compliance in Michigan); NAT'L CTR. FOR STATE COURTS & N. AM. INDIAN LEGAL SERVS., INC., AN ANALYSIS OF COMPLIANCE WITH THE INDIAN CHILD WELFARE ACT IN SOUTH DAKOTA: FINAL REPORT (2004) (analyzing surveys of ICWA noncompliance in South Dakota), available at <http://www.sdtribalrelations.com/icwa/icwa04analysis.pdf>; see also Brief for Wis. Tribes as Amici Curiae Supporting Respondents, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399), 2013 WL 1308821, at \*6, \*10–13 (noting that between 2005 and 2007, Wisconsin tribes received notice in less than 18% of ICWA foster care and adoption cases, and documenting other violations).

66. See Brief for Ass'n on Am. Indian Affairs, Nat'l Congress of Am. Indians, Nat'l Indian Child Welfare Ass'n, Indian Tribes, and Other Indian Orgs. as Amici Curiae Supporting Respondents, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12-399), 2013 WL 1279462, at \*17–18 (discussing abusive adoption practices involving Indian children and noting that "Indian children were placed in foster care far more frequently than non-Indian children"); Brief for Wis. Tribes as Amici Curiae, *supra* note 65, at 37–38 (discussing adoption practices in Wisconsin involving Indian children); John Echohawk et al., *The Adoption Industry's Ugly Side*, POLITICO (Apr. 16, 2013, 5:21 AM), <http://www.politico.com/story/2013/04/the-ugly-side-of-the-adoption-industry-90091.html> ("All across this country – but especially in states that are home to multiple Native American Tribes – unethical adoption attorneys are purposely circumventing the federal law that is meant to protect Native American children."); see, e.g., *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 517 (Ct. App. 1996) (reporting that the father in the case did not admit that he was Indian on an adoption form after being told that "the adoptions would be delayed or prevented if [Father's] Indian ancestry were known"); *In re Adoption of Infant Boy Crews*, 803 P.2d 24, 27 (Wash. Ct. App. 1991) ("[Adoption counselor] advised [the birth mother] not to mention her Indian blood to anyone, stating, 'What I don't hear, I don't know.'"), *aff'd*, 825 P.2d 305 (Wash. 1992).

67. "Facts on the ground" is a diplomatic term first used to describe efforts to establish settlements in disputed parts of territory claimed by Israel, and thereby cement abstract claims to the territory with the reality of occupation by individuals and families. See Nomi Maya Stolzenberg, *Facts on the Ground*, in PROPERTY AND COMMUNITY 108–09 (Gregory S. Alexander & Eduardo M. Peñalver eds., 2010). Similarly, placing a child, even illegally, with a family makes it less likely that a court will later disturb the placement.

68. See *In re Adoption of B.G.J.*, 111 P.3d 651, 659 (Kan. Ct. App. 2005), *aff'd*, 133 P.3d 1 (Kan. 2006); see also OKLA. STAT. tit. 10A, § 1-1-102B.6. (2014) (recognizing that permanency is relevant to determining best interests of the child).

to permit Veronica's removal from the state until they were satisfied that the placement complied with ICWA.<sup>69</sup> Had the required notice to Brown and the tribe been made before Veronica's placement with the Capobiancos, the Oklahoma courts would almost certainly have determined that Brown was entitled to custody under the act.<sup>70</sup> Even if the Oklahoma courts had determined that Brown did not have rights under ICWA, Oklahoma law would require that he be provided with notice and an opportunity to establish that his efforts to parent his child had been thwarted before terminating his parental rights.<sup>71</sup> Most important, had the case been considered without the backdrop of Veronica's long placement with the Capobiancos, there would have been little reason to prevent a fit and loving father from parenting his child.

On January 6, 2010, while Brown's unit was on lockdown awaiting imminent deployment, the Washington County Sheriff's Office of Oklahoma called Brown and told him that he had to come to Bartlesville to sign some paperwork.<sup>72</sup> Brown was not allowed to travel to Bartlesville, but wangled permission to meet the process server at a mall parking lot near his army base.<sup>73</sup> There, the process server gave Brown papers stating that Brown was not contesting the adoption of Baby Girl.<sup>74</sup> Brown signed,

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69. *See Cherokee Nation v. Nomura*, 160 P.3d 967, 977 (Okla. 2007) (holding that the administrator of the Oklahoma Interstate Compact on the Placement of Children must ensure compliance with ICWA before allowing the child to be sent to another state for adoption).

70. Transcript of Record, *supra* note 30, at 10 ("I find that Oklahoma would never have given consent for the child to be removed from the State of Oklahoma through the Interstate Compact for Placement of Children, had the Interstate Compact Application been correct."); *see also, e.g., In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004) (holding that ICWA applied to an unmarried mother's attempt to place her child for adoption without the consent of the unmarried Indian father). Brown did initially file his action seeking custody in the Oklahoma courts, but the court properly dismissed the action in favor of the South Carolina courts given the pending action there. *See* Suzette Brewer, *The Fight for Baby Veronica, Part 3*, INDIAN COUNTRY TODAY MEDIA NETWORK (June 4, 2013) [hereinafter Brewer, *The Fight for Baby Veronica, Part 3*], <http://indiancountrytodaymedianetwork.com/2013/06/04/fight-baby-veronica-part-3-149704>. The adoptive couple filed their motion to dismiss six months to the day after Veronica had arrived in South Carolina, *see Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 555 (S.C. 2010), *rev'd*, 133 S. Ct. 2552, invoking the jurisdictional provisions of both the Uniform Child Custody Jurisdiction and Enforcement Act § 201(a)(1) (1997) (providing jurisdiction to the state in which the child has resided for six months immediately preceding the action) and the Uniform Adoption Act § 3-101(a)(1) (1994) (providing jurisdiction to the state where a child has resided for the six months immediately preceding the action). *See also* OKLA. STAT. tit. 10, § 7502-1.1 cmts. (2014) (discussing jurisdiction in adoption cases).

71. OKLA. STAT. tit. 10, § 7505-4.1C.1, 7505-4.2D.

72. *See* Brewer, *The Fight for Baby Veronica, Part 1*, *supra* note 45; Email from Chrissi Nimmo, Assistant Attorney Gen., Cherokee Nation, to Bethany R. Berger, Professor, Univ. of Conn. Sch. of Law (Mar. 18, 2014) (on file with author).

73. Brewer, *The Fight for Baby Veronica, Part 1*, *supra* note 45; *see also Adoptive Couple*, 731 S.E.2d at 555, *rev'd*, 133 S. Ct. 2552.

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

thinking that he was agreeing to relinquish his rights to Maldonado, but immediately realized his mistake.<sup>75</sup> He testified that, “I then tried to grab the paper up. [The process server] told me that I could not grab that [sic] because . . . I would be going to jail if I was to do any harm to the paper.”<sup>76</sup>

Immediately upon returning to Fort Sill, Brown contacted a Judge Advocate General lawyer on base, and with her assistance retained an attorney the next day.<sup>77</sup> On January 11, 2010, Brown filed papers seeking a stay under the Servicemember’s Civil Relief Act, and on January 14 filed a complaint to establish paternity, custody, and child support of his daughter.<sup>78</sup> Brown left for Iraq on January 18, leaving his father with power of attorney while he was abroad.<sup>79</sup> In the meantime, the Cherokee Nation intervened in the case in April 2010, and court-ordered paternity testing in May confirmed that Brown was Veronica’s father.<sup>80</sup>

Brown returned from Iraq in December 2010, but the family court did not hold a hearing on the matter until September 2011.<sup>81</sup> On September 29, 2011, Judge Deborah Malphrus issued an order from the bench finding that ICWA applied to the case, that terminating Brown’s parental rights would not be in Veronica’s interests, and that it would be best for all concerned to quickly transfer Veronica to Brown, on October 15, 2011.<sup>82</sup> The judge found that even if ICWA did not apply, South Carolina law would prevent termination because Brown was a “thwarted father” who had tried to support and care for his child, but who had been prevented from doing so by the birth mother’s deliberate efforts.<sup>83</sup> Judge Malphrus declared that although the “[a]doptive [c]ouple have had this child in their care for two years, a child is not property, and the right to custody cannot ripen simply by virtue of the passage of time. Custody and parental rights cannot be gained by adverse possession.”<sup>84</sup>

On November 25, 2011, the judge issued a written opinion reiterating, in most respects, her earlier order.<sup>85</sup> Although she reversed the finding that

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75. *Id.*

76. *Id.* (alterations in original) (internal quotation marks omitted).

77. *See id.*

78. *Id.* The complaint was originally filed in Oklahoma, but the Oklahoma courts dismissed the lawsuit in favor of the case pending in South Carolina. *See Brewer, The Fight for Baby Veronica, Part 3, supra* note 70; *see also Adoptive Couple*, 731 S.E.2d at 571 n.42 (Kittredge, J., dissenting).

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

80. *Id.*

81. *Id.* at 555 n.11, 556.

82. Transcript of Record, *supra* note 30, at 10, 17–19.

83. *See id.* at 13.

84. *Id.* at 17.

85. *See Adoptive Couple*, 731 S.E.2d at 552.

Brown was a thwarted father under South Carolina law,<sup>86</sup> Judge Malphrus wrote that “[t]he undisputed testimony is that he is a loving and devoted father [to his other daughter]. Even [Mother] herself testified that [Father] was a good father. There is no evidence to suggest that he would be anything other than an excellent parent to this child,” and “[Father] has convinced me of his unwavering love for this child.”<sup>87</sup> The judge concluded that “[w]hen parental rights and the best interests of the child are in conflict, the best interests of the child must prevail. However, in this case, I find no conflict between the two.”<sup>88</sup>

Judge Malphrus also rejected the “existing Indian family” exception,<sup>89</sup> which some courts have used to deny application of ICWA when the involved family does not have a meaningful connection with an Indian tribe.<sup>90</sup> However, Judge Malphrus also found that, even if the exception was good law, it would not apply to the facts of this case given Brown and his family’s strong connection to the Cherokee Nation and its culture:

I find [Father] is a Cherokee in more than name only, and there is, in fact an existing Indian family. There was ample testimony to support that [Father’s] heritage and culture are very important to him and always had been . . . [T]here was evidence in [the home of Father and his family] reflecting their pride and connection to the [Cherokee] Nation and the Wolf Clan. I find that [Father] has a strong cultural tie to the Cherokee Nation.<sup>91</sup>

The appellate court granted a temporary stay of execution of the order, but lifted it on December 30, 2011.<sup>92</sup> The Capobiancos transferred Veronica to the Browns on December 31, 2011.<sup>93</sup> By this time, the Capobiancos had retained a local public relations firm, and a phalanx of reporters was waiting at the scene of the hand off.<sup>94</sup>

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86. See Email from Chrissi Nimmo, Assistant Attorney Gen., Cherokee Nation, to Bethany R. Berger, Professor, Univ. of Conn. Sch. of Law (Feb. 2, 2014) (on file with author); see also *infra* notes 332–38 and accompanying text.

87. Brief in Opposition, *supra* note 30, at \*9 (citation omitted) (internal quotation marks omitted) (first, third, and fourth alteration in original).

88. *Adoptive Couple*, 731 S.E.2d at 566 (alteration in original) (quoting the family court).

89. *Id.* at 556.

90. See *id.* at 558 n.17.

91. Brief in Opposition, *supra* note 30, at \*8–9 (alterations in original) (internal quotation marks omitted).

92. *Adoptive Couple*, 731 S.E.2d at 556.

93. *Id.* at 552.

94. Brewer, *The Fight for Baby Veronica, Part 3*, *supra* note 70. The Capobiancos’ attorney changed the location of the hand off from their home to the Omni Hotel at the last minute. *Id.* Upon checking out the location and seeing the swarm of cameras, Sharon Jones, one of Brown’s attorneys, refused to conduct the hand off there and told the Capobiancos to meet Brown where he

Although this Article discusses the details of the legal dispute in the next Section, the subsequent proceedings are also important to an understanding of the case's facts. On July 26, 2012, the South Carolina Supreme Court affirmed Judge Malphrus's family court decision.<sup>95</sup> On June 25, 2013, the U.S. Supreme Court reversed.<sup>96</sup> On July 17, 2013, without holding a hearing on Veronica's interests, the South Carolina Supreme Court ordered the adoption finalized and Veronica immediately transferred to the Capobiancos.<sup>97</sup> In early August, Brown turned himself in to Oklahoma authorities rather than hand her over.<sup>98</sup> The Oklahoma authorities stayed extradition pending a hearing, and, in the meantime, ordered the parties to submit to mediation.<sup>99</sup> Finally, after mediation broke down and the Oklahoma Supreme Court lifted its emergency stay of execution,<sup>100</sup> Brown relinquished Veronica to the Capobiancos on September 23, 2013, eight days after her fourth birthday.<sup>101</sup>

There is no question that the Capobiancos provided a good home for Veronica. Because there has been no factual hearing since Veronica's transfer in December 2011, there are no judicial findings regarding her family life with the Browns (Brown remarried in 2009; Veronica knew his wife Robin as "Mommy").<sup>102</sup> Newspaper articles suggest that Veronica thrived with the Browns as well, and was a happy, bubbly child who loved her parents, enjoyed her pink and purple room and helping tend the ducks, geese, and horses at her grandparents' farm, was attached to her half-sister, and gleefully participated in Cherokee stomp dances at weekly classes with

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was waiting at her office. *Id.* Brown and Veronica remained in Jones' office until the reporters gave up and went away. *Id.*

95. *Adoptive Couple*, 731 S.E.2d at 552.

96. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2257 (2013).

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

98. *See Craig Day & Lacie Lowry, Baby Veronica Dad Turns Self in to Oklahoma Authorities, Resists Extradition*, NEWS ON 6 (Aug. 12, 2013, 8:33 AM), <http://www.newson6.com/story/23109019/chokeee-court-holds-emergency-hearing-for-baby-veronica>; *see also* Brandi Ball, *Arrest Warrant Issued for Biological Father of Baby Veronica*, NEWS ON 6 (Aug. 10, 2013, 1:43 PM), <http://www.newson6.com/story/23100247/report-arrest-warrant-issued-for-biological-father-of-baby-veronica>.

99. Email from Chrissi Nimmo, Assistant Attorney Gen., Cherokee Nation, to Bethany R. Berger, Professor, Univ. of Conn. Sch. of Law (Mar. 18, 2014) (on file with author).

100. *See Brown v. DeLapp*, 312 P.3d 918, 918 (Okla. 2013).

101. Michael Overall, *Baby Veronica Case: Dusten Brown to Stop Custody Fight for Veronica*, TULSA WORLD (Oct. 10, 2013, 5:55 AM), [http://www.tulsaworld.com/news/baby-veronica-case-dusten-brown-to-stop-custody-fight-for/article\\_2d903520-319a-11e3-abf1-0019bb30f31a.html](http://www.tulsaworld.com/news/baby-veronica-case-dusten-brown-to-stop-custody-fight-for/article_2d903520-319a-11e3-abf1-0019bb30f31a.html); *see also Adoptive Couple*, 731 S.E.2d 550, 552 (S.C. 2012), *rev'd*, 133 S. Ct. 2552 (2013) (stating that Veronica was born on September 15, 2009).

102. Oklahomanews, *Baby Veronica Case aired 7-12-13* (July 15, 2013), <http://www.youtube.com/watch?v=t4vfBX2oAUw>.

other children.<sup>103</sup> Although some of these reports are from sympathetic fora like *Indian Country Today*, others come from the Oklahoma TV News<sup>104</sup> and the Charleston, South Carolina *Post and Courier*.<sup>105</sup> All available evidence suggests that Veronica has had two loving, happy homes and, at four years old, had to leave the second one and return to the first.

### B. *The Legal Battle*

Indian law cases usually occupy an obscure backwater in the Supreme Court docket. Justices have described them as “pee wee” and even “chickenshit” cases.<sup>106</sup> Not so with *Adoptive Couple*. The Copabiancos were represented by Lisa Blatt, who has argued more cases before the Supreme Court than any other woman in private practice and has won all but one.<sup>107</sup> Guardian ad Litem Jo Prowell, an aggressive participant in the litigation, was represented by Paul Clement.<sup>108</sup> Clement is perhaps the most active Supreme Court litigator in the country; his recent high profile cases include arguments against the constitutionality of the Affordable Care Act, the Voting Rights Act, and for the constitutionality of the Defense of Marriage Act.<sup>109</sup> Maldonado submitted an amicus brief authored by Gregory Garre (former U.S. Solicitor General and clerk for Justice William Rehnquist) and Lori Alvino McGill (former clerk for Justice Ruth Bader Ginsburg).<sup>110</sup> Amicus briefs supporting reversal were

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103. See Suzette Brewer, *Inseparable Sisters: Adoption Order Exact Toll on Baby Veronica's Family*, INDIAN COUNTRY TODAY MEDIA NETWORK (July 19, 2013), <http://indiancountrytodaymedianetwork.com/2013/07/19/inseparable-sisters-adoption-order-exacts-toll-baby-veronicas-family-150500>; Brewer, *The Fight for Baby Veronica, Part 1*, *supra* note 45; Andrew Knapp, *To Oklahoma's American Indian Tribes, Veronica is a Battle Cry for Cultures*, POST & COURIER, (Aug. 17, 2013), <http://www.postandcourier.com/article/20130817/PC16/130819408>.

104. *E.g.*, Oklahomanews, *supra* note 102.

105. See Knapp, *supra* note 103.

106. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 57–58, 359 (1979) (quoting Justices John Marshall Harlan and William J. Brennan).

107. See Vanessa O'Connell, *A Chat with Lisa Blatt, a Record-Holding Supreme Court Litigator*, WALL ST. J. L. BLOG (Jan. 20, 2011, 3:22 PM), <http://blogs.wsj.com/law/2011/01/20/a-chat-with-lisa-blatt-a-record-holding-supreme-court-litigator/>; Lisa S. Blatt, ARNOLD & PORTER LLP, <http://www.arnoldporter.com/professionals.cfm?action=view&id=5409> (last visited Jan. 12, 2015).

108. Response of Guardian Ad Litem *ex rel.* Baby Girl, in Support of Petition for Writ of Certiorari at 1, 20, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12–399).

109. David G. Savage, *Lawyer Relishes Tough and Unpopular Cases Before Supreme Court*, L.A. TIMES (Dec. 26, 2011), <http://articles.latimes.com/2011/dec/26/nation/la-na-court-clement-20111226>.

110. Brief for Birth Mother as Amica Curiae Supporting Petitioners at 14, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12–399); Gregory G. Garre, U.S. DEPT. JUSTICE, <http://www.justice.gov/osg/bio/gregory-g-garre> (last visited Jan. 12, 2015); Lori Alvino McGill, QUINN EMANUEL URQUHART & SULLIVAN, LLP, <http://www.quinnemanuel.com/attorneys/mcgill-lori-alvino.aspx> (last visited Jan. 12, 2015).

also filed by the American Academy of Adoption Attorneys, the National Council on Adoption, the County Welfare Officers of California, and law professors Joan Heifetz Hollinger and Elizabeth Bartholet, the latter a passionate advocate of transracial adoption.<sup>111</sup>

Brown was represented by the Yale Law School Supreme Court Clinic, led by Charles Rothfeld, another star Supreme Court litigator.<sup>112</sup> The United States also weighed in on the respondents' behalf; Deputy Solicitor General Edwin Kneedler argued the U.S. position.<sup>113</sup> The twenty-two amicus briefs supporting Birth Father and Baby Girl included many from Indian tribes and organizations as well as one from the ACLU; one from current and former members of congress (written by Kathleen Sullivan, former Dean of Stanford Law School and another Supreme Court superstar);<sup>114</sup> one from the attorneys general of eighteen different states; one from a number of churches and religious organizations; one from the Minnesota Department of Human Services; and one from eighteen leading child welfare organizations (written by Patricia Millett, the woman who has argued the second most cases before the Supreme Court).<sup>115</sup>

This concentration of attorney firepower was not a reflection of the complexity or conflict below regarding the legal issues in the case. The case appeared to involve dry questions of statutory construction, and, as SCOTUSblog opined, the “plain language of the [statute]” appeared to encompass this situation.<sup>116</sup> The first question was whether Brown was a “parent” under § 1903(9) of ICWA,<sup>117</sup> which defines the term to mean

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111. Brief for the Am. Acad. of Adoption Attorneys as Amici Curiae Supporting Petitioners, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12–399); Brief for Nat'l Council for Adoption as Amici Curiae Supporting Petitioners, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12–399); Brief for Professor Joan Heifetz Hollinger and Professor Elizabeth Bartholet, Ctr. for Adoption Policy, and Advokids as Amici Curiae Supporting Respondent Baby Girl and Reversal, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12–399); Brief of the Cal. State Ass'n of Counties and the Cnty. Welfare Dir. Ass'n of Cal. as Amici Curiae Supporting Petitioners, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12–399).

112. Tony Mauro, *Brief of the Week: Star Advocates Face Off in High-Profile Adoption Case*, NAT'L L.J. (Dec. 4, 2012), <http://www.nationallawjournal.com/id=1202580249740?> (LexisNexis subscription required).

113. See Brief for the United States as Amicus Curiae Supporting Affirmance, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12–399); *Adoptive Couple v. Baby Girl*, OYEZ PROJECT, [http://www.oyez.org/cases/2010-2019/2012/2012\\_12\\_399](http://www.oyez.org/cases/2010-2019/2012/2012_12_399) (last visited Jan. 12, 2015).

114. Kathleen M. Sullivan, QUINN EMANUEL URQUHART & SULLIVAN, LLP, <http://www.quinnemanuel.com/attorneys/sullivan-kathleen-m.aspx> (last visited Jan. 12, 2015).

115. O'Connell, *supra* note 107. For a helpful compilation of briefs, see Matthew L.M. Fletcher, *Turtle Talk Guide to the Amici Supporting Respondents in Baby Veronica Case (Adoptive Couple v. Baby Girl)*, TURTLE TALK (Mar. 29, 2013), <http://turtletalk.wordpress.com/2013/03/29/turtle-talk-guide-to-the-amici-supporting-respondents-in-baby-veronica-case-adoptive-couple-v-baby-girl/>.

116. Amy Howe, *Argument Preview: Court to Take on Law and Emotion in Indian Adoption Case*, SCOTUSBLOG (Apr. 13, 2013, 8:40 PM), <http://www.scotusblog.com/?p=162343>.

117. *Id.*; see also *Adoptive Couple*, 133 S. Ct. at 2559–60.

“any biological parent . . . of an Indian child,” but excludes “the unwed father where paternity has not been acknowledged or established.”<sup>118</sup> Although most courts apply state law standards to determine whether paternity has been acknowledged or established, all would consider the steps Brown took—filing an assertion of paternity and having it judicially established via DNA testing—to be sufficient.<sup>119</sup> Yet the Supreme Court did not even resolve this question, assuming without deciding that Brown was a parent under ICWA.<sup>120</sup>

The second question was whether the standards ICWA establishes for involuntary termination of parental rights applied to a father who had not had custody of his child.<sup>121</sup> Section 1912 as a whole governs involuntary child welfare proceedings in state court.<sup>122</sup> Whereas, § 1913, in contrast, governs voluntary consent to foster care and termination of parental rights.<sup>123</sup> Section 1912(a) requires notice to a child’s parent and tribe at least ten days before any involuntary foster care placement or termination of parental rights.<sup>124</sup> Section 1912(b) provides for court-ordered counsel for any indigent parent in any “removal, placement, or termination proceeding,” while § 1912(c) provides all parties with the right to examine all records in the case.<sup>125</sup> Section 1912(d) provides that the party seeking foster care placement or termination of parental rights must show that active remedial efforts had been made “to prevent the breakup of the Indian family.”<sup>126</sup> Section 1912(e) provides that foster care placement may not be ordered absent “clear and convincing evidence . . . 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,” while § 1912(f) provides that termination of parental rights may not be ordered absent evidence “beyond a reasonable doubt” of such harm.<sup>127</sup>

The South Carolina Supreme Court found that because the adoptive couple had not established serious harm to Veronica from her father’s custody or that efforts had been made to prevent family breakup as

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118. 25 U.S.C. § 1903(9) (2012).

119. See *Bruce L. v. W.E.*, 247 P.3d 966, 978–79 (Alaska 2011) (summarizing cases from various states that demonstrate the sufficiency of affirmative steps to acknowledge paternity); see also Brief of the States, *supra* note 25, at 16–22 (discussing case law and arguing that Brown satisfied standards established by state courts).

120. *Adoptive Couple*, 133 S. Ct. at 2560.

121. See *Howe*, *supra* note 116; see also *Adoptive Couple*, 133 S. Ct. at 2560–62.

122. 25 U.S.C. § 1912.

123. *Id.* § 1913.

124. *Id.* § 1912(a).

125. *Id.* § 1912(b)–(c).

126. *Id.* § 1912(d).

127. *Id.* § 1912(e)–(f).

required by §§ 1912(d) and (f), parental rights could not be terminated.<sup>128</sup> Petitioners argued, however, that even if Brown was a parent, and was thus required to receive notice and court-appointed counsel in a termination of parental rights proceeding under § 1912, none of the standards § 1912 requires for involuntary termination applied because he did not presently have custody of Veronica.<sup>129</sup> Rather, only state law standards applied, and in South Carolina, unwed fathers, like Brown, had no defenses at all against termination of their parental rights.<sup>130</sup> This proposition makes no sense in light of the rest of § 1912—would Congress really require numerous procedural protections for parents facing involuntary termination of parental rights only to permit the termination to proceed without any substantive defense? And yet this is the conclusion that five members of the Supreme Court reached.<sup>131</sup>

Starting with the words “continued custody” in § 1912(f), the Court determined that they included only custody by someone who already had legal or physical custody.<sup>132</sup> This certainly is one meaning of the term. As Justice Antonin Scalia pointed out in his dissent, however, “continued custody” could also refer to custody that was “not merely that initial or temporary custody” but protracted or without interruption in the future.<sup>133</sup> Scalia’s interpretation is also far more consistent with the structure of § 1912 as a whole, which deals generally with involuntary terminations, and gives significant rights in such proceedings to unmarried fathers who have acknowledged paternity.<sup>134</sup>

The Court then defined custody to mean physical or legal custody as defined by state law.<sup>135</sup> Because mothers have legal custody of illegitimate children in the absence of a contrary court order, the substantive requirements of § 1912(f) did not apply.<sup>136</sup> This was actually a far more radical proposition than argued by Petitioners, who only asserted that Brown lacked legal rights because he had not provided the financial support necessary under South Carolina law to provide unmarried fathers

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128. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 562–64 (S.C. 2012), *rev’d*, 133 S. Ct. 2552 (2013).

129. Reply Brief for Petitioners at 7–8, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12–399).

130. *See id.*

131. *See Adoptive Couple*, 133 S. Ct. at 2556–57.

132. *Id.* at 2560.

133. *Id.* at 2571–72 (Scalia, J., dissenting); *see also id.* at 2577 n.6 (Sotomayor, J., dissenting) (agreeing with Scalia’s proposition).

134. *See id.* at 2573 (Sotomayor, J., dissenting) (arguing that interpreting § 1912 through two words at the end of the statute is a “textually backward reading” that “misapprehends ICWA’s structure and scope”).

135. *See id.* at 2562 (majority opinion).

136. *Id.*

with the right to contest termination of parental rights in adoptions.<sup>137</sup> State laws differ on when unwed fathers have such rights, with a number of states according greater rights than South Carolina.<sup>138</sup>

Virtually all state statutes, however, provide that unmarried mothers have legal custody of their children until otherwise established.<sup>139</sup> Because at least 67% of Indian children are born to unmarried parents,<sup>140</sup> this would prevent most fathers who do not live with their children from seeking custody under § 1912(f).<sup>141</sup>

But the Court's holding could be given a less sweeping interpretation. In places, the Court claimed that its ruling was limited to a "parent who abandoned his or her child prior to birth and *never* had physical or legal custody."<sup>142</sup> Further, Justice Stephen Breyer stated in concurrence that the Court was not deciding the case of a "father with visitation rights or a father who has paid 'all of his child support obligations,' [or] special circumstances such as a father who was deceived about the existence of the child or a father who was prevented from supporting his child."<sup>143</sup> Later courts may find that *Adoptive Couple* does not apply to parents who at some time had significant contact with or responsibility for their children. The legal rule announced by the majority, however, does not clearly exclude such cases—such fathers do not have "legal or physical custody" under state law,<sup>144</sup> and therefore would not appear to have any rights under the standards applied in the case.

The Court also held that fathers like Brown are not entitled to any protections under § 1912(d), which requires that "active efforts" be made to prevent the breakup of the Indian family before termination or foster care placement.<sup>145</sup> That this provision was "adjacent" to § 1912(e) and (f), the Court stated, "strongly suggests that the phrase 'breakup of the Indian family' should be read in harmony with the 'continued custody'

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137. Brief for Petitioners, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12-399), 2013 WL 633597, at \*25–26.

138. See Bruce L. v. W.E., 247 P.3d 966, 978–79 (Alaska 2011) (summarizing case law from several states on the issue of establishing paternity).

139. See 1 DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN § 7:10, at 598 (rev. 2d ed. 2005).

140. See Ctrs. for Disease Control & Prevention, *Births: Final Data for 2012*, 62 NAT'L VITAL STATISTICS REPS. 9 tbl.13 (Dec. 30, 2013), [http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62\\_09.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_09.pdf). This report undercounts as it tracks nonmarital births by the race of the mother, not the father, and thus misses cases in which the father, but not the mother, was American Indian.

141. See Brief of Wis. Tribes, *supra* note 65, at 20–21 (noting that 95% of all voluntary relinquishments are by unmarried mothers).

142. See *Adoptive Couple*, 133 S. Ct. at 2563 n.8.

143. *Id.* at 2571 (Breyer, J., concurring) (quoting *Adoptive Couple*, 133 S. Ct. at 2578 & n.8 (Sotomayor, J., dissenting)).

144. See *id.* at 2562 (majority opinion).

145. *Id.* at 2557; see also 25 U.S.C. § 1912(d) (2012).

requirement.”<sup>146</sup> It is not clear why a restrictive reading of language *after* the language construed “strongly suggests” that the restriction should be used to narrow earlier parts of the statute. The Court found, however, that because Brown did not have legal or physical custody, there was no family breakup in terminating Veronica’s legal relationship to him.<sup>147</sup>

In summary, although the Court assumed that Brown was a parent under ICWA, and left untouched the requirements that such parents have rights to notice, counsel, intervention, and examination of all records in any involuntary termination proceedings, it rendered those rights essentially meaningless. While state law might require some kind of substantive showing before parental rights could be terminated, the substantive standards in ICWA simply did not apply.

A few state courts in the 1980s limited ICWA’s application in cases involving unmarried Indian fathers, but these cases were based primarily on those courts’ interpretation of the overall purposes of the statute, rather than construction of the actual words of the statute. In the first of these cases, *In re Adoption of Baby Boy L.*,<sup>148</sup> the Kansas Supreme Court held that ICWA did not apply at all in a case where the father never had custody of his child, because there was no “existing Indian family” to break up.<sup>149</sup> But courts and legislatures have since generally rejected this “existing Indian family exception,” even in several of the states that originally adopted it.<sup>150</sup>

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146. *Adoptive Couple*, 133 S. Ct. at 2563.

147. *Id.* at 2562. It is true that the South Carolina Supreme Court was somewhat confused about when the “active efforts” requirement would apply, suggesting that for a father who was not interested in having a relationship with his child this would mandate measures “attempting to stimulate [Biological] Father’s desire to be a parent.” *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 562 (S.C. 2012), *rev’d*, 133 S. Ct. 2552. The majority understandably had some fun with such a requirement. *Adoptive Couple*, 133 S. Ct. at 2563–64 & n.9. But if § 1912 is correctly read only to apply to involuntary terminations of parental rights, no such “active efforts” would be required for fathers not interested in parenting their children.

148. 643 P.2d 168 (Kan. 1982), *overruled by In re A.J.S.*, 204 P.3d 543 (Kan. 2009).

149. *See id.* at 175–76; *accord In re S.A.M.*, 703 S.W.2d 603, 608 (Mo. Ct. App. 1986) (refusing to apply § 1912(d) and (f) to a case both because the unmarried father did not qualify as a parent and because there was no “Indian family” to preserve). *In re S.A.M.* did state briefly that the child in that case was not in the appellant’s “continued” custody, but did not rest its opinion on this holding. *Id.* at 607; *see also In re Adoption of Baby Boy D.*, 742 P.2d 1059, 1063–64 (Okla. 1985) (holding noncustodial unmarried father did not have standing to object to adoption or invoke protections of §§ 1911, 1912, and 1913 because the child had not been part of an “existing Indian environment”), *overruled by In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004).

150. *See* ROBERT ANDERSON, BETHANY R. BERGER, PHILIP P. FRICKEY & SARAH KRAKOFF, *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 512 (2010) (listing six states and one appellate division in California that follow the “existing Indian family” doctrine and fifteen states and one appellate division in New York that reject it).

Like those early state court decisions, in *Adoptive Couple* the U.S. Supreme Court rested its opinion, in part, on its finding that ICWA “was primarily intended to stem the unwarranted removal of Indian children from intact Indian families.”<sup>151</sup> State courts were forced to acknowledge that Congress had other important goals in ICWA,<sup>152</sup> particularly after 1989, when the Supreme Court decided *Mississippi Choctaw v. Holyfield*,<sup>153</sup> its sole previous case on the act, strongly affirming ICWA’s application to twins voluntarily relinquished for adoption at birth.<sup>154</sup> Although the Court in *Adoptive Couple* declined Petitioners’ invitation to adopt the existing Indian family exception,<sup>155</sup> by echoing the pre-*Holyfield* narrow interpretation of congressional purpose and providing a way to evade application of ICWA through construction of its statutory language, the decision may breathe new life into the generally rejected doctrine.

With little discussion, the Supreme Court also eviscerated the substantive standard that applies to both voluntary and involuntary placements under ICWA. Section 1915(a) provides that:

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.<sup>156</sup>

Some courts have found that factors such as birth-parent preference and long placement with a prospective family might contribute to “good cause” to deviate from the placement preferences.<sup>157</sup> The Supreme Court,

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151. *Adoptive Couple*, 133 S. Ct. at 2561.

152. See 25 U.S.C. § 1901(2)–(5), 1902 (2012) (referring to congressional “responsibility for the protection and preservation of Indian tribes,” the fact that “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children,” the placement of children in “non-Indian foster and adoptive homes,” and policies to “promote the stability and security of Indian tribes and families”).

153. 490 U.S. 30 (1989).

154. *Id.* at 53.

155. See Marcia A. Zug, *The Real Impact of Adoptive Couple v. Baby Girl: The Existing Indian Family Doctrine Is Not Affirmed, but the Future of the ICWA’s Placement Preferences Is Jeopardized*, 42 CAP. U. L. REV. 327, 339 (2013).

156. 25 U.S.C. § 1915(a), declared unconstitutional as applied by *In re Santos Y.*, 92 Cal. App. 4th 1274, 1312 (Ct. App. 2001).

157. See, e.g., *id.* § 1915(c) (providing that parental preference could be considered in appropriate circumstances); *In re Adoption of F.H.*, 851 P.2d 1361, 1364 (Alaska 1993) (concluding that mother’s preference for placement with non-Indian adoptive parents was an appropriate factor in finding good cause); *In re Appeal in Maricopa Cnty. Juvenile Action No. A–25525*, 667 P.2d 228, 234 (Ariz. Ct. App. 1983) (finding good cause where child had resided with adoptive mother for three years). *But see In re T.S.W.*, 276 P.3d 133, 145 (Kan. 2012) (concluding

however, held that the placement preferences were completely “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.”<sup>158</sup>

If taken at face value, this holding completely undermines the statutory requirement; henceforward, to evade compliance with the preferences one only need keep the proposed placement for adoption secret until a family has filed to adopt the child. Because there would be “no alternative party” at that moment, the placement preferences would not apply. Before *Adoptive Couple v. Baby Girl*, no one assumed that Congress intended the statute to be so easily evaded. Indeed, the guidelines promulgated by the Bureau of Indian Affairs suggested the contrary, stating that one of the factors in determining good cause was “[t]he unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.”<sup>159</sup> State statutes,<sup>160</sup> judicial decisions,<sup>161</sup> and federal guidelines<sup>162</sup> all agree that § 1915 requires, at a minimum, reasonable efforts to find a suitable family meeting the preferences.

It might be possible to avoid this result by reading the majority opinion to permit application of the placement preferences in situations in which individuals outside the preferences initially file for adoption, but a family within the preferences files before the adoption is finalized.<sup>163</sup> The court would then determine whether the second family was suitable for the child, and whether good cause existed to finalize adoption with the first family instead. Justice Breyer suggested this in his concurrence, asking whether

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parental preference alone cannot constitute good cause); *In re Custody of S.E.G.*, 521 N.W.2d 357, 364 (Minn. 1994) (holding it improper to find that long placement alone constituted good cause).

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

159. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,594 (Nov. 26, 1979).

160. See, e.g., CAL. WELF. & INST. CODE § 361.31(k) (West 2014) (requiring documentation of efforts to find placement complying with the preferences); IOWA CODE § 232B.9(8) (2014) (requiring documentation of “active efforts” to comply with the preferences), *declared unconstitutional by In re N.N.E.*, 752 N.W.2d 1 (2008); WIS. STAT. § 48.028(7)(e) (2014) (determining the existence of good cause to depart from placement preference based on considerations of whether a preferential placement is unavailable only after diligent efforts have been made).

161. See, e.g., *In re Welfare of S.N.R.*, 617 N.W.2d 77, 84–85 (Minn. Ct. App. 2000) (rejecting application to deviate from placement preferences where, among other things, there was no showing of unavailability of homes after diligent search).

162. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. at 67,594–95.

163. See Zug, *supra* note 155, at 349–50 (arguing that this is the correct reading of *Adoptive Couple*)

§ 1915 could “allow an absentee father to reenter the special statutory order of preference with support from the tribe, and subject to a court’s consideration of ‘good cause?’ I raise, but do not here try to answer, the question.”<sup>164</sup>

On remand, however, the South Carolina Supreme Court rejected this alternative interpretation, although both Brown and his parents had by then filed adoption petitions in the Oklahoma and Cherokee courts. The court held:

[A]t the time Adoptive Couple sought to institute adoption proceedings, they were the only party interested in adopting her. Because no other party has sought adoptive placement in this action, § 1915 has no application in concluding this matter, nor may that section be invoked at the midnight hour to further delay the resolution of this case. We find the clear import of the Supreme Court’s majority opinion to foreclose successive § 1915 petitions, for litigation must have finality, and it is the role of this court to ensure “the sanctity of the adoption process” under state law is “jealously guarded.”<sup>165</sup>

Although the language refers to “the time the Adoptive Couple sought to institute adoption proceedings,” one might read the decision to be based on the fact that the petitions to adopt came years after the litigation began. This condemnation of the “midnight hour” petition seems bizarrely punitive, considering it was used to bar a biological father who since the moment he was provided with notice of the proposed adoption has sought custody of his child, and which every court had held he had a right to until a couple of months earlier.

Why did the Court thus do violence to ICWA’s statutory text and purpose? Justice Clarence Thomas’s concurrence states that both Petitioner and Respondent “put forward a plausible interpretation of the relevant sections of the Indian Child Welfare Act,” but he joined with the majority opinion because it better accorded with his belief that an originalist reading of the Indian Commerce Clause should end federal Indian law as we know it.<sup>166</sup> Without elaboration, the majority opinion referred vaguely to potential “equal protection concerns,”<sup>167</sup> but when examined, these

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164. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2571 (2013) (Breyer, J., concurring)

165. *Adoptive Couple v. Baby Girl*, 746 S.E.2d 51, 53 (S.C. 2013) (quoting *Gardner v. Baby Edward*, 342 S.E.2d 601, 603 (S.C. 1986)).

166. See *Adoptive Couple*, 133 S. Ct. at 2565–71 (Thomas, J., concurring) (arguing that the Indian Commerce Clause does not support ICWA, or indeed any congressional action not having to do with commerce and trade). For a powerful argument that Justice Thomas was wrong in his assertion that the original understanding of constitutional federal Indian power was limited to trade, see Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1028–32 (2015).

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

concerns are legally evanescent. For the four Justices beside Thomas, this Article argues, the opinion cannot be justified on statutory or constitutional foundations, but only on ill-founded policy beliefs. Prodded a little, these beliefs reveal divisions as to race, gender, and class, and misunderstanding of the roles they played in the case and in Indian adoptions in general.

## II. THE BEST INTERESTS OF THE CHILD?

The obvious response to the arguments in this Article is that *Adoptive Couple* was decided based on the best interests of a child, not her or her parents' race, or gender, or anything else. This claim has two parts: first, that ICWA undermined Veronica's best interests; second, that holding ICWA applies to cases like this would harm Indian children in general. Both claims, however, fall apart on further examination.

Regarding the first part of the claim, after a four-day hearing with numerous witnesses and two experts, the family court specifically found that placing Veronica with her birth father was in Veronica's interests.<sup>168</sup> The evidence was "undisputed" that Brown was an "excellent parent" and would love and care for Veronica.<sup>169</sup> Judge Malphrus wrote that "[w]hen parental rights and the best interests of the child are in conflict, the best interests of the child must prevail," but "in this case, I find no conflict between the two."<sup>170</sup> The family court and South Carolina Supreme Court also found—consistent with psychological literature—that the healthy attachment Veronica presumably had to the Capobiancos would likely enable her to bond to Brown and his family without lasting harm.<sup>171</sup> All reports suggest that these courts were correct and that Veronica thrived with her birth father and his wife.<sup>172</sup> The claim that the decision to reverse the family court was about Veronica's interests is further belied by the 2013 decision to remove Veronica after two years with her father without even a factual hearing as to her best interests.

There is also no evidence that ICWA has harmed Indian children by interfering with warranted adoptions or their permanency. Although Justice Samuel Alito wrote forebodingly that Respondent's interpretation of ICWA "would put certain vulnerable children at a great disadvantage" because "many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA,"<sup>173</sup> this assertion is simply implausible given the great demand for

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168. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 552, 563, 565–66 (S.C. 2012), *rev'd*, 133 S. Ct. 2552.

169. Brief in Opposition, *supra* note 30, at \*9–10.

170. *Adoptive Couple*, 731 S.E.2d at 566 (alteration in original) (quoting family court).

171. *See id.* at 563.

172. *See supra* note 103 and accompanying text.

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

healthy adoptable babies. Since the 1920s, a continuous “baby famine” has led to repeated scandals regarding black-market and illegal adoptions.<sup>174</sup> Decreasing stigma attached to single motherhood; far greater employment, childcare, and welfare options for women; and greater availability of birth control and abortion have radically reduced the supply of adoptable infants since the 1970s.<sup>175</sup> Before 1973, 8.7% of infants born to all single mothers and 19.3% of those born to white single mothers were relinquished for adoption at birth;<sup>176</sup> by 2002, however, only 1% of infants born to all single mothers, and only 1.3% of those born to white single mothers were relinquished at birth.<sup>177</sup> In this same period, the percentage of births to unmarried mothers has not even doubled.<sup>178</sup>

While the supply of adoptable infants is just a small fraction of what it was in the 1970s, the demand for adoption has not similarly declined. One estimate is that there are about six families seeking to adopt for every completed adoption.<sup>179</sup> Although the excess demand for adoptable babies led adopters to look overseas for children, the supply there is also dwindling, partly as a result of the United States’ 2008 accession to the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption.<sup>180</sup> The reduction is also due to efforts by

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174. LAURA BRIGGS, *SOMEBODY’S CHILDREN: THE POLITICS OF TRANSRACIAL AND TRANSNATIONAL ADOPTION* 6–7 (2012).

175. *See id.* at 7; *see also* EVAN B. DONALDSON ADOPTION INSTITUTE, *SAFEGUARDING THE RIGHTS AND WELL-BEING OF BIRTHPARENTS IN THE ADOPTION PROCESS* 7 (rev. 2007). Although the increase in age-related infertility may be thought to be a potential cause of the increased demand for adoption, it is not clear that there is a net increase in infertile couples given the dramatic advances in fertility treatment. What is clear, as discussed *infra* Section V.C, is that today infertility is not simply a biological issue, but a class issue, as upper-middle-class women are far more likely to defer childbearing for education or work.

176. ANJANI CHANDRA ET AL., *CTRS. FOR DISEASE CONTROL & PREVENTION, ADOPTION, ADOPTION SEEKING, AND RELINQUISHMENT FOR ADOPTION IN THE UNITED STATES* 9 tbl.5 (1999).

177. JO JONES, *CTRS. FOR DISEASE CONTROL & PREVENTION, WHO ADOPTS? CHARACTERISTICS OF WOMEN AND MEN WHO HAVE ADOPTED CHILDREN* 5 fig.6 (2009); *cf.* MADELYN FREUNDLICH, *ADOPTION AND ETHICS: THE MARKET FORCES IN ADOPTION* 8–9 (2000) (noting that only about 1% of babies born to unmarried mothers were placed for adoption from 1989–1995).

178. *See* JOYCE A. MARTIN ET AL., *CTRS. FOR DISEASE CONTROL & PREVENTION, BIRTHS: FINAL DATA FOR 2012*, at tbl.16 (2013) (noting the percentage of births to unmarried women was 26.4% in 1970, 43.6% in 2002, and 45.3% in 2012).

179. JO JONES, *CTRS. FOR DISEASE CONTROL & PREVENTION, 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 4, 19 tbl.1 (2008); FREUNDLICH, *supra* note 177, at 8–9 (“The data suggest a ratio of approximately six adoption seekers for every actual adoption.”).

180. *See* Chiaki Moriguchi, *The Evolution of Child Adoption in the United States, 1950–2010: An Economic Analysis of Historical Trends* 8–9 (Inst. of Econ. Research, Hitotsubashi Univ. Discussion Paper Series A, Paper No. 572, 2012), <http://hermes-ir.lib.hit-u.ac.jp/rs/bitstream/10086/23103/1/DP572.pdf>. *See generally* *Convention on Protection of Children and Cooperation*

important sending countries such as South Korea,<sup>181</sup> Liberia,<sup>182</sup> Russia, China,<sup>183</sup> and Guatemala,<sup>184</sup> to limit or shut down adoptions in the face of allegations of corruption and baby trafficking.

Related to the argument that ICWA would keep adoptive children from finding homes was the argument that ICWA represents a legally sanctioned form of “race matching,” which denies needy children adoptions by willing parents solely because they are not the same race.<sup>185</sup> While race matching was once both the law and practice of adoption,<sup>186</sup> it endures

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*in Respect of Intercountry Adoption*, HCCH (May 29, 1993), <http://www.hcch.net/upload/conventions/txt33en.pdf>.

181. See Intercountry Adoption Notice, Bureau of Consular Affairs, U.S. Dept. of State, *Korea Begins Implementing Special Adoption Act* (Jan. 25, 2013), available at <http://travel.state.gov/content/adoptionsabroad/en/country-information/alerts-and-notice/south-korea-1.html> (providing notice of a South Korean law prioritizing domestic adoptions and requiring family court approval of all inter-country adoptions).

182. KATHRYN JOYCE, *THE CHILD CATCHERS: RESCUE, TRAFFICKING, AND THE NEW GOSPEL OF ADOPTION*, at x (2013) (noting that Liberia shut down international adoption after numerous complaints about unethical adoption practices, including allegations of child trafficking).

183. Kevin Voigt & Sophie Brown, *International adoptions in decline as number of orphans grows*, CNN (Sept. 17, 2013), <http://www.cnn.com/2013/09/16/world/international-adoption-main-story-decline/>.

184. Moriguchi, *supra* note 180, at 16; Rachel L. Swarns, *A Family, for a Few Days a Year*, N.Y. TIMES (Dec. 8, 2012), <http://www.nytimes.com/2012/12/09/world/americas/stalled-adoption-program-in-guatemala-leaves-families-in-limbo.html> (discussing effect of Guatemalan shut down of adoptions, as well as U.S. restrictions on adoptions from countries like Vietnam and Cambodia).

185. RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 480, 518 (2003) (calling ICWA “the last stand of open race matching in America,” and arguing that it “decrease[s] the likelihood that needy children will find adoptive homes, popularize[s] hurtful superstitions, and reinforce[s] claims that unfairly stigmatize substantial numbers of non-Indian adoptive parents”). A frequent claim is that this movement is necessary to combat the ill effects of similarly condoned race matching, such as the 1974 statement by the National Association of Black Social Workers against placement of African American children in White homes. BRIGGS, *supra* note 174, at 56–57. This argument overlooks the lack of evidence of any effect of the statement. See *id.* at 57. The highpoint of the first wave of transracial adoptions was in 1970, at 1743 adoptions. *Id.* By the time the Association issued its statement four years later, the number had already dropped to 591. *Id.*

186. See Mary Eschelbach Hansen & Daniel Pollack, *Transracial Adoption of Black Children: An Economic Analysis*, in *BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES* 133, 134 (Michele Bratcher Goodwin ed., 2010). The Interethnic Placement Provisions, amending the Multi-Ethnic Placement Act, prohibited race matching in public adoptions in 1996. See Interethnic Placement Provisions, Pub. L. No. 104-188, § 1808(c)(1), 110 Stat. 1903 (1996) (codified at 42 U.S.C. § 1996b(1) (2012)); see also Joan Heifetz Hollinger, ABA Ctr. on Children & the Law, *A Guide to the Multiethnic Placement Act of 1994*, AM. BAR ASS'N 1, [http://www.americanbar.org/content/dam/aba/administrative/child\\_law/GuidetoMultiethnicPlacementAct.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/child_law/GuidetoMultiethnicPlacementAct.authcheckdam.pdf) (last visited Jan. 12, 2015). Since then, there have been two cases in which public agencies were found to block white families from adopting black children (interestingly, one was in South Carolina), and some other cases in which public agencies were asked to change procedures. See Hansen & Pollack, *supra*, at 142–43.

today as a function of private adopters and the market.<sup>187</sup> Seeking to cater to the preferences of private adopters, agency websites advertise racial segmentation, charging thousands less for less racially desirable babies.<sup>188</sup> In this blatantly racially segmented market, however, the children that suffer are those of African American descent; Latino, Asian, and American Indian children are generally classified with the vanishingly small supply of white infants.<sup>189</sup> A recent empirical analysis of applications to adopt available infants, for example, found that parents are seven times less likely to seek African American infants, but there were no differences between rates of application for White and Hispanic babies.<sup>190</sup>

In short, the demand for babies like Veronica is such that procedural hurdles will not deter prospective adoptive families. As evidence of this, ICWA was enacted in 1978;<sup>191</sup> since then, multiple high-profile cases have overturned adoptive placements that failed to comply with its mandates.<sup>192</sup> Yet the demand for babies is great enough that individuals like the Capobiancos wait for months if not years and spend upwards of \$40,000 to adopt children with Indian heritage and pay little attention to the potential implications of the law.<sup>193</sup>

But what about children involuntarily removed from their families? Won't ICWA's procedural protections and placement preferences prevent necessary terminations of parental rights and decrease the likelihood of Indian children finding permanent placements? In 2005, the Government Accountability Office evaluated this concern and determined it was

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187. See, e.g., PAMELA ANN QUIROZ, *ADOPTION IN A COLOR-BLIND SOCIETY* 50 (2007) ("By law race cannot be factored into placement; yet in private adoption children are categorized, labeled, described, and priced along racial lines. The obviously race-conscious practice of private agencies contradicts this color-blind policy, and on websites of private agencies, private identifiers such as race become public code. . . . Apparently, race matching and race consciousness are only allowed in the 'free' market of adoption.").

188. See *id.* at 68–70, 77.

189. *Id.* at 72–73, 76.

190. Baccara et al., *supra* note 20, at abstract, 3. Girls, like Veronica, are also generally preferred over boys. See *id.* at 23.

191. *Indian Child Welfare Act of 1978*, NAT'L INDIAN WELFARE ASS'N, [http://www.nicwa.org/indian\\_child\\_welfare\\_act/](http://www.nicwa.org/indian_child_welfare_act/) (last visited Jan. 12, 2015).

192. See, e.g., *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 53–54 (1989) (invalidating a three-year placement of twins made in violation of ICWA); *In re Adoption of Halloway*, 732 P.2d 962, 963–65, 970 (Utah 1986) (invalidating a five-year placement of a boy made in violation of ICWA).

193. Melanie Duncan initially estimated in her testimony that they had spent \$30,000 to \$40,000 for the adoption before the litigation arose but later said that those figures were probably too low. Testimony of Adoptive Mother, *supra* note 53, at 198–99. She also testified that she was aware in entering the process that Veronica had Cherokee heritage, and knew that it might create risks, but considered this just one of the risks present in all adoptions. *Id.* at 181, 215–16.

unfounded.<sup>194</sup> Children subject to ICWA did not remain without permanent placements longer or experience more changes in placements than other children in foster care.<sup>195</sup>

Indeed, even the idea that adoption is a significant option for such children is inconsistent with the realities of foster care. Fifteen years after the Adoption and Safe Families Act of 1997 put financial pressure on states to terminate parental rights and place more children for adoption,<sup>196</sup> about 20% of foster children, and only about 50% of children placed in foster homes with the intent that they be adopted, actually exit foster care via adoption.<sup>197</sup> Foster children are older and less desirable adoptees than children relinquished at birth, and all but 15% of the adopters of such children had been their foster parents prior to adoption.<sup>198</sup> Additionally, as many as 25% of the adopters, accounting for much of the increase in adoptions from foster care since 1997, were related to the child.<sup>199</sup>

Given the importance of adoption by relatives for children in foster care, involving fathers and their families may actually increase the possibilities for permanent placement.<sup>200</sup> Similarly, ICWA may also increase potential permanent placements by enlisting tribes in recruiting foster and adoptive families for children, particularly the kind of hard-to-place older children that are more likely to be in foster care.<sup>201</sup>

The child welfare organizations' amicus brief underscored the consistency between children's interests, ICWA, and its application in cases like *Adoptive Child*.<sup>202</sup> Eighteen of the leading child welfare organizations in the country joined the brief.<sup>203</sup> They included Casey Family Programs, the largest foundation focused on foster care and the child welfare system; the Child Welfare League of America, whose

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194. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-290, INDIAN CHILD WELFARE ACT: EXISTING INFORMATION ON IMPLEMENTATION ISSUES COULD BE USED TO TARGET GUIDANCE AND ASSISTANCE TO STATES 4 (Apr. 2005), <http://www.gao.gov/assets/250/245936.pdf>.

195. See *id.*

196. See Frontline, *Overview: The Adoption and Safe Families Act of 1997*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/fostercare/inside/asfa.html> (last visited Jan. 12, 2015).

197. CHILDREN'S BUREAU, TRENDS IN FOSTER CARE AND ADOPTION (FFY 2002–FFY 2012), ADMIN. FOR CHILD. YOUTH & FAMILIES, U.S. DEP'T HEALTH & HUMAN SERVS. 3 (2013), [http://www.acf.hhs.gov/sites/default/files/cb/trends\\_fostercare\\_adoption2012.pdf](http://www.acf.hhs.gov/sites/default/files/cb/trends_fostercare_adoption2012.pdf).

198. See Moriguchi, *supra* note 180, at 18–19, tbl 4.

199. *Id.* at 19.

200. Cf. Brief of Casey Family Programs et al. as Amici Curiae Supporting Respondent Birth Father at 2–3, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12–399).

201. For example, in *Adoptive Couple*, the Cherokee Nation had identified several approved Cherokee families who would be interested in adopting Baby Girl if her family did not want custody. Brief for the Cherokee Nation at 21–22, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12–399).

202. Brief of Casey Family Programs et al., *supra* note 200, at 2–3.

203. *Id.* at 1–2.

members include five hundred public and private child welfare organizations from across the country; the North American Council on Adoptable Children, founded by adoptive families to meet the needs of children waiting for permanent families and those seeking to adopt them; Voice for Adoption, which advocates for improved adoption policies and supports adoptive families; the Foster Care Alumni of America, a national organization of alumni of the foster care system; FosterClub, a national network of children and teens in foster care; and the National Association of Social Workers, which represents 140,000 social workers from all fifty states.<sup>204</sup>

The amici agreed that “legitimate, regularized adoptions are an extremely important part of the child welfare system.”<sup>205</sup> Nevertheless, they were also “unanimous that it is a best practice to preserve a child’s ties with her fit, willing birth parents even if those ties are initially undeveloped due to separation of the child from the parents shortly after birth, as may happen with an adoption placement made at birth,”<sup>206</sup> calling this a “bedrock principle of child welfare.”<sup>207</sup> In particular, the organizations argued that fully involving birth fathers regardless of whether they had been previously involved with the child was important both to ensure stable permanent placements and to allow children to build relationships important for their well-being.<sup>208</sup>

The organizations were also vehement in their insistence that ties formed in placements before legal approval should not be used to justify termination of parental rights. “It would turn child welfare best practices upside down,” they opined, “if temporary foster care or contested non-final adoptive placements, however erroneous, could justify courts’ disregard of governing legislative rules providing substantive and procedural safeguards for preserving a child’s ties to her fit and willing birth parents.”<sup>209</sup> They called the “acknowledged heartbreak” of the removal of Veronica from the Capobiancos “a case in point” and “the consequence of the petitioners’ adoption agency’s circumvention of governing Oklahoma and federal law and the failure to adhere to best practices which amici have long advocated—not an improper delay in the biological father’s expression of his interest.”<sup>210</sup>

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204. *Id.* apps. 1a, 3a, 7a, 9a; *Become a Member*, CWLA, <http://www.cwla.org/membership/> (last visited Jan. 12, 2015).

205. Brief of Casey Family Programs et al., *supra* note 200, at 27.

206. *Id.* at 9–10.

207. *Id.* at 3.

208. *See id.* at 8–10.

209. *Id.* at 18.

210. *Id.* at 19.

The amicus brief submitted by eighteen states, including California, New York, and most of the states with the highest Indian populations in the United States, agreed that according full rights to birth fathers under ICWA supported the interests of children and stable adoption.<sup>211</sup> Because states have different standards regarding the rights of unmarried birth fathers in adoption,<sup>212</sup> whether an adoption without paternal consent was legal might depend on which state's law applied. Which state's law applied, in turn, could depend on the residence of the mother, father, or adoptive parent, the child's place of birth and current residence, and where the adoption dispute was filed. This variation could lead to confusion, disruptive challenges to placement, and "an adoption brokerage business" to game which state's law would apply.<sup>213</sup> It would also undermine states' interests "in ensuring that their children's and adoptive parents' rights are protected regardless of where a child is born, where the father resides, or where the adoption ultimately takes place."<sup>214</sup>

In conclusion, the organizations most deeply concerned and involved with the rights of children in foster care and adoption—the largest child welfare organizations dedicated to their needs and the states empowered to protect them—agreed that both in Veronica's case and in general, ICWA's protections served the best interests of children. The Court based its suggestion that they did not—that indeed, they raised equal protection concerns<sup>215</sup>—on untested intuitions rather than fact or expert opinion. The next Part shows how these intuitions emerged from distinctions of race, gender, and class that are damaging to fathers, mothers, and ultimately to children as well.

### III. 3/256THS: DISTORTIONS OF RACE IN THE NAME OF EQUALITY

Paul Clement's<sup>216</sup> mantra in arguing *Adoptive Couple* was that ICWA only applied because Veronica had "3/256ths of Cherokee blood." Unfortunately for Brown, this became the mantra of the Supreme Court majority as well. This assertion was false on several levels and reveals the distorted way in which assertions of racial egalitarianism are used to justify colonial domination of Native peoples.

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211. Brief of the States, *supra* note 25, at 4, 25; see also TINA NORRIS, PAULA L. VINES & ELIZABETH M. HOEFFEL, U.S. CENSUS BUREAU 6 (2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>.

212. See Brief of the States, *supra* note 25, at 23–25; see also generally *The Rights of Unmarried Fathers*, CHILDREN'S BUREAU, (Jan. 2014), [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/putative.pdf](https://www.childwelfare.gov/systemwide/laws_policies/statutes/putative.pdf) (summarizing and reprinting varied state laws).

213. Brief of the States, *supra* note 25, at 25 (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 46 n.20 (1989) (internal quotation marks omitted)).

214. *Id.*

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

216. See *supra* notes 108–09 and accompanying text.

### A. *The Making of a Meme*

Petitioners seem to have hit on the winning theme almost by accident. Veronica's blood quantum was not raised in the proceedings below and only appeared in the record through the letter to the Cherokee Nation stating that Brown was "1/8 Cherokee, supposedly enrolled."<sup>217</sup> In their reply brief arguing for a writ of certiorari, Petitioners stated in a footnote that "Baby Girl is 1/2 Hispanic and 1/16 Cherokee."<sup>218</sup> (This conflation of Hispanic heritage with a particular racial makeup is questionable as well—Latin Americans may be White, Black, Asian, or American Indian, and are frequently some combination of these—but it is consistent with the efforts of Petitioners and their allies to reduce ethnic and cultural identity to biology.) In their first brief on the merits, Petitioners stated, again in a footnote, "[w]e have since reviewed records from Baby Girl's paternal grandparents reflecting that Baby [G]irl is 3/256 Cherokee."<sup>219</sup>

It was left for Clement, on behalf of the Guardian ad Litem, to turn this assertion into a battle cry. He began his brief with the claim that "Baby Girl's sole link to any tribe is her 3/256ths of Cherokee blood. The central question in this case is whether that is enough to work a Copernican shift in the relationship between the parties."<sup>220</sup> He repeated the 3/256ths assertion five more times in his brief.<sup>221</sup> He also repeated the statement in his argument before the Court<sup>222</sup> and was in such a haste to repeat it again before closing that he stumbled and had to substitute the easier to say "1 percent."<sup>223</sup>

By the time Clement sat down, the seed had taken root. When Charles Rothfeld<sup>224</sup> stood up to argue for Respondents, the Justices took up the refrain.<sup>225</sup> Chief Justice Roberts asked him

is there at all a threshold before you can call, under the statute, a child an 'Indian child'? 3/256ths? And what if the tribe—what if you had a tribe with a zero percent blood

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217. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 554 (S.C. 2012), *rev'd*, 133 S. Ct. 2552 (internal quotation marks omitted).

218. See Reply Brief for Petitioners, *supra* note 129, at 5 n.1.

219. See Brief for Petitioners, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12–399), 2013 WL 633597, at \*6 n.1.

220. Reply Brief for Guardian ad Litem, *ex rel.* Baby Girl, Supporting Reversal at 1, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12–399).

221. *Id.* at 2, 8, 16, 20–21.

222. Transcript of Oral Argument at 28, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12–399) ("[I]t happened because of 3/256ths of Cherokee blood.").

223. See *id.* at 29.

224. See *supra* note 112 and accompanying text.

225. Students who have been told to have a "theme of the case" and work their legal arguments into it should take note: It works!

requirement; they're open for, you know, people who want to apply, who think culturally they're a Cherokee or—or any number of fundamentally accepted conversions.<sup>226</sup>

He returned to this theme later, stating, “I’m just wondering is 3/256ths close—close to zero? I mean, that’s—that’s the question in terms to me, that if you have a definition, is it one drop of blood that triggers all these extraordinary rights?”<sup>227</sup> After Rothfeld sought to establish that Cherokee citizenship relies not on blood quantum but lineal descent, Justice Alito introduced a variation on the theme, asking: “But what if a tribe makes eligibility available for anybody who, as a result of a DNA test, can establish any Indian ancestry, no matter how slight?”<sup>228</sup> Justice Sonia Sotomayor finally intervened, giving Rothfeld the opportunity to turn the final minutes of his argument back to statutory interpretation.<sup>229</sup>

Focusing on the portion of the oral argument dealing with statutory interpretation, one might predict a win for Respondents. The Justices generally poked holes in Petitioners’ statutory arguments, but not the Respondents’. On reading the opinion, however, one realizes that the 3/256ths meme was more important than the statutory text. Justice Alito began his opinion for the majority with this sentence: “This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee.”<sup>230</sup> After reciting the facts and procedural history, the Court repeated the phrase: “It is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law.”<sup>231</sup> One did not need to read the statutory analysis to know that Petitioners would win.

### B. *Disputing the “Undisputed”*

In reality, blood quantum had nothing to do with ICWA’s application to Veronica, and her actual blood quantum is probably not 3/256ths Cherokee. ICWA does not require any fraction of Indian blood. Rather, it states that an “Indian child” is “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”<sup>232</sup> This definition is predominantly political. While children who are not yet enrolled in an Indian tribe must be biological children of

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226. Transcript of Oral Argument, *supra* note 222, at 38–39, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12–399).

227. *Id.* at 42.

228. *Id.* at 42–43.

229. *See id.* at 43–51.

230. *Adoptive Couple*, 133 S. Ct. at 2556.

231. *Id.* at 2559.

232. 25 U.S.C. § 1903(4) (2012).

members of the tribe, it is membership or eligibility for membership in an Indian tribe that defines Indian status.<sup>233</sup> Indeed, the South Dakota Supreme Court has held that a child without Indian heritage who had been adopted by a Lakota family and had become a member of their tribe is an “Indian child” for purposes of the act.<sup>234</sup>

Veronica was an Indian child under ICWA because her father was a citizen of the Cherokee Nation of Oklahoma and she was eligible for Cherokee citizenship. Her eligibility did not depend on blood quantum. Like a significant plurality of tribes,<sup>235</sup> the Cherokee Nation does not require any particular degree of heritage, but instead requires establishing one lineal ancestor from particular historical census rolls.<sup>236</sup> For the Cherokee Nation, this means proof of descent from the Dawes Rolls, census rolls created by the federal government between 1899 and 1906 in preparation for “allotment,” the division and sale of Cherokee, Choctaw, Chickasaw, Creek, and Seminole land.<sup>237</sup>

Although the rolls ostensibly record blood quantum, these “blood” determinations are well known to be inaccurate. Despite frequent intermarriage, the rolls did not include heritage from tribes other than the tribe at issue;<sup>238</sup> and for many with some African heritage, they failed to include any Cherokee heritage at all.<sup>239</sup> Additionally, some traditional Cherokee citizens refused to enroll at all, resisting the destruction of the tribe the Dawes Rolls sought to facilitate.<sup>240</sup> Those who did enroll had incentives to misrepresent their blood quantum to avoid the federal property restrictions imposed on those of Cherokee blood.<sup>241</sup> Therefore,

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233. *See id.* § 1903(4)(b).

234. *In re Dependency & Neglect of A.L.*, 442 N.W.2d 233, 235 (S.D. 1989).

235. Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. INDIAN L. REV. 243, 271 (2008) (noting that 44% of tribal constitutions reviewed in a comprehensive study followed a lineal descent rule).

236. *See Citizenship*, CHEROKEE NATION, <http://www.cherokee.org/Services/TribalCitizenship/Citizenship.aspx> (last visited Jan. 12, 2015); *see also* Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 48 (2006) (discussing blood quantum and lineal descent in regard to Indian tribal membership).

237. *Id.* at 30, 40–41.

238. ANGIE DEBO, *AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES* 47 (1973); *see also, e.g., Cully v. Mitchell*, 37 F.2d 493, 494 (10th Cir. 1930).

239. Spruhan, *supra* note 236, at 41.

240. DEBO, *supra* note 238, at 37. Allotment was imposed despite steadfast Cherokee objection, *id.* at 32–33, and would ultimately result in most of the Cherokee Nation being sold to non-Indians. After completion, moreover, Cherokee Nation courts would be dissolved and Cherokee Nation laws would no longer be recognized. Act of June 29, 1898, ch. 517, § 28, 30 Stat. 495, 504–05.

241. After 1904, only allottees without Indian blood could alienate their lands, *see* REPORT OF THE U.S. INDIAN INSPECTOR FOR THE INDIAN TERRITORY 30 (1905), while after 1906, only allottees

many, like Brown, who Maldonado believed to have one-eighth Cherokee descent, report more heritage than can be proven from the Dawes Rolls, while others, like Maldonado, report Cherokee heritage not reflected on the rolls at all, and there is reason to believe some of these reports are accurate.<sup>242</sup>

In short, when the majority confidently declared that “[i]t is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law,”<sup>243</sup> it was wrong on three counts. First, Veronica likely had more Cherokee heritage from her father than is reflected in the Dawes Rolls and, if her mother’s testimony is credible, some Cherokee heritage from her mother as well.<sup>244</sup> Second, Veronica’s quantum of Cherokee blood was irrelevant to her citizenship in the Cherokee Nation. Therefore, third, under federal law, Veronica’s “Cherokee blood” was not the reason her father had rights to object to her adoption.

### C. *Settler Colonialism for a Modern Era*

The factual and legal inaccuracies in the 3/256ths meme are, of course, not the central problem. The central problem is why the claim, whatever its merit, was so compelling to the Justices. The easy answer is that racial classifications are inconsistent with American ideology, or at least with the ideology of color-blindness. The Justices’ focus on the alleged small degree of heritage casts the lie on this answer. If the Justices really objected to classification by race, they should not have objected to applying ICWA to a child like Veronica, who was not obviously racially Indian. This objection was not a product of America’s relatively recent

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with less than full Indian blood could do so, Act of Apr. 26, 1906, ch. 1876, § 20, 34 Stat. 145 (1906).

242. See Dan Littlefield, *Study of Historical Facts Clarifies Freedman Citizenship Issue*, CHEROKEE PHOENIX, available at <http://www.cherokeephoenix.org/Article/Index/1760> (last visited Jan. 12, 2015) (“Cherokee family stories commonly tell how an ancestor on the Dawes roll is listed as half blood when he or she was really full. Most of those stories are probably true. Knowing that they would likely be labeled incompetent, many Cherokees probably chose voluntarily to lower their blood quantum.”); see also, e.g., Stephen Herrington, *Elizabeth Warren: Record of American Indian Heritage Was Destroyed in 1906*, HUFFINGTON POST (July 22, 2012, 5:12 AM), [http://www.huffingtonpost.com/stephen-herrington/re-elizabeth-warren-ameri\\_b\\_1535095.html](http://www.huffingtonpost.com/stephen-herrington/re-elizabeth-warren-ameri_b_1535095.html) (discussing the Choctaw author’s family’s story). Because Congress decreed that the blood quantum determinations on the Dawes Rolls are conclusive, however, courts have repeatedly held that these determinations cannot be amended, even if determinations regarding an enrollee’s other family members establish the inaccuracy of the records. See, e.g., *Cully*, 37 F.2d at 494–95, 499 (refusing to change legal determination that daughter had one-quarter Indian blood based on rolls records, although her mother was recorded as being one-half Seminole, and her father as being full Creek).

243. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2559 (2013).

244. See *supra* note 47 and accompanying text (quoting the letter from the birth mother’s attorney to the Cherokee Nation stating the birth mother’s belief that she is part Cherokee).

rejection of racial classifications, but instead of a much older ideology: the expectation and insistence on the absorption and disappearance of indigenous peoples.

One could see *Adoptive Couple* as part of the campaign to enforce color-blindness as an equality principle, and some of the Justices certainly did. This was, after all, the term in which the Supreme Court both invalidated the preclearance portions of the Voting Rights Act in *Shelby County v. Holder*<sup>245</sup> and narrowed the eye of the needle that universities must thread to consider race in admissions in *Fisher v. University of Texas at Austin*.<sup>246</sup> Chief Justice John Roberts, at least, has shown some confusion about the difference between Native sovereignty and affirmative action, arguing in his confirmation hearings that his representation of the State of Hawaii in *Rice v. Cayetano*<sup>247</sup>—a case regarding voting for the trustees of Native Hawaiian trust land<sup>248</sup>—was an argument in favor of affirmative action.<sup>249</sup> But classifying Indians in this way confuses the different racial logic applied to African Americans and Indians. The discussion of race in the *Adoptive Couple* oral argument shows that the Justices were not primarily concerned about special rights for Indians, but instead about ensuring that those rights remained limited to a small and racially defined group.

The dominant understanding of the role of race in America emerges from the history of slavery and the control of African American and later immigrant laborers. The colonial domination of indigenous peoples, in contrast, was founded in the desire to establish control over the land and ideological superiority over the nation.<sup>250</sup> This generates stark differences in the regulation of boundaries between the dominated and dominating peoples. While the boundaries between African Americans and Whites, for example, were rigidly maintained, the boundaries between Indians and Whites were deliberately porous, and intermarriage resulting in assimilation into the colonizing group was often encouraged.<sup>251</sup> As Professor Patrick Wolfe wrote in his foundational work on settler colonialism in Australia, although “the one-drop rule has meant that the category ‘black’ can withstand unlimited admixture, the category ‘red’ has

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245. 133 S. Ct. 2612, 2631 (2013).

246. 133 S. Ct. 2411, 2421 (2013).

247. 528 U.S. 495 (2000).

248. *Id.* at 510–11.

249. See N. BRUCE DUTHU, AMERICAN INDIANS AND THE LAW 142 (2008).

250. See Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 593–94 (2009) [hereinafter Berger, *Red*]; VINE DELORIA JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 173–74 (1988).

251. Berger, *Red*, *supra* note 250, at 594–95, 626, 633–44.

been highly vulnerable to dilution.”<sup>252</sup> The result was to increase commodified black labor, “so that white plantation owners father black children,” but “white fathers generated so-called ‘half-breeds’ whose indigeneity was compromised.”<sup>253</sup>

Although Wolfe wrote primarily about Australia, racial mixing has been advocated as a means to end Indian-ness throughout U.S. history. Pocahontas was celebrated as an example of successful conversion and civilization of an Indian princess by intermarriage.<sup>254</sup> In the same year that Thomas Jefferson proposed forcible removal of Indian tribes beyond the Mississippi, he also advised the Delawares to “mix with us by marriage, your blood will run in our veins, and will spread over this great island.”<sup>255</sup> Later, at the height of Jim Crow, in 1888 Congress enacted a statute providing citizenship to Indian women who married white men to encourage assimilation.<sup>256</sup> American-Indian scholar Vine Deloria Jr. wrote that when he worked in Washington, D.C. with the National Congress of American Indians, “it was a rare day when some white didn’t visit [his] office and proudly proclaim that he or she was of Indian descent.”<sup>257</sup> The claimants often intend by these claims to assert sympathy with Indians and defend against claims of racism. For Indians fighting for the existence of their tribes, however, these claims are only a reminder of the successful destruction of tribal identity.

The distinct racial and cultural ethos of settler colonialism has important implications for adoption of Indian children and perceptions of Indian race. Incorporation of Indians into white families has been part of American policy from the celebrated kidnapping and marriage of Pocahontas by the Virginia Company<sup>258</sup> to the partnership between the Bureau of Indian Affairs with the Child Welfare League of America to move Indian children to homes far from the reservation in the 1950s and 1960s.<sup>259</sup> Although the federal program itself did not cover many children,

252. PATRICK WOLFE, *SETTLER COLONIALISM AND THE TRANSFORMATION OF ANTHROPOLOGY: THE POLITICS AND POETICS OF AN ETHNOGRAPHIC EVENT* 1–2 (1999) (footnote omitted).

253. *Id.* at 2.

254. See Bethany Ruth Berger, *After Pocahontas: Indian Women and the Law, 1830 to 1934*, 21 *AM. INDIAN L. REV.* 1, 2 (1997) [hereinafter Berger, *After Pocahontas*].

255. Berger, *Red*, *supra* note 250, at 627.

256. See Act of Aug. 9, 1888, ch. 818, § 2, 25 Stat. 392, 392 (codified as amended at 25 U.S.C. § 182 (1888)).

257. DELORIA, *supra* note 250, at 2–3. Deloria also noted that these claimed ancestors were always women. *Id.* at 3.

258. See RALPH HAMOR, *A TRUE DISCOURSE OF THE PRESENT STATE OF VIRGINIA* 4–11 (Va. State Library 1957) (1615).

259. See DAVID FANSHIEL, *FAR FROM THE RESERVATION: THE TRANSRACIAL ADOPTION OF INDIAN CHILDREN*, at ix (1972); 2 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 1153–54 (1984).

it represented a widely held idea that Indian children were better off away from their birth families. In the legislative report on the Indian Child Welfare Act, for example, Congress found that one in four Indian children under age one in Minnesota were adopted and that, in Washington, Indian children were nineteen times more likely to be adopted than other children.<sup>260</sup>

There is no credible argument that the Capobiancos actively tried to take Veronica away from an Indian environment—all the reliable evidence suggests that they simply wanted a child to love. Nevertheless, adoption of Indian children into non-Indian homes has a particularly honored and accepted place in American culture. Further, the notion of easy and beneficial assimilation of Indian children into white culture helps fuel the desirability of Indian children as adoptees.

More importantly, the simultaneous fragility and romanticization of Indian status posed a significant challenge to the claim that Veronica could be considered Indian or Cherokee. The possibility that a child could remain politically Indian after generations of intermarriage undermined the assumption that Indian tribes would eventually disappear. The questions of Justices Roberts and Alito reflect this concern: would recognizing Veronica as Cherokee mean that tribes could be “open for, you know, people who want to apply, who think culturally they’re a Cherokee or—or any number of fundamentally accepted conversions,”<sup>261</sup> or “anybody who, as a result of a DNA test, can establish any Indian ancestry, no matter how slight?”<sup>262</sup> At the same time, the idea that Dusten Brown—phenotypically White and a soldier in the U.S. Army—was in fact Indian undermined romantic notions of Indians as isolated sources of mysticism and a spiritual connection to the natural world.

The Supreme Court’s focus on biological race, moreover, led it to ignore the evidence that the Browns were traditionally Indian in all other senses of the word. First, as enrolled citizens, Brown and his family were politically part of the Cherokee Nation of Oklahoma; Brown’s father even voted in Cherokee elections.<sup>263</sup> Second, they were geographically part of the Cherokee Nation. Although Justice Thomas’s opinion asserted that the Browns did not live on a reservation,<sup>264</sup> the Cherokee Nation no longer has a formal reservation.<sup>265</sup> What it does have is a fourteen-county

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260. H.R. REP. NO. 95-1386, at 9 (1978).

261. Transcript of Oral Argument, *supra* note 222, at 38–39 (quoting Roberts, C.J.).

262. *Id.* at 43 (quoting Alito, J.).

263. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 566 n.28 (S.C. 2012), *rev’d*, 133 S. Ct. 2552 (2013).

264. *Adoptive Couple*, 133 S. Ct. at 2570 (Thomas, J., concurring).

265. See *Frequently Asked Questions*, CHEROKEE NATION, <http://www.cherokee.org/AboutTheNation/FrequentlyAskedQuestions.aspx> (last visited Jan. 12, 2015) (“Where is the Cherokee Nation? The Cherokee Nation is *not* a reservation; it is a 7,000 square mile jurisdictional

jurisdictional area in Northeastern Oklahoma, and Notawa and Bartlesville, where Brown, his parents, and Maldonado live, are part of it.<sup>266</sup> Although Brown lived on a military base when the case arose, the Cherokee Nation was where Brown grew up and called home, and where he returned after his tour in Iraq.<sup>267</sup>

Finally, the Supreme Court ignored the evidence that Brown was very much culturally Cherokee as well. His family owned Indian trust land in Pryor and Cayuga, Oklahoma, had traditional ties with their extended relatives, and were proud of their membership in the Wolf Clan.<sup>268</sup> They regularly prepared traditional foods such as “grape dumplings, buckskin bread, Indian cornbread, Indian tacos, wild onions, fry bread, polk salad and deer meat,” and attended Cherokee holidays in Tahlequah, Oklahoma—the Cherokee Nation’s capitol.<sup>269</sup> The family court found that Brown was a “Cherokee in more than name only” and that his “heritage and culture are very important to him and always ha[ve] been.”<sup>270</sup>

By every measure except race, the Browns were a Cherokee family living in a Cherokee community. In the name of racial equality, however, the Supreme Court constrained the application of ICWA, in part, because the Browns just were not racially Indian enough. This was not a manifestation of egalitarianism, but rather of something much older: the belief that the dilution of Indian blood should end Indian tribes and the Indian problem once and for all.

#### D. Equal Protection Evasions

But doesn’t the role of Indian heritage in Cherokee enrollment, and therefore in ICWA, render it suspect under the equal protection implications of the Fifth Amendment? No. Both ICWA and its application to this case are consistent with the original understanding of the Equal Protection Clause, decades of unquestioned Supreme Court opinions, and state court consensus in ICWA cases with facts like these.

As I have discussed elsewhere, the drafters of the Fourteenth Amendment understood that protecting the sovereignty and separate rights of Native peoples was as much a matter of equality as preventing state

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area covering all of eight counties and portions of six additional counties in Northeastern Oklahoma.”).

266. See *Cherokee Nation Jurisdiction*, CHEROKEE NATION, [http://www.cherokee.org/Portals/0/Documents/2013/01/33080Cherokee\\_Nation\\_Jurisdiction.pdf](http://www.cherokee.org/Portals/0/Documents/2013/01/33080Cherokee_Nation_Jurisdiction.pdf) (last visited Jan. 12, 2015); *Adoptive Couple*, 731 S.E.2d at 553.

267. See *id.* at 553, 555 & n.11.

268. *Id.* at 565 n.28.

269. *Id.* (quoting the family court); see also *National Holiday*, CHEROKEE NATION, <http://www.cherokee.org/AboutTheNation/NationalHoliday.aspx> (last visited Jan. 12, 2015).

270. Brief in Opposition, *supra* note 30, at \*9 (quoting the family court).

discrimination against African Americans.<sup>271</sup> More importantly, as the Supreme Court first began to confront questions of reverse discrimination under the Equal Protection Clause, it decided in *Morton v. Mancari*<sup>272</sup> that federal measures providing different treatment to Native people are constitutional under the Fourteenth Amendment so long as they “can be tied rationally to the fulfillment of Congress’s unique obligation toward the Indians.”<sup>273</sup> There, the Court upheld an employment preference for Indians in the Bureau of Indian Affairs (BIA), reasoning that given the unique degree of control the BIA held over Indians lives, such a measure was rationally related to the goal of increasing tribal self-governance.<sup>274</sup> The Court further reasoned that because the application of the preference required membership in a federally recognized Indian tribe, the measure was “political rather than racial in nature.”<sup>275</sup>

Since then, the Supreme Court has relied upon *Mancari* to uphold a number of different federal programs treating Indians differently, as well as state actions implementing federal obligations.<sup>276</sup> One of these cases, *Fisher v. District Court*,<sup>277</sup> was a precursor to ICWA. In *Fisher*, the Court held that tribal courts had exclusive jurisdiction over an adoption dispute between tribal members and that such exclusive jurisdiction was not impermissible racial discrimination but, rather, a necessary result of retained self-government of the tribe.<sup>278</sup> Most recently, in 2000, *Rice v. Cayetano*<sup>279</sup> struck down a state scheme giving Native Hawaiians special voting rights in state elections,<sup>280</sup> but reaffirmed the validity of *Mancari* and its progeny, stating: “Of course, as we have established in a series of cases, Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances

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271. See Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CALIF. L. REV. 1165, 1172–79 (2010) [hereinafter Berger, *Reconciling Equal Protection and Federal Indian Law*].

272. 417 U.S. 535 (1974).

273. *Id.* at 555. See generally Berger, *Reconciling Equal Protection and Federal Indian Law*, *supra* note 271, at 1183–86.

274. *Mancari*, 417 U.S. at 554.

275. *Id.* at 553 n.24.

276. See, e.g., *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500–01, 504 (1979) (discussing civil and criminal jurisdiction); *United States v. Antelope*, 430 U.S. 641, 645–47 (1977) (upholding criminal statutes that based jurisdiction on tribal membership); *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84–86 (1977) (discussing eligibility for compensation for illegal acquisition of tribal land); *Fisher v. Dist. Ct.*, 424 U.S. 382, 390–91 (1976) (discussing jurisdiction in adoption cases).

277. 424 U.S. 382.

278. *Id.* at 390–91.

279. 528 U.S. 495 (2000).

280. *Id.* at 499, 524.

and needs.”<sup>281</sup>

ICWA easily fits within the *Mancari* precedent. The provisions regarding exclusive tribal jurisdiction over Indian children domiciled on a reservation largely codify *Fisher v. District Court*.<sup>282</sup> The provisions requiring truly voluntary consent to relinquish custody and preventing unnecessary involuntary removals of children<sup>283</sup> try to ensure that Indian communities and tribes do not lose their future generations without cause.<sup>284</sup> Because, as Congress recognized, “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children,”<sup>285</sup> these goals are well within “Congress’[s] unique obligation toward the Indians.”<sup>286</sup> In addition, because ICWA applies only to children who are either tribal citizens, or whose parents are tribal citizens and who are eligible for citizenship themselves, it accomplishes these goals through a classification that rests squarely on “political rather than racial” belonging.<sup>287</sup>

Therefore, although ICWA has faced several state and lower federal court challenges under the equal protection implications of the Fifth Amendment, all but one court has rejected such challenges.<sup>288</sup> The one court to uphold a constitutional challenge is the third division of the California appellate courts, which, in a split with the other divisions, found that ICWA may be unconstitutional as applied to “children whose biological parents do not have a significant social, cultural or political

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281. *Id.* at 519.

282. *See* 25 U.S.C. § 1911(a) (2012).

283. *See id.* §§ 1912–13.

284. *See id.* § 1901(2)–(5) (discussing the congressional findings underlying ICWA).

285. *Id.* § 1901(3).

286. *See* *Morton v. Mancari*, 417 U.S. 535, 555 (1974). *See generally* Berger, *Reconciling Equal Protection and Federal Indian Law*, *supra* note 271, at 1183–86.

287. *See Mancari*, 417 U.S. at 553 n.24. Although some raised concerns about ICWA’s coverage of children who had not themselves formally enrolled in their tribes, Congress determined that “[t]he constitutional and plenary power of Congress over Indians and Indian tribes and affairs cannot be made to hinge upon the cranking into operation of a mechanical [enrollment] process established under tribal law, particularly with respect to Indian children who, because of their minority, cannot make a reasoned decision about their tribal and Indian identity.” H.R. REP. NO. 95-1386, at 17 (1978). In contrast, the Iowa Supreme Court has held that a state statute that applied ICWA to children who were not eligible for tribal membership was unconstitutional. *In re A. W.*, 741 N.W.2d 793, 813 (Iowa 2007).

288. *See, e.g., In re Appeal in Pima Cnty. Juvenile Action*, 635 P.2d 187, 193 (Ariz. Ct. App. 1981) (rejecting the challenge); *In re Armell*, 550 N.E.2d 1060, 1067–68 (Ill. App. Ct. 1990) (same); *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003) (same); *In re Adoption of Child of Indian Heritage*, 529 A.2d 1009, 1010 (N.J. Super. Ct. App. Div. 1987) (noting that the Act has been held constitutional), *aff’d*, 543 A.2d 925 (1988); *In re Guardianship of D.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980) (rejecting the challenge).

relationship with an Indian community.”<sup>289</sup> No court, however, has found that ICWA is unconstitutional as applied to a child whose biological family is so fully socially, culturally, and politically Cherokee as the Browns. The Court’s ominous reference to “equal protection concerns,”<sup>290</sup> therefore, was deliberately vague; to uncover its foundation would reveal that it was built upon air.

#### IV. MARGINALIZING MOTHERS

The decision in *Adoptive Couple* may appear, at first glance, to be a feminist one: a single mother unsupported by the birth father gets exclusive rights to make decisions for her child. Further examination, however, shows the decision was founded in ideas about parenthood that are destructive for women, particularly women of color, and their children. This Part shows the links between the rise and fall of the constitutional rights of nonmarital fathers and those of nonmarital mothers and children, and their relationship to policies reducing support for families headed by single women and facilitating adoption of their children.

##### A. *The Rise and Fall of Constitutional Rights of Unmarried Fathers*

For most of U.S. history, the law sharply divided the rights of parents and children in marital and non-marital families. Until well into the twentieth century, fathers had substantial—even supreme—rights regarding their children by marriage,<sup>291</sup> and such children had economic and legal rights with respect to those fathers.<sup>292</sup> A child of unmarried parents, however, was historically considered *filius nullius*, the child of no one,<sup>293</sup> and even their mothers were denied many parental rights.<sup>294</sup> Even after unmarried mothers and children began to be recognized as family

289. *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 526 (Dist. Ct. App. 1996); see also *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 718–19, 730–31 (Dist. Ct. App. 2001) (affirming the doctrine of *In re Bridget R.*, 49 Cal. Rptr. 2d 507). Commentators have roundly criticized this line of decisions. See Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373, 1380–88 (2002); Lorie M. Graham, “*The Past Never Vanishes*”: *A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 34–43 (1998).

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

291. See Barbara Bennett Woodhouse, “*Who Owns the Child?*”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1036–50 (1992).

292. *Id.* at 1037–38.

293. Laura Oren, *Honor Thy Mother?: The Supreme Court’s Jurisprudence of Motherhood*, 17 HASTINGS WOMEN’S L.J. 187, 189 (2006).

294. “Neither subsequent marriage of the parents, nor paternity established by acknowledgment could ‘legitimate’ an illegitimate child.” Susan E. Satava, Comment, *Discrimination Against the Unacknowledged Illegitimate Child and the Wrongful Death Statute*, 25 CAP. U. L. REV. 933, 937 (1996).

units in the nineteenth century, they were denied many of the legal rights attached to the parent-child relationship; unmarried fathers, moreover, had no rights or responsibilities at all.<sup>295</sup>

These legal rules reflected three concepts deeply linked to the unequal status of women: first, pregnancy outside of marriage was a shameful, marginalized state; second, only a legal relationship to a man could establish full legal personhood; and third, absent such a legal tie, men had little emotional or caretaking attachment to their children.<sup>296</sup> Families of color suffered particularly under these rules, both because of higher rates of illegitimacy<sup>297</sup> and because of disregard of their attachment to their children.<sup>298</sup>

Both the stigma of unmarried motherhood and the acceptance of paternal domination of the marital family suffered serious setbacks in the 1960s and 1970s, and courts and legislatures shifted accordingly. Although the first challenges came in cases involving motherhood, part of this clearly feminist development was the recognition that fathers, whether married or not, also had interests in the care and welfare of their children. By the 1980s, however, the Court began to reassert the distinctions of legitimacy, reducing parental rights of unmarried fathers to facilitate the claims of married husbands.

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295. See Oren, *supra* note 293, at 189, 191.

296. See Michelle Oberman, *Mothers Who Kill: Coming to Terms with Modern American Infanticide*, 34 AM. CRIM. L. REV. 1, 71 (1996) (“[T]here still is considerable shame and guilt associated with a teenager’s pregnancy.”); Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850–1880*, 103 YALE L.J. 1073, 1082–84 (1994) (summarizing in part the inequality of wives before the law); Matthew B. Firing, Note, *In Whose Best Interests? Courts’ Failure to Apply State Custodial Laws Equally Amongst Spouses and Its Constitutional Implications*, 20 QUINNIPIAC PROB. L.J. 223, 228 (2007) (explaining that effective fatherhood from the early 1880s through the early 1900s was measured by the father’s ability to earn income, not the emotional bonds he forged with his children).

297. See generally Steven Ruggles, *The Origins of African-American Family Structure*, 59 AM. SOC. REV. 136, 136, 138 (1990) (noting that, from 1880 to 1990, “black children were two to three times more likely to reside without one or both parents than were white children”).

298. The boarding school system was the greatest symptom of this notion regarding Native people. See, e.g., *In re Can-Ah-Couqua*, 29 F. 687, 687, 689, 690 (D. Alaska 1887) (rejecting an Alaska Native mother’s habeas corpus action for the release of her eight-year-old son after three years in boarding school although “the profligate and dissolute life she has lived has not entirely extinguished the natural affection and love of a mother’s heart”); see also Berger, *After Pocahontas*, *supra* note 254, at 44–45 (discussing assumptions that Native women cared little for their children, who should be removed for their own good). The brutal system of slavery is the paradigmatic example of disrespect for relationships between African American parents and children, although suspicion of parents’ unwillingness or inability to raise their own children, and practices of separating children from their parents to put them to work continued long after. BRIGGS, *supra* note 174, at 49–52; see also DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 65 (2002) (discussing denigration and disregard for relationship between Black mothers and their children in welfare reform discourse).

The Supreme Court first affirmed the constitutional rights of nonmarital children and their mothers with a pair of 1968 cases involving Louisiana law. *Levy v. Louisiana*<sup>299</sup> invalidated a law preventing nonmarital children from suing for the wrongful death of their mother,<sup>300</sup> while *Glon v. American Guarantee and Liability Insurance Co.*<sup>301</sup> invalidated a law preventing nonmarital mothers from suing for the wrongful deaths of their children.<sup>302</sup> In 1972, the Court affirmed the connection between nonmarital fathers and their children by striking down a provision of Louisiana's worker's compensation scheme that denied death benefits to illegitimate children who had lived with the dead worker but whom he had not formally acknowledged.<sup>303</sup>

*Stanley v. Illinois*,<sup>304</sup> the first case to acknowledge the parental rights (as opposed to simply obligations) of unmarried fathers, was decided later that year.<sup>305</sup> There, in a case in which an unmarried father's rights in the children he had lived with their entire lives were terminated without a hearing, the Court held that the interest "of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."<sup>306</sup> Over the next few years, the Court decided several more cases regarding the relationship between nonmarital fathers and their children.

Some of these cases involved the rights of nonmarital children to claim support from their fathers. *Gomez v. Perez*,<sup>307</sup> for example, invalidated a Texas law providing that only marital children could demand child support from their fathers,<sup>308</sup> while *Trimble v. Gordon*<sup>309</sup> struck down an Illinois law providing that nonmarital children could not be the intestate heirs of their fathers.<sup>310</sup> Other cases supported the desire of nonmarital fathers to

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299. 391 U.S. 68 (1968).

300. *Id.* at 72 ("These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would.").

301. 391 U.S. 73 (1968).

302. *Id.* at 75. In *Glon*, the State sought to defend the scheme with its desire to discourage illegitimacy. While not stating that the purpose itself was invalid, the Court found it inapplicable here: "[W]e see no possible rational basis for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death." *Id.*

303. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 165 (1972).

304. 405 U.S. 645 (1972).

305. *Id.* at 658-59.

306. *Id.* at 651.

307. 409 U.S. 535 (1973).

308. *Id.* at 537-38.

309. 430 U.S. 762 (1977).

310. *Id.* at 763, 766.

care for their children. Thus, *Jimenez v. Weinberger*<sup>311</sup> allowed fathers to claim Social Security disability benefits for nonmarital children born after the disability began,<sup>312</sup> while *Weinberger v. Wiesenfeld*<sup>313</sup> held that fathers were entitled to survivor's Social Security benefits after the death of their wives.<sup>314</sup>

In *Wiesenfeld*, the Social Security Administration sought to restrict survivor's benefits to women on the grounds that the benefits were designed to permit the survivor to remain home with the children, but the Court found that "[i]t is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female."<sup>315</sup> Ruth Bader Ginsburg litigated *Wiesenfeld* for the Women's Rights Project of the ACLU,<sup>316</sup> and the reason why is clear: Breaking down the legal presumption that only mothers had an interest in or responsibility for childcare was a key goal of the feminist movement.<sup>317</sup>

In 1978, on the eve of the passage of ICWA, *Quilloin v. Walcott*<sup>318</sup> held that an unwed father who had neither lived with nor made any effort to legitimate his child for eleven years after their birth had no constitutional right to veto a stepfather's adoption of the child.<sup>319</sup> *Quilloin* was a rare unanimous decision on the rights of unwed fathers, and the opinion sensitively recognized both the rights of biological parents and the rights of families not formed through biology.

The *Quilloin* Court reiterated that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents,"<sup>320</sup> and declared it "firmly established that 'freedom of personal choice in matters of family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.'"<sup>321</sup> But the Court emphasized that "this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child," or one where "adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the

311. 417 U.S. 628 (1974).

312. *Id.* at 634–35.

313. 420 U.S. 636 (1975).

314. *Id.* at 651. During this time period, the court also summarily affirmed lower court decisions striking down legislative distinctions between marital and nonmarital children. *See, e.g.,* *Davis v. Richardson*, 342 F. Supp. 588, 589 (Dist. Ct. Conn.), *aff'd*, 409 U.S. 1069 (1972); *Griffin v. Richardson*, 346 F. Supp. 1226, 1231 (Dist. Ct. Md.), *aff'd*, 409 U.S. 1069 (1972).

315. 420 U.S. at 651–52.

316. *Id.* at 637.

317. For an example of this theme in feminist writing, see BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 138 (2d ed. 2000).

318. 434 U.S. 246 (1978).

319. *Id.* at 256.

320. *Id.* at 255 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (internal quotation marks omitted)).

321. *Id.* (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974)).

result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant.”<sup>322</sup> In this situation, the Court found that the state did not need to establish that the biological father was an unfit parent, but simply that the adoption was “in the best interests of the child.”<sup>323</sup>

The next year, the Court illustrated the narrowness of the *Quilloin* holding. *Caban v. Mohammed*<sup>324</sup> held that it was unconstitutional to deny an unmarried father—whose name was on his children’s birth certificates and who had lived with the children until his separation from their mother—the right to block their adoption by the mother’s new husband.<sup>325</sup> The appellees in that case argued that the “closer relationship” a mother bore to her children justified requiring the consent of unwed mothers, but not fathers, before adoptions.<sup>326</sup> The New York Court of Appeals upheld the challenged distinction on the ground that requiring paternal consent “would have the overall effect of denying homes to the homeless and of depriving innocent children of the other blessings of adoption. The cruel and undeserved out-of-wedlock stigma would continue its visitations.”<sup>327</sup> The Supreme Court rejected both justifications. First, “[m]aternal and paternal roles are not invariably different in importance. . . . [A]n unwed father may have a relationship with his children fully comparable to that of the mother.”<sup>328</sup> Second, although “some unwed fathers would prevent the adoption of their illegitimate children, . . . [t]his impediment to adoption usually is the result of a natural parental interest shared by both genders alike.”<sup>329</sup>

The Court soon shifted from its earlier rejection of distinctions based on illegitimacy, upholding exclusion of unmarried mothers from survivor’s benefits after the death of the father of their children,<sup>330</sup> as well as different technical state requirements before nonmarital children could have a legal relationship to their parents.<sup>331</sup> The parental rights of unmarried fathers suffered a similar blow. In 1983, *Lehr v. Robertson*<sup>332</sup> held that an

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322. *Id.*

323. *Id.* (internal quotation marks omitted).

324. 441 U.S. 380 (1979).

325. *Id.* at 394.

326. *Id.* at 388 (quoting oral argument).

327. *In re Malpica-Orsini*, 331 N.E.2d 486, 489 (N.Y. 1975).

328. *Caban*, 441 U.S. at 389.

329. *Id.* at 391–92.

330. *Califano v. Boles*, 443 U.S. 282, 296 (1979).

331. *See, e.g., Lalli v. Lalli*, 439 U.S. 259, 261–63, 264 (1978) (upholding a state law requiring paternity to have been established by judicial decree during the life of the decedent to establish intestate succession, in a case in which the father had acknowledged his children by affidavit and provided them with child support during their lives).

332. 463 U.S. 248 (1983).

unmarried father was not entitled to notice or the right to prevent adoption of his child by her stepfather where he had neither lived with her, financially supported her, nor added his name to New York's putative father registry.<sup>333</sup>

The *Lehr* case might seem similar to *Quilloin*, but Lehr had lived with the mother (who struggled with mental illness) before the birth and visited her in the hospital until she left with their daughter, Jessica, without telling him where she was going.<sup>334</sup> During the next two years, Lehr repeatedly searched for Jessica, occasionally finding and visiting her before her mother would move again.<sup>335</sup> Then, after he had been unable to find Jessica for a year, Lehr finally located Jessica with the aid of a detective agency after her mother had married.<sup>336</sup> Before Lehr learned of the adoption petition, he filed to establish paternity and visitation, and the judge in the adoption case knew this.<sup>337</sup> Nevertheless, the U.S. Supreme Court found that Lehr was not entitled to notice of the petition for adoption by Jessica's stepfather (much less the right to object to it) because he could have established his rights by filing with the putative father registry—a registry of which neither he nor the vast majority of unmarried fathers were aware.<sup>338</sup> Where previous cases could be read to distinguish between willing and reluctant fathers, *Lehr* seemed to permit states to deny rights to even willing fathers who had been thwarted in their desire to parent their children.

Despite the links between condemnation of illegitimacy and condemnation of women's sexual freedom, rules like those encouraged by *Lehr* may still seem to forward women's interests. Why shouldn't women facing the prospect of raising their children on their own have sole rights to determine how their children are raised and by whom? The context of these cases undermines this feminist gloss. *Quilloin*, *Caban*, and *Lehr* all supported states in transferring legal bonds to children from unmarried fathers to married husbands. They do not support women's freedom to raise their children themselves, but rather their choice to legitimate them through stepparent adoption. Stepparent adoptions comprise a large

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333. *Id.* at 267–68, 274.

334. *Id.* at 268–69 (White, J., dissenting). Because the family court denied Lehr an opportunity to be heard in the adoption case, Lehr was not permitted to establish these facts at trial. *Id.* at 271.

335. *Id.* at 269.

336. *Id.*

337. *Id.* at 252 (majority opinion); *id.* at 275 (White, J., dissenting).

338. *See id.* at 264 (majority opinion) (declaring that the father's ignorance of the registry was not an excuse); Brief of Legal Services Organizations as Amici Curiae in Support of Petitioner at 11–13, 52, *Lehr* 463 U.S. 248 (No. 81-1756) (noting that the existence of the registry was not publicized anywhere, Lehr and the vast majority of unmarried fathers did not know of it, and that even some Family Court clerks did not know that fathers could register with it before paternity had been adjudicated).

percentage of all adoptions.<sup>339</sup> They usually involve a man adopting the children of his new wife, and are the reason that men are twice as likely to adopt as women.<sup>340</sup> Limitations on the rights of unmarried fathers to object to such adoptions were designed, in part: to encourage other men to take advantage of the “noble” laws that permitted them to rescue children from the “social stigma and consequences of bastardy;”<sup>341</sup> to permit them to secure “a normal home for a child;”<sup>342</sup> and to legitimate children who were deemed “at risk economically, medically, emotionally, and educationally.”<sup>343</sup>

In 1989, the Court even more firmly established the rights of husbands over biological unmarried fathers in *Michael H. v. Gerald D.*<sup>344</sup> In that case, Victoria was born of an affair between Michael and Carole while Carole was married to Gerald.<sup>345</sup> Soon after, Carole and Victoria moved in with Michael, although they moved between living with Michael, Gerald, and another man, Scott, over the next few years.<sup>346</sup> A blood test showed with 98.07% certainty that Michael was Victoria’s father.<sup>347</sup> Michael supported Carole and Victoria when he was permitted to, and Victoria knew Michael as “Daddy.”<sup>348</sup> Later, however, Carole reunited with Gerald.<sup>349</sup> When Michael filed to establish paternity and visitation rights, Gerald intervened, declaring that under California law a husband was the presumptive father of children born to his wife, and Michael had no standing to challenge that presumption.<sup>350</sup>

Although Victoria’s Guardian ad Litem argued that granting Michael visitation would be in the child’s best interests, a plurality of the Supreme Court held that neither Michael nor Victoria had any due process rights

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339. Evan B. Donaldson Adoption Inst., *Safeguarding the Rights and Well-Being of Birthparents in the Adoption Process* 16 (2007), available at [http://www.adoptioninstitute.org/old/publications/2006\\_11\\_Birthparent\\_Study\\_All.pdf](http://www.adoptioninstitute.org/old/publications/2006_11_Birthparent_Study_All.pdf) (noting that stepparent adoptions constituted 42% of adoptions in 1992, but have stopped being tracked by courts, and have likely reduced somewhat since then).

340. CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF HEALTH & HUMAN SERVS., NO. 23-27, 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 1, 16 (2008), available at [http://www.cdc.gov/nchs/data/series/sr\\_23/sr23\\_027.pdf](http://www.cdc.gov/nchs/data/series/sr_23/sr23_027.pdf).

341. Brief for Appellees Robertson at 16, *Lehr*, 463 U.S. 248 (No. 81-1756), 1982 LEXIS 215, at \*16.

342. *In re Malpica-Orsini*, 331 N.E.2d 486, 491 (N.Y. 1975).

343. *See Lehr*, 463 U.S. at 266 n.25 (internal quotation marks omitted).

344. 491 U.S. 110, 113 (1989).

345. *Id.* at 113–14.

346. *Id.* at 114.

347. *Id.*

348. *Id.* at 143–44 (Brennan, J., dissenting).

349. *Id.* at 115 (majority opinion).

350. *Id.*

requiring a hearing on paternity or visitation.<sup>351</sup> Emphasizing the “historic respect—indeed, sanctity” that the law accorded the “unitary family,” a family “typified, of course, by the marital family,”<sup>352</sup> the Court found that Michael’s relationship to his biological child was not “so deeply embedded within our traditions as to be a fundamental right.”<sup>353</sup> When confronted with marriage, the biology-plus approach of the earlier cases lost hands down.<sup>354</sup> Although biology alone still gave unmarried mothers rights with respect to their children, the choice of marital “parenthood” over biology would have deep implications for birth mothers in adoption policy.

### B. *Links Between Denigration of Unmarried Fathers and Condemnation of Poor Single Mothers*

The resurgence of legal differences stemming from unmarried parenthood was part of a much broader trend, one in which opposition to illegitimacy was repackaged from a moral issue to a socio-economic one.<sup>355</sup> Daniel Moynihan, Assistant Secretary of Labor under Presidents John F. Kennedy and Lyndon B. Johnson, had already made condemning illegitimacy safe for liberals with the 1965 Report, *The Negro Family: The Case for National Action*, which called the “matriarchy” of unmarried black women a key part of the “tangle of pathology” that left black communities poor and crime-ridden.<sup>356</sup> In the 1980s, President Ronald Reagan made the imagined “welfare queen”—black, unmarried, and using her children to live in luxury on welfare payments—the central figure in his campaign against welfare.<sup>357</sup> In the late 1980s, media frenzies demonized poor single mothers of color over “crack babies”—presumptively black, possibly Latino—and children with Fetal Alcohol Syndrome (FAS)—presumptively Native American.<sup>358</sup> Although meta-analysis of scientific studies later showed that crack use did not have consistent effects on cognitive or psychomotor development<sup>359</sup> and that FAS was rare among even babies of alcoholic women who drank

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351. *Id.* at 119–31.

352. *Id.* at 123 & n.3.

353. *Id.* at 125.

354. *See id.* at 123.

355. *See* BRIGGS, *supra* note 174, at 95.

356. U.S. DEP’T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965), available at <http://www.dol.gov/oasam/programs/history/moynchapter4.htm> (“[T]he Negro community has been forced into a matriarchal structure which, because it is to out of line with the rest of the American society, seriously retards the progress of the group as a whole . . .”).

357. KAARYN S. GUSTAFSON, *CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY* 35 (2011); *see also* Solangel Maldonado, *Illegitimate Harm: Law Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 367–68 (2011).

358. BRIGGS, *supra* note 174, at 99–108.

359. *Id.* at 100–01.

excessively throughout their pregnancies,<sup>360</sup> hundreds of women were criminally prosecuted “and tens of thousands lost their children to foster care.”<sup>361</sup>

In 1993, political scientist Charles Murray’s influential Wall Street Journal op-ed, *The Coming White Underclass*, raised the alarm that unmarried white women were now having children at rates similar to those of blacks in the 1960s and that society was doomed if this trend continued.<sup>362</sup> He claimed that fatherlessness produced young men who were unteachable, unemployable, and ultimately criminal, and that a society with a substantial proportion of such men “must be ‘Lord of the Flies’ writ large.”<sup>363</sup> The reason for the trend: with the advent of welfare, a single woman could actually afford to keep her child.<sup>364</sup> The response: “end all economic support for single mothers.”<sup>365</sup> This, Murray argued, would renew a healthy degree of stigma for the (newly impoverished) mothers unable to enlist male support for their families and discourage others from following in their path.<sup>366</sup> What about the children now deprived of financial support? First, “[t]here are laws already on the books about the right of the state to take a child from a neglectful parent.”<sup>367</sup> Second, adoption should be “easy for any married couple who can show reasonable evidence of having the resources and stability to raise a child.”<sup>368</sup>

These successive campaigns shifted the blame for suffering children from poverty and socioeconomic disadvantage to poor single mothers. By the mid-1990s, these trends bore significant policy fruit as well.<sup>369</sup> In line with Murray’s urging, the effect of these policies was twofold—to take away financial support from single mothers and then to offer adoption as the solution for the children impoverished as a result.<sup>370</sup> In 1996, the

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360. *Id.* at 108.

361. *Id.* at 102, 107.

362. Charles Murray, *The Coming White Underclass*, WALL ST. J. (Oct. 29, 1993), <http://www.sullivan-county.com/racism/murray.htm>. Murray and other conservative academics had been making similar arguments in their scholarship since the 1980s. See GUSTAFSON, *supra* note 357, at 38–39.

363. Murray, *supra* note 362.

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. See BRIGGS, *supra* note 174, at 115–17 (discussing Speaker of the House Newt Gingrich’s 1994 welfare reform plan to put the children of mothers receiving Aid to Families with Dependent Children (AFDC) in orphanages as part of the Contract with America and its implementation with the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) and the Adoption and Safe Families Act (ASFA)).

370. *Id.* at 116.

Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) sought to “end welfare as we know it.”<sup>371</sup> PRWORA created lifetime caps of five years (or less at a state’s option) on receipt of welfare, required women to work rather than take care of their children, authorized states to cap welfare payments at a certain number of children, and provided states with financial incentives to remove families from welfare rolls.<sup>372</sup> In 1996, the Interethnic Provisions of the Multiethnic Placement Act (MEPA) prohibited consideration of race in placements of children for foster care and adoption.<sup>373</sup> Finally in 1997, the Adoption and Safe Families Act (ASFA) sought to vastly increase adoption by: (1) terminating federal funding for family reunification and requiring states to plan for adoption if a child had not exited the child welfare system in fifteen months; (2) providing substantial tax credits to adopting parents; and (3) providing states with significant financial subsidies for each child adopted from the system.<sup>374</sup> In other words, biological families were stripped of financial support, adoptive families were financially rewarded, and states were incentivized to end welfare payments and move children into adoptive homes.

In the campaign to increase adoptions, birth mothers are either invisible or condemned.<sup>375</sup> Harvard Law Professor Elizabeth Bartholet, an active participant in the ASFA and MEPA debates, called her 1999 paean to adoption *Nobody’s Children*,<sup>376</sup> erasing the parents of the child, and echoing the old description of illegitimate children as *filius nullius*—children of no one.<sup>377</sup> Since then, members of the Christian Right adoption movement have explicitly adopted the *filius nullius* concept, asserting that because the term “orphan” means fatherless child in the bible, children of single mothers are by definition orphans, and therefore eligible for adoption.<sup>378</sup> The thousands of Christian Right “crisis pregnancy counseling

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371. See Jason DeParle, *Welfare Limits Left Poor Adrift as Recession Hit*, N.Y. TIMES (Apr. 7, 2012), <http://www.nytimes.com/2012/04/08/us/welfare-limits-left-poor-adrift-as-recession-hit.html> (quoting President Clinton, 1995 State of The Union Address, WASH. POST (Jan. 24, 1995), <http://www.washingtonpost.com/wp-srv/politics/special/states/docs/sou95.htm>).

372. See GUSTAFSON, *supra* note 357, at 44–47.

373. 42 U.S.C. § 1996b(1)(A) (2012).

374. See Pub. L. No. 105–89, 111 Stat. 2115 (codified at 42 U.S.C. § 670 (2012)). The tax credits associated with ASFA are codified at 26 U.S.C. § 23.

375. See JOYCE, *supra* note 182, at xvi, 98; BRIGGS, *supra* note 174, at 16–17.

376. ELIZABETH BARTHOLET, *NOBODY’S CHILDREN: ABUSE, NEGLECT, FOSTER CARE DRIFT AND THE ADOPTION ALTERNATIVE* (1999).

377. BRIGGS, *supra* note 174, at 17.

378. JOYCE, *supra* note 182, at 107. This translation of children with a single parent into orphans may also be less explicit. For example, a book by Russell Moore, one of the founders of the modern Christian Adoption movement, goes directly from a paragraph discussing the need to persuade single mothers to choose adoption to the plight of the “orphan” (who apparently is likely

centers,” moreover, counsel single pregnant women that keeping an illegitimate child is immature and emotional and leads to harm and neglect, while choosing adoption is “a higher and less selfish form of love,” and a way to “[defeat] . . . ‘evil’ within themselves.”<sup>379</sup> Many private adoption facilitators are also affiliated with the Christian Right, including both the Nightlight Christian Agency that helped arrange Veronica’s adoption and Raymond Godwin, the attorney who represented the Capobiancos in the South Carolina courts and co-founded Carolina Christian Hope Adoption Agency with his wife, Laura.<sup>380</sup> (The name Nightlight may be familiar. Nightlight was at the center of media attention when President George W. Bush praised it as the pioneer of Snowflakes® Embryo Adoptions, “adoptions” of embryos discarded during in vitro fertilization.)<sup>381</sup>

Unmarried fathers lost further rights in this period as well. Following two high profile challenges to adoptions by unmarried fathers in the 1990s,<sup>382</sup> thirty-four states have now adopted putative father registries like that upheld in *Lehr*, many providing unmarried fathers only thirty days after a child’s birth to register.<sup>383</sup> South Carolina does not have a putative father registry, but its statutes require unmarried fathers to show they either

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to wind up a prostitute and later kill herself). RUSSELL D. MOORE, *ADOPTED FOR LIFE: THE PRIORITY OF ADOPTION FOR CHRISTIAN FAMILIES AND CHURCHES* 83 (2009).

379. JOYCE, *supra* note 182, at 115 (first alteration in original) (quoting CURTIS YOUNG, FAMILY RESEARCH COUNCIL, *THE MISSING PIECE: ADOPTION COUNSELING IN THE PREGNANCY RESOURCE CENTERS* (2000), available at [http://www.heartbeatinternational.org/pdf/missing\\_piece.pdf](http://www.heartbeatinternational.org/pdf/missing_piece.pdf)) (internal quotation marks omitted).

380. See RAYMOND W. GODWIN, ATTORNEY AT LAW PC, <http://www.scadopt.net> (last visited Jan. 12, 2015) (describing attorney Ray Godwin’s experience with adoption and including a page on “Miracles in Adoption” featuring an article describing adoption as “a very important concept for a Jesus follower.”) (follow “Miracles in Adoption” hyperlink). In 2007, Carolina Hope hired Dan Cruver, one of the leading figures in the Christian adoption movement, as its Ministry Outreach Coordinator. See Tim Brister, *Dan Cruver and Carolina Hope Christian Adoption Agency*, TIMMY BRISTER BLOG (Aug. 17, 2007), <http://timmybrister.com/2007/08/dan-cruver-and-carolina-hope-christian-adoption-agency/>.

Nightlight has now absorbed Carolina Hope, but Laura Godwin has remained at the helm of the South Carolina branch. See Andrew Knapp, *South Carolina Couple’s Attorney Says Oklahoma Tribe Never Expressed Interest Before Desaray’s Birth*, POST & COURIER (Sept. 13, 2013, 6:35 PM), <http://www.postandcourier.com/article/20130913/PC16/130919617> (“Godwin’s wife [Laura] ran Carolina Hope Christian Adoption Agency, which was absorbed into Nightlight in 2009.”); *Adoption Counseling and Coaching Services*, NIGHTLIGHT CHRISTIAN ADOPTIONS, <http://www.nightlight.org/post-adoption-counseling-services/> (last visited Jan. 12, 2015) (listing Laura Godwin as the adoption counseling contact for the South Carolina branch of Nightlight).

381. *Snowflakes Mentioned in President Bush’s “Decision Points,”* NIGHTLIGHT CHRISTIAN ADOPTIONS (Jan. 11, 2011), <http://www.nightlight.org/2011/01/nightlight-christian-adoptions-snowflakes-mentioned-in-president-bushs-decision-points/>.

382. Laura Oren, *Thwarted Fathers or Pop-Up Pops: How to Determine When Unmarried Fathers Can Block the Adoption of Their Newborn Children*, 40 FAM. L.Q. 153, 160–70 (2006).

383. *Id.* at 170–71, 180.

lived with or supported their child or the child's mother in order to have standing to object to adoption of their infant children.<sup>384</sup>

This shift is even clearer in the uniform laws on the subject. In 1988, the drafters of the Uniform Putative and Unknown Fathers Act declined to recommend a putative father registry, opining that “most fathers or potential fathers—even very responsible ones—are not likely to know about the registry.”<sup>385</sup> Further, the Uniform Adoption Act of 1994, (which has only been adopted in Vermont) required notice to all putative fathers, but limited the fathers whose consent was necessary for adoption.<sup>386</sup> In contrast, the Uniform Parentage Act of 2000 (adopted in part by eight states) required an unmarried father to either register as a putative father or file a suit to establish paternity to avoid losing any right to notice of adoption of a child less than one year old.<sup>387</sup> While states have not widely adopted any of these uniform laws, this progression reveals the shift from a modicum of protection of parental rights to an emphasis on quick and easy adoption of desirable newborns. Only a minority of states have statutes that permit unmarried fathers to assert rights if they can show they were thwarted in their desire to parent or support a child.<sup>388</sup> Notably, Oklahoma is among those states.<sup>389</sup>

Although South Carolina's statute does not create an exception for thwarted fathers, the South Carolina Supreme Court found in *Abernathy v. Baby Boy*<sup>390</sup> that the constitution compelled such an exception to protect the rights of fathers who had been denied the opportunity to parent.<sup>391</sup> The facts of *Abernathy* are eerily similar to those in *Adoptive Couple*, including the fact that the birth father was on active duty in the military, implored the birth mother to marry him when he learned she was pregnant, and the birth mother rejected his offer and later refused further contact from him.<sup>392</sup> In

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384. S.C. CODE ANN. § 63-9-310(A)(4)–(5) (2013).

385. UNIF. PARENTAGE ACT, art. 4, cmt. (2002).

386. UNIF. ADOPTION ACT § 3-401(3) (1994). The Act also required consent of unmarried fathers who had lived with or supported the child's mother or provided clear and convincing evidence that they were “thwarted fathers.” *Id.* § 2-401(1) cmt. (1994).

387. UNIF. PARENTAGE ACT § 402 (2000).

388. Oren, *supra* note 382, at 173.

389. OKLA. STAT. tit.10 § 7505-4.2 (2014); *see also In re Baby Boy W.*, 988 P.2d 1270, 1271 (Okla. 1999).

390. 437 S.E.2d 25 (S.C. 1993).

391. *Id.* at 29.

392. *Id.* at 27, 29. There were facts in *Abernathy* not present in *Adoptive Couple*: while overseas, the birth father gave the birth mother access to his bank account and car in case she needed anything (she did not take advantage of these); he came to the hospital two days after the birth, which is how he learned of the adoptive placement; and his calls to the birth mother were persistent enough that she complained to her supervisor that he was harassing her. *Id.* While Brown did not go this far, fathers should not have to stalk the mothers of their children in order to preserve their parental rights.

fact, in her September 29, 2011 order from the bench, family court Judge Deborah Malphrus originally found that Brown was a thwarted father under *Abernathy* and its progeny.<sup>393</sup>

Oddly, although no further evidence or pleadings were presented, Judge Malphrus reversed this finding in her formal November 25, 2011 order, and the South Carolina Supreme Court did not revisit the issue, resting its opinion on ICWA alone.<sup>394</sup> It seems even odder that in response to this same set of facts, the Supreme Court majority declared not just once, but seven times in its opinion, that Brown had “abandoned” his child.<sup>395</sup> Given the decades of law and policy treating noncustodial fathers as mere spoilers keeping children from the blessings of legitimacy, however, that conclusion was likely only too easy to reach.

The shift toward easy adoption and away from rights of biological parents has not helped children, and in many cases has hurt them. Given the demand for infants relinquished for adoption at birth and the reality that many unmarried noncustodial fathers are not interested in parenting their children, these legal changes are unlikely to have much effect on demand or stability of adoption of newborns. And although the number of adoptions from foster care has increased since 1996 to around 50,000 per year, the percentage of children leaving foster care through adoption has remained at about 20% since 2002.<sup>396</sup> Rates of adoption from foster care, moreover, began to increase rapidly before the enactment of ASFA,<sup>397</sup> and much of the recent increase is due to increases in adoptions by relatives.<sup>398</sup> Because more than half of children still exit foster care by parental

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393. Transcript of Record, *supra* note 30, at 14–15.

394. Email from Chrissi Nimmo, Assistant Attorney Gen., Cherokee Nation, to Bethany R. Berger, Professor, Univ. of Conn. Sch. of Law (Feb. 2, 2014) (on file with author).

395. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2557, 2562 & n.7, 2563 & n.8 (2013).

396. CONNA CRAIG & DEREK HERBERT, NAT’L CTR. FOR POL’Y ANALYSIS, THE STATE OF THE CHILDREN: AN EXAMINATION OF GOVERNMENT-RUN FOSTER CARE 7 (1997), available at <http://www.ncpa.org/pdfs/st210.pdf> (“22,491 foster child adoptions were finalized in 47 states in fiscal [year] 1996.”); Admin. for Children, Youth & Families, *Trends in Foster Care and Adoption (FFY 2002-FFY 2012)*, U.S. DEP’T HEALTH & HUMAN SERVS. 3 (July 19, 2013) [hereinafter *Trends in Foster Care and Adoption*], [http://www.acf.hhs.gov/sites/default/files/cb/trends\\_fostercare\\_adoption2012.pdf](http://www.acf.hhs.gov/sites/default/files/cb/trends_fostercare_adoption2012.pdf).

397. *Trends in Foster Care and Adoption*, *supra* note 396, at 1. The number of adoptions from foster care has increased significantly since the passage of ASFA, but it was already increasing at a rapid pace before ASFA was enacted. Frank A. Biafora & Dawn Esposito, *Adoption Data and Statistical Trends*, in HANDBOOK OF ADOPTION: IMPLICATIONS FOR RESEARCHERS, PRACTITIONER, AND FAMILIES 39 (Rafael A. Javier, Amanda L. Baden, Frank A. Biafora, & Alina Camacho-Gingerich eds., 2007). Each year, moreover, almost twice as many children are waiting for adoption as are actually adopted from foster care. *See id.*; *Trends in Foster Care and Adoption*, *supra* note 396, at 1.

398. Moriguchi, *supra* note 180, at 6 (noting that 23% of adoptions from foster care in 2007 were to related adoptive parents).

reunification,<sup>399</sup> shifting federal funds from family preservation to adoption lessens the chance that these children receive effective parenting.<sup>400</sup> Nor did the legal changes reduce the number of children in foster care. In 2006, the number of children in foster care was 505,000, compared to 507,000 in 1996 when ASFA was adopted.<sup>401</sup> Since 2006, the number has dropped to approximately 400,000, but this reduction is wholly accounted for by the smaller number of children entering the system.<sup>402</sup>

Meanwhile, cuts to welfare for needy families have affected millions of poor children. If successful in helping poor mothers achieve economic well-being, PRWORA would have truly benefitted both women and children. Not surprisingly given its origins in hysteria regarding illegitimacy and welfare cheats, PRWORA was not well designed to do so. Although work requirements were mandatory, states were not required to provide childcare for working mothers or count education (which might qualify women for well-paying jobs) as work.<sup>403</sup> Once jobs dried up during the recession, lifetime limits left families in abject poverty.<sup>404</sup>

In essence, in the name of reducing illegitimacy and helping children in foster care, the United States has enacted a system that limits the rights of all birth parents in adoptions, reduces parenting support for the birth families to which most foster children will return, and undermines stable incomes and child care for many more poor families. These measures have slightly increased the small percentage of children who exit foster care through adoption but have had no effect on the vast majority of children in

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399. *Trends in Foster Care and Adoption*, *supra* note 396, at 3; ADMIN. ON CHILDREN, YOUTH & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD WELFARE OUTCOMES 1998: ANNUAL REPORT 4-3 (2000), available at <http://archive.acf.hhs.gov/programs/cb/pubs/cwo98/cwo98.pdf>.

400. See ROBERTS, *supra* note 298, at 103 (opining that emphasis on “freeing” foster children for adoption may exacerbate racism in the child welfare system).

401. *Trends in Foster Care and Adoption*, *supra* note 396, at 1; STAFF OF H. COMM. ON WAYS AND MEANS, 106TH CONG., 2000 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON THE PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 718–19 (Comm. Print 2000), available at <http://www.gpo.gov/fdsys/pkg/GPO-CPRT-106WPRT61710/pdf/GPO-CPRT-106WPRT61710-2-12.pdf>. But see ADMIN. OF CHILDREN, YOUTH & FAMILIES, U.S. DEP'T HEALTH & HUMAN SERVS., THE AFCARS REPORT: PRELIMINARY FY 2006 ESTIMATES AS OF JANUARY 2008, at 1 (2008), <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport14.pdf> (offering a slightly different preliminary estimate for number of children in foster care as of September 30, 2006).

402. See *Trends in Foster Care and Adoption*, *supra* note 396, at 1 (displaying a table showing that since FY2006, an average of 34,500 fewer children per year (or a total of 242,000 fewer children) have entered foster care). Increasing ratios of exit from foster care to entry have little impact. Between 2006 and 2012, only about 1,571 more children exit than enter per year (a 0.6% difference). See *id.* For the entire decade between 2002 and 2012, moreover, an average of 5,270 more children entered than exited foster care each year (a 1.85% difference). See *id.*

403. See GUSTAFSON, *supra* note 357, at 45–46.

404. DeParle, *supra* note 371.

the system. *Adoptive Couple* was decided against the backdrop of the false narrative that adoption is the cure for illegitimacy and poverty, unmarried parents who object to adoption are irresponsible and uncaring, and that parental rights and procedural safeguards will block the hungry tide of prospective adoptive parents. No part of this narrative supports the rights or interests of women or their children.

## V. ECONOMICS

Of course, the narrative of children's interests has gained currency against a backdrop of powerful economic interests. States are ostensibly interested in encouraging adoption of low-income children by higher-income families to reduce state welfare rolls. Further, private adoption agencies and attorneys who facilitate most adoptions in the United States are interested in maintaining a steady supply of completed adoptions on behalf of the parents who pay them. Finally, the trends toward expensive private adoptions and later childbearing for upper-middle-class women have ensured a growing economic divide between adoptive and birth parents.

### A. State Interests

Charles Murray's linking of adoption and the end of welfare was nothing new. Adoption has long been proposed as a magic bullet to solve the problems of poverty, and policies to increase the number of adoptions often go hand in hand with efforts to reduce welfare rolls.<sup>405</sup> Because most needs-based welfare assistance is tied to the support for minor children,<sup>406</sup> removing the children often means removing financial support. These policies were not directly at issue in *Adoptive Couple*—while the state paid for her medical services, Maldonado was employed as a casino worker by the Osage Tribe,<sup>407</sup> and Brown was first a soldier and then working in private security while serving in the National Guard<sup>408</sup>—but they helped to shape the legal and policy background of the case.

As Professor Laura Briggs has documented, American Indian children, like African American children, became targets for child welfare removals after they began receiving state-financed welfare assistance in large numbers.<sup>409</sup> Native children had always been vulnerable to removal from

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405. See, e.g., JOYCE, *supra* note 182, at 45 (describing “orphan trains” of the 1880s to the 1920s shipping urban immigrant children from American cities to be adopted by Protestant farmers to relieve pressure on public support).

406. Brynne Keith-Jennings, *SNAP Plays a Critical Role in Helping Children*, CTR. ON BUDGET & POL'Y PRIORITIES (July 17, 2012), <http://www.cbpp.org/cms/?fa=view&id=3805>.

407. See Brewer, *Some Disturbing Facts*, *supra* note 39.

408. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 553 n.2 (S.C. 2012).

409. BRIGGS, *supra* note 174, at 7–8.

their families, from the earliest colonial efforts to obtain children as hostages and subjects of acculturation to the nineteenth and early twentieth century federal and religious efforts to place children in boarding schools where they could be separated from uncivilized tribal influences.<sup>410</sup> But these efforts were not focused on adoption—instead, Indian children would be taught to be non-Indians and then released to support themselves and provide an example to their families. Economic assistance did not come from states or municipalities, but was provided by the federal Indian Department (later the BIA) in the form of rations doled out by reservation agents pursuant to treaty agreements.<sup>411</sup> There were links between economic assistance and child removal—parents could have their rations docked if they did not send their children to school<sup>412</sup>—but they were largely indirect.

The Social Security Act of 1935<sup>413</sup> required states to provide Aid to Families with Dependent Children to all eligible families in the state, imposing some uniformity on the disparate, poor relief programs provided by states, municipalities, and private charities.<sup>414</sup> Although states and counties vigorously resisted provision of welfare to families on reservations,<sup>415</sup> by the 1950s, Indian children and families started receiving state welfare assistance, and, with it, contact with state social workers.<sup>416</sup> This began a tide of children flowing from reservations into the child welfare system and from there into white adoptive homes.<sup>417</sup> The BIA encouraged this tide with its Indian Adoption Project, which placed a federal stamp of approval on child removal as a response to poverty of Indian children.<sup>418</sup> In the 1960s, in response to pleas by mothers and grandmothers, the Association of American Indian Affairs began holding press conferences and litigating cases across the country regarding the casual removal of Indian children from their families.<sup>419</sup> In 1974, Congress began holding hearings on the issue; finally, after four years of hearings

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410. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 (Nell Jessup Newton et al. eds., 2012).

411. *Id.* § 22.06[1].

412. *Id.*; 25 U.S.C. § 283 (2012).

413. Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.).

414. *See* 42 U.S.C. § 602(a)(10)(A) (1994) (repealed 1996).

415. *See, e.g.,* *Acosta v. San Diego Cnty.*, 272 P.2d 92, 93–94 (Cal. Dist. Ct. App. 1954); *State ex rel. Williams v. Kamp*, 78 P.2d 585, 587 (Mont. 1938); *State Bd. of Pub. Welfare v. Bd. of Comm'rs*, 137 S.E.2d 801, 801–03 (N.C. 1964).

416. BRIGGS, *supra* note 174, at 71.

417. *Id.*

418. PRUCHA, *supra* note 259, at 1154.

419. BRIGGS, *supra* note 174, at 77–82.

without action, the Indian Child Welfare Act was enacted in 1978.<sup>420</sup>

A similar history unfolded with respect to African Americans, who began to swell child welfare rolls in the 1960s just as civil rights advocacy and legal changes made them eligible for such benefits in large numbers for the first time.<sup>421</sup> Although white families have always comprised the majority of those receiving welfare in the United States, by the 1980s, the black, unmarried, “welfare queen” had become the powerful image of welfare in the United States.<sup>422</sup> Removing children from these women would end both their entitlement to economic support and the threat of social contagion from these demonized mothers to their children.<sup>423</sup>

But removing children from their families does not actually make economic sense. First, it is expensive to keep children in foster care, and relatively few foster children exit through adoption by middle-income families.<sup>424</sup> But ASFA created federal subsidies for adoptions from foster care that can incentivize states to remove the children and seek adoption anyway.<sup>425</sup> These subsidies are higher—as much as three times higher—for “special needs” children; South Dakota, the target of a recent investigation for its removals of Indian children and noncompliance with ICWA, has designated all Indian children as special needs children.<sup>426</sup> (As an aside, Veronica was labeled a special needs child because of her mixed race heritage, resulting in a larger adoption tax credit to the Capobiancos.)<sup>427</sup> At least officially, moreover, states did not support the adoptive couple’s position in this case. As discussed above, eighteen states—not including South Dakota or Oklahoma, but including many other states with high Indian populations—filed an amicus brief in support of the birth father and the procedures required by ICWA.<sup>428</sup> The perceived links between adoption, child welfare, and state financial assistance, however, likely helped shape the legal and policy assumptions Brown faced in the Supreme Court.

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420. *Id.* at 90–91.

421. *Id.* at 38–41.

422. *See supra* note 357 and accompanying text.

423. *See supra* Section IV.B.

424. *See supra* Part II.

425. *See* ROBERTS, *supra* note 298, at 110.

426. Laura Sullivan & Amy Walters, *Incentives and Cultural Bias Fuel Foster System*, NPR (Oct. 25, 2011), <http://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system>.

427. Email from Chrissi Nimmo, Assistant Attorney Gen., Cherokee Nation, to Bethany R. Berger, Professor, Univ. of Conn. Sch. of Law (Mar. 18, 2014) (on file with author). *See* 26 U.S.C. § 23(a)(3) (2012) (allowing adoption credit of \$10,000 over actual adoption expenses for special needs children).

428. Brief of the States, *supra* note 25, at at 3–4.

### B. Adoption Industry Interests

More powerful than state interests were those of the adoption industry, whose business model depends on infant adoptions. Private entities have long sought to profit from families wishing to adopt. Indeed, governments and nonprofits only began coordinating adoptions in the 1900s after unlicensed “baby brokers” started trying to fulfill the demand.<sup>429</sup> Even after official organizations got into the business, scandals over “baby snatching” and “baby buying” gained congressional attention in the 1920s and 1950s.<sup>430</sup> Both adoption facilitators and adoptive parents, however, fended off proposals to create federal regulation of the industry, leaving private adoptions to lighter state regulation.<sup>431</sup>

Although private adoptions have long generated concern, one difference has an enormous impact on the economic interests in adoptions. Historically, adoptions accompanied by the exchange of money were considered illegal or “black market” adoptions.<sup>432</sup> Although adopting parents were encouraged to make donations to adoption agencies, adoptions were not themselves a source of profit.<sup>433</sup> Even when agencies began to charge fees, as late as the 1970s these fees were often on a sliding scale based on the income of the adopters.<sup>434</sup>

Today, of course, things are different, with costs amounting to tens of thousands of dollars, and sometimes much more, for adopting an infant.<sup>435</sup> In the words of political economist and Barnard College President Debora Spar, “despite the heartfelt sentiments of parents and providers, there is a flourishing market for both children and their component parts. . . . and many individuals are profiting handsomely.”<sup>436</sup> Although many agree that adoption is now a market,<sup>437</sup> “the baby market does not operate like other

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429. DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 166–67 (2006).

430. FREUNDLICH, *supra* note 177, at 9–10; ADOPTION AND ETHICS: THE MARKET FORCES IN ADOPTION 9 (2000); SPAR, *supra* note 429, at 172.

431. SPAR, *supra* note 429, at 172.

432. FREUNDLICH, *supra* note 177, at 9.

433. *Id.* at 13–14.

434. Elizabeth Landes & Richard Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 330 (1978).

435. See Baccara, *supra* note 20, at 2 (noting that the average cost of infant adoption in 2009 was \$32,000); Mansnerus, *supra* note 21 (reporting adoptions costing up to \$100,000).

436. SPAR, *supra* note 429, at xv (writing both about adoption and fertility practice); *see also id.* at 160 (“[O]f course, baby selling is illegal. . . . In practice, though, adoption is indeed a market, particularly in its international dimensions.”).

437. See, e.g., FREUNDLICH, *supra* note 177, at 3; Michele B. Goodwin, *Preface to BABY MARKETS*, *supra* note 186, at xiii; JEANNE A. HOWARD, EVAN B. DONALDSON ADOPTION INST., *UNTANGLING THE WEB: THE INTERNET’S TRANSFORMATIVE IMPACT ON ADOPTION* 4 (Adam Pertman ed., 2012), available at [http://adoptioninstitute.org/old/publications/2012\\_12\\_UntanglingtheWeb.pdf](http://adoptioninstitute.org/old/publications/2012_12_UntanglingtheWeb.pdf) (finding a “growing ‘commodification’ of adoption and a shift away from the perspective

markets do. There are differential prices that make little sense; scale economies that don't bring lower costs; and customers who will literally pay whatever they possibly can."<sup>438</sup>

Melanie Duncan's testimony gives some insight into the multiplicity of private entities involved in a typical adoption. The Capobiancos decided to work with a private attorney rather than an agency, but wound up working with multiple agencies, with attorney Raymond Godwin essentially acting as a contractor managing many interests.<sup>439</sup> First, there was Adoption Advertising, Inc., to which they paid \$8,700 to connect them to Maldonado.<sup>440</sup> There was also over \$2,000 to Adoption Advocacy, Inc. for pre- and post-placement home studies.<sup>441</sup> Then there was Phyllis Zimmerman, the attorney they hired to represent Maldonado in the case.<sup>442</sup> Godwin also contracted on their behalf to have Nightlight Christian Adoption Agency, whose South Carolina office is run by his wife, conduct the birth family study.<sup>443</sup> Through Godwin, the Capobiancos also paid for a number of Maldonado's "expenses" including her rent, utility, and car payments.<sup>444</sup> In her testimony, Melanie Duncan initially guessed that they had spent \$20,000 to \$40,000 for the adoption before the litigation arose, but later, when asked if this was all, said, "I don't even want to speculate. It's going to be more than that . . . I know that's a low figure."<sup>445</sup>

Not surprisingly, the number and kind of entities offering private adoption services have multiplied since the advent of fees for adoptions.<sup>446</sup> One study by the National Adoption Information Clearinghouse found that the number increased by several hundred just between 1995 and 1998, reaching a total of 1764.<sup>447</sup> Today, the internet exponentially increases the number and diversity of entities facilitating adoption.<sup>448</sup> There are, however, no uniform national statistics regarding adoption service providers, or even consistent tracking of the total number and kind of

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that its primary purpose is to find families for children"); Sanford Katz, *Dual Systems of Adoption in the United States*, in *CROSS CURRENTS: FAMILY LAW AND POLICY IN THE UNITED STATES AND ENGLAND* 284 (Sanford Katz et al. eds., 2000); QUIROZ, *supra* note 187, at 6 (describing adoption as "a business driven by market forces").

438. SPAR, *supra* note 429, at xvi.

439. Testimony of Adoptive Mother, *supra* note 53, at 171:19–24.

440. *Id.* at 191:13–21,

441. *Id.* at 190:16–24.

442. *Id.* at 173:19–25.

443. *Id.* at 178:3–5.

444. *Adoptive Couple v. Baby Girl*, No. 2009-DR-10-03803, at 14 (S.C. Fam. Ct. Sept. 29, 2011).

445. Testimony of Adoptive Mother, *supra* note 53, at 189:13–16, 198:22–199:4.

446. See FREUNDLICH, *supra* note 177, at 3.

447. See Mansnerus, *supra* note 21.

448. See HOWARD, *supra* note 437, at 4–5.

private adoptions.<sup>449</sup>

Although the different entities providing adoption services are in professional competition,<sup>450</sup> their business model depends on two things: adoptable infants and completed adoptions. The ability to link adoption to the personal and romanticized realm of family formation has shielded the market aspects of adoption providing a powerful narrative for those seeking a regulatory environment that protects their interests.<sup>451</sup> The National Council for Adoption (NCFA), for example, was formed in the 1980s when private adoption agencies banded together to prevent federal promulgation of a Model State Adoption Act, which would have provided for open adoptions and mandated that a mother could not finally agree to relinquishment until two weeks after birth.<sup>452</sup> After defeating the proposal, the NCFA contributed substantially to the Uniform Adoption Act of 1994,<sup>453</sup> which provides for permanently sealed adoption records, relinquishment for adoption immediately after birth, and limited rights of unmarried fathers.<sup>454</sup> The NCFA has also been charged with successfully opposing federal regulation that would set limits on adoption fees.<sup>455</sup>

The result of this successful advocacy is that, although all states regulate private adoptions to some degree, many claim the industry is largely unregulated.<sup>456</sup> These regulations also vary widely from state to state, with some states known for loose adoption regulations.<sup>457</sup> South Carolina, for example, was known as a haven for lax adoption practices in the 1980s; although the laws have changed since then, some claim the reputation remains valid.<sup>458</sup> A telling example of the light regulation possible is the comment by Russell Moore, a prominent proponent of the Christian adoption movement, that the local humane society had refused to allow his family to have a cat, noting that they had been “qualified by the Commonwealth of Kentucky to be fit to adopt two children but not one

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449. See QUIROZ, *supra* note 187, at 10.

450. See Katz, *supra* note 437, at 283–85.

451. See Kimberly D. Kraswicz, *Price and Pretense in the Baby Market*, in *BABY MARKETS*, *supra* note 186, at 42.

452. *Mission*, NAT'L COUNCIL FOR ADOPTION, <https://www.adoptioncouncil.org/who-we-are/mission.html> (last visited Jan. 12, 2015).

453. *Federal Adoption Policy*, NAT'L COUNCIL FOR ADOPTION, <https://www.adoptioncouncil.org/who-we-are/mission/Federal-Adoption-Policy> (last visited Jan. 12, 2015).

454. UNIF. ADOPTION ACT §§ 2-401, 2-404, 6-102, 6-104 (1994).

455. See BRIGGS, *supra* note 174, at 113.

456. See Michele Bratcher Goodwin, *Baby Markets*, in *BABY MARKETS*, *supra* note 186, at 5; MIRAH RIBEN, *THE STORK MARKET: AMERICA'S MULTI-BILLION DOLLAR UNREGULATED INDUSTRY*, at xviii–xix (2007) (quoting various critiques of the adoption industry's lack of regulation).

457. See BRIGGS, *supra* note 174, at 115; Mansnerus, *supra* note 21.

458. See Andrew Knapp, *Skeptics of Veronica, Desaray cases call for closer look at private adoptions, laws*, POST & COURIER (Sept. 22, 2013, 3:32 PM), <http://www.postandcourier.com/article/20130921/PC16/130929823>.

cat.”<sup>459</sup> Ironically, Moore intended this as a condemnation of the humane society,<sup>460</sup> rather than the system in place to ensure adequate families for children.

ICWA may serve children, tribal, and parental interests, but it is contrary to the interests of private providers. ICWA’s placement preferences will likely result in a child becoming entirely unavailable for a high-priced adoption, and being placed instead with a family unlikely to afford the agency fees.<sup>461</sup> In an outrageous recent case, a private adoption agency even claimed “good cause” for deviation from the placement preferences after demanding that, to be eligible, any families from the child’s tribe had to be able to pay the agency’s \$27,500 fee.<sup>462</sup> In addition, by providing birth parents with additional protections in voluntary adoptions, and increasing the rights of birth fathers to consent at all, ICWA may result in refusals to consent to adoption or revocations of initial consent. In general, ICWA reflects a different era of adoption law, one in which the United States was coming to terms with the harms of closed, coerced adoptions of nonmarital children, and before the focus of adoption practice shifted from finding homes for needy children to finding children for infertile couples.<sup>463</sup> It is not surprising that both the NCFCA and the American Academy of Adoption Attorneys filed amicus briefs on behalf of the Capobiancos,<sup>464</sup> and celebrated the result.<sup>465</sup>

### C. *Class and Paths to Parenthood*

The most obvious economic factor in *Adoptive Couple* was the way class divided the birth parents and the prospective adoptive parents, replicating the divides between relinquishing and adoptive parents in private adoptions generally. These divides mean both that the upper-middle-class people who make and implement rules regarding adoption—lawyers, judges, and legislators—will find it easier to empathize with adoptive parents, and that many people of all classes will see adopters as better parents. They help to explain why Dusten Brown—a decorated war

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459. MOORE, *supra* note 378, at 116.

460. *See id.*

461. Brief of Wisconsin Tribes as Amici Curiae Supporting Respondents at 37, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12–399).

462. *In re T.S.W.*, 276 P.3d 133, 137, 144 (Kan. 2012).

463. *See, e.g.,* Katz, *supra* note 437, at 284 (“[T]he forces that have been successful in promoting private adoption are . . . [those] whose focus is on locating a child for parents rather than parents for a child.”).

464. Brief of Amicus Curiae American Academy of Adoption Attorneys in Support of Writ of Certiorari, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12–399); Brief of Amici Curiae National Council for Adoption in Support of Petitioners, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12–399).

465. *See Equal Justice Under the Law for Kids, Too*, NAT’L COUNCIL FOR ADOPTION (June 26, 2013), <http://www.adoptioncouncil.org/blog/2013/06/equal-justice-under-the-law-for-kids-too>.

veteran, supposedly one of America's heroes—was so roundly condemned by observers, including the Supreme Court itself, and why it was so easy to sell a misleading narrative about the facts of the case.

Infertility was once primarily a matter of biology, affecting the well-off and the poor alike, if not disproportionately the poor because of the health effects of disadvantage. Dramatic advances in reproductive technology have reduced the incidence of infertility, again with particular benefit to those with the ability to pay. As opportunities began to open for working women, however, neither the economies of the workplace nor those of the home shifted to accommodate care for children.<sup>466</sup> In response, women with significant educational and career opportunities began to delay childbearing to balance the demands on their time.<sup>467</sup> The result was a growth in structural rather than biological infertility, disproportionately affecting upper-middle-class women.<sup>468</sup> The demand for adoption, once distributed relatively equally across the working and middle class, now took a decisive class shift. At the same time, the shift to expensive private agency adoptions meant that infant adoption was placed out of reach for most working-class families.<sup>469</sup>

The three youngest Supreme Court Justices illustrate this trend. The two women, Justice Elena Kagan and Justice Sotomayor are both unmarried and without children. The man—Chief Justice Roberts—married another high-powered lawyer when they were both in their forties and adopted two children.<sup>470</sup> In fact, Chief Justice Roberts has experienced the controversy arising from stringent adoption requirements first hand, as right-wing conspiracy fanatics seized on the fact that his children are from Ireland (a country that does not permit nonresidents to adopt),<sup>471</sup> to allege that President Obama used the supposed illegality of the adoptions to

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466. See BRIGGS, *supra* note 174, at 96–97.

467. See *id.*; see also KAY HYMOWITZ ET AL., KNOT YET: THE BENEFITS AND COSTS OF DELAYED MARRIAGE IN AMERICA 3, 6 (2013) (noting that the trend in delaying marriage has significant economic benefits for all women, but those without a college education are having children without marriage).

468. BRIGGS, *supra* note 174, at 96–97.

469. See Goodwin, *Baby Markets*, *supra* note 456, at 9 (noting that financial status is a significant factor in adoption decision-making).

470. Joan Biskupic, *Roberts Plays Dual Roles: Chief Justice and Father*, USA TODAY (June 25, 2006, 11:15 PM), [http://usatoday30.usatoday.com/news/washington/2006-06-25-roberts\\_x.htm](http://usatoday30.usatoday.com/news/washington/2006-06-25-roberts_x.htm); Christina Wilkie, *Jane Roberts, Chief Justice John Roberts' Spouse, Breaks the Mold of Supreme Court Wives*, HUFFINGTON POST (Aug. 9, 2012, 4:16 PM), [http://www.huffingtonpost.com/2012/08/09/jane-roberts-john-roberts-supreme-court\\_n\\_1760726.html](http://www.huffingtonpost.com/2012/08/09/jane-roberts-john-roberts-supreme-court_n_1760726.html).

471. Adoption Act 2010 (Act No. 21/2010) (Ir.) § 33(5), available at <http://www.irishstatutebook.ie/pdf/2010/en.act.2010.0021.pdf>.

blackmail Roberts into voting to uphold the Affordable Care Act.<sup>472</sup>

Adoption has become not just a matter of class, but also a matter of gender equality, and even reproductive rights.<sup>473</sup> Adoption has permitted women to devote themselves to their education and careers and yet also be mothers. Indeed, even as low-income single mothers became demonized in the media, another group, so-called “single mothers by choice,” largely well-educated, professional women who choose to have children on their own, has grown and gained significant acceptance and influence since former Vice-President Dan Quayle’s attack on Murphy Brown.<sup>474</sup> A telling example of this is Elizabeth Bartholet, a Harvard Law professor who wrote about employment discrimination before becoming a transracial adoption advocate after she adopted two Peruvian boys as a single mother in the 1980s.<sup>475</sup> Adoption gained more traction as a civil and reproductive rights question as the LGBT movement raised claims regarding the rights of same-sex families to adopt and parent.<sup>476</sup> Of course the foil for all of these claims was that children would benefit by moving into middle-class families, even if those families were nonbiological, older, female-headed,

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472. *Was Chief Justice Roberts Blackmailed into Supporting Obamacare? Maybe.*, MRCONSERVATIVE (May 18, 2013, 7:23 PM), <http://mrconservative.com/2013/05/16722-was-chief-justice-roberts-blackmailed-into-supporting-obamacare-maybe/>.

473. *See* BRIGGS, *supra* note 174, at 97.

474. *See, e.g.*, Mikki Morissette, *A Response to Ann Coulter*, HUFFINGTON POST (Feb. 12, 2009, 5:12 AM), [http://www.huffingtonpost.com/mikki-morissette/a-response-to-ann-coulter\\_b\\_157078.html](http://www.huffingtonpost.com/mikki-morissette/a-response-to-ann-coulter_b_157078.html) (critiquing Anne Coulter’s attack on single motherhood, but only because it did not account for middle-class single mothers by choice like her). Full disclosure: I am a “single mother by choice,” albeit not by adoption, and have a son six months younger than Veronica. I had several friends and acquaintances who were already single mothers by choice that I could ask about the process before I got pregnant. I have gotten nothing but support for my decision, and some questions from parents of thirty-something daughters about whether they could refer their daughters to me. It was not until a friend, who became an informal guardian and adoptive mother to a young woman who aged out of foster care and got pregnant and raised her child, told me she didn’t like the sobriquet “single mothers by choice” because it denigrated those who did not choose to get pregnant, but did choose to have their children, that I realized the class distinction implicit in the phrase.

475. *See* Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 945 (1982); Elizabeth Bartholet, *Proof of Discriminatory Intent Under Title VII: United States Postal Service Board of Governors v. Aikens*, 70 CALIF. L. REV. 1201, 1201 (1982); Kevin Voigt, *International Adoption: Saving Orphans or Child Trafficking?*, CNN WORLD (Sept. 18, 2013, 2:41 PM), <http://www.cnn.com/2013/09/16/world/international-adoption-saving-orphans-child-trafficking/> (stating that Elizabeth Bartholet adopted children from Peru in the 1980s).

476. *See, e.g.*, *Howard v. Child Welfare Agency Review Bd.*, No. CV 1999-9881, 2004 WL 3154530, at \*1, \*13 (Ark. Cir. Ct. Dec. 29, 2004) (invalidating Arkansas’ exclusion of gay people as foster parents), *aff’d sub nom. Dep’t of Human Servs. v. Howard*, 238 S.W.3d 1 (Ark. 2006); *Fla. Dep’t of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79, 92 (Fla. Dist. Ct. App. 2010) (invalidating Florida’s statute prohibiting adoption of children by homosexual foster parents); BRIGGS, *supra* note 174, at 97.

or LGBT.<sup>477</sup> While this narrative is usually true—willing, caring parents are always better than unwilling, incapable, or abusive ones—this does not undermine its class dimensions or justify diminishing the rights of birth families who may be less wealthy but are fully able to love and care for their children.

This class narrative affected the *Adoptive Couple* case from the beginning.<sup>478</sup> Christinna Maldonado selected the Capobiancos because “they’re a mother and father that live inside a home where she can look up to them and they can give her everything she needs when needed.”<sup>479</sup> Jo Prowell, the Guardian ad Litem who followed the case to the Supreme Court, resisted repeated requests by the Browns and their attorney to conduct a home study of the Browns. They testified that, when she did conduct the study, she told them about how well educated the Capobiancos were, what a beautiful home they had, and how they could send Veronica to any private school and college they chose.<sup>480</sup> She allegedly said that they needed to “get down on [their] knees and pray to . . . make the right decision for this baby.”<sup>481</sup> The South Carolina Supreme Court, although it ruled against the Capobiancos, called them “ideal parents.”<sup>482</sup> Dusten Brown, despite his loving and supportive parents, close relationship with his other daughter, and decorated military service, could only be less than

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477. The median income of adoptive parents has been consistently higher than the median income of biological parents ever since the government began tracking such data in 2000. See ROSE M. KREIDER & DAPHNE A. LOFQUIST, U.S. CENSUS BUREAU, ADOPTED CHILDREN AND STEPCHILDREN: 2010, at 17 (2014), available at <http://www.census.gov/prod/2014pubs/p20-572.pdf> (listing the median household income for adopted children under eighteen at \$73,000 and the same figure for biological children at \$60,000); ROSE M. KREIDER, U.S. CENSUS BUREAU, ADOPTED CHILDREN AND STEPCHILDREN: 2000, at 17 (2000), available at <http://www.census.gov/prod/2003pubs/censr-6.pdf> (listing the median household income for adopted children under 18 at \$56,000 and the same figure for biological children at \$48,000).

478. A recent *Harvard Law Review* commentary thus misses the point in arguing that the point of contention in the case is between biological and affective definitions of family. See *Indian Child Welfare Act—Termination of Parental Rights—Adoptive Couple v. Baby Girl*, 127 HARV. L. REV. 368 (2013). Although the piece is correct that changing definitions of the family and the demotion of biology in many people’s lives is important, see *id.* at 377, it misses the profound implications of the line the Court chose to draw here for historically disadvantaged families, biological or not, and the prioritization of marital families over even affective families in cases like *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), and *Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001) (holding that a son born out of wedlock in Vietnam but who had resided in the U.S. with his citizen father for years could not claim citizenship through his father, although one could claim citizenship through a citizen mother in similar circumstances). See *supra* notes 344–50 and accompanying text. The class and disadvantage-based implications of this line explain why the majority was dominated by the conservative members of the Court, while the minority by the progressive members.

479. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 553 (S.C. 2012).

480. See Transcript of Record, *supra* note 30, at 513, 568.

481. See *id.* at 513, 570.

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

“ideal.” In the media circus the Capobiancos’ public relations team created, he became just another deadbeat dad who was careless with his sperm and bad for his daughter, while the Capobiancos were the parents to which any right-thinking father would give his child.

### CONCLUSION

On October 10, 2013, two weeks after relinquishing Veronica to the Capobiancos, Brown decided to end all appeals in the case.<sup>483</sup> Holding back tears, he said, “I cannot bear to continue it any longer . . . I love her too much to continue to have her in the spotlight.”<sup>484</sup> Baby Girl is now, and will likely remain, Veronica Capobianco.

Although there was no hearing about what would be in Veronica’s *best* interests, one can hope that she will come out of this well. In general, adoptees, including transracial adoptees, have similar outcomes to nonadoptees,<sup>485</sup> and there is nothing to suggest that the Capobiancos will not provide her with a stable, loving family. While transracial adoptees grapple with distinctive ethnic identity issues, with supportive families they otherwise thrive.<sup>486</sup> Indian adoptees, in particular, struggle with identity issues and sometimes suffer serious harms as a result, but they usually do well so long as their adoptive families are open and supportive of their Indian identities and relationship to their Indian families.<sup>487</sup> The brutal legal and media battle that pitted the Capobiancos against the Browns and the Cherokee Nation, of course, makes it harder to imagine

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483. Overall, *supra* note 101.

484. *Id.*

485. See HOLLEE MCGINNIS ET AL., EVAN B. DONALDSON ADOPTION INSTITUTE, BEYOND CULTURE CAMP: PROMOTING HEALTH IDENTITY FORMATION IN ADOPTION 9 (Adam Pertman ed., 2009), available at [http://adoptioninstitute.org/old/publications/2009\\_11\\_BeyondCultureCamp.pdf](http://adoptioninstitute.org/old/publications/2009_11_BeyondCultureCamp.pdf).

486. See *id.* at 5–7, 17–19 (reporting results of a study comparing Korean and White adoptees, and summarizing studies regarding adoption generally).

487. See RITA J. SIMON & SARAH HERNANDEZ, NATIVE AMERICAN TRANSRACIAL ADOPTEES TELL THEIR STORIES (2008) (collecting interviews in which many, despite reports of happy childhoods and enhanced opportunities through adoption, speak of struggles with Indian identity and the sense that Indian children should ideally be placed with Indian families); Rita Sindelar, Negotiating Indian Identity: Native Americans and Transracial Adoption, at 50–51 (Aug. 2004) (unpublished Master’s Dissertation, Loyola University Chicago) (on file with Lewis Library, Loyola University Chicago). The UN Rapporteur on the Rights of Indigenous Peoples has also raised concerns about the denial of Veronica’s right to cultural identity, *USA/Indigenous Peoples: UN Expert Urges Respect for the Rights of Cherokee Child in Custody Dispute*, UNITED NATIONS OFF. HIGH COMMISSIONER FOR HUM. RTS. (Sept. 10, 2013), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13695&LangIE>; see also Kristen A. Carpenter & Lorie Graham, *Human Rights to Culture, Family, & Self-Determination: The Case of Adoptive Couple v. Baby Girl*, in INDIGENOUS PEOPLE AND HUMAN RIGHTS (Stefan Kirchner & Joan PolICASTRI eds. forthcoming 2015), available at <http://dx.doi.org/10.2139/ssrn.2401886> (discussing human rights concerns).

that relationship developing. In particular, the Capobiancos' decision to serve Brown and the Cherokee Nation with a demand for half a million dollars for attorney's fees and costs two days after Brown relinquished Veronica<sup>488</sup> (and file a new demand for over one million dollars a month later)<sup>489</sup> seems gratuitously vindictive, particularly because the attorneys worked pro bono.

For the Browns, of course, this is a tragedy that will last a lifetime. Studies of single mothers coerced into relinquishing their children find lifelong grief similar to that caused by the death of a child.<sup>490</sup> Like them, the Browns have lost a child against their will, and will likely always feel the effects.

But Veronica is just one little girl, and the Browns are just one family. More troubling than the impact of this case on the participants is the potential impact on all members of the adoption triad—children, birth parents, and adoptive parents. The decision, particularly without Justice Breyer's gloss on it,<sup>491</sup> has the potential to wipe out ICWA rights of almost all Indian birth fathers and even birth mothers who do not have legal custody of their children. In private adoption cases, it provides a neat loophole to evade the requirement to seek suitable families within the child's extended family or tribe. And although the Court did not adopt the existing Indian family exception, the decision may breathe new life into what had become a dying and discredited doctrine.<sup>492</sup>

The decision also sanctions dubious tactics like those practiced here, evading proper notice under the law until the long illegal placement of a child could ripen into a legal right to remain. Because the Supreme Court left untouched the requirement that all parents receive notice of adoptions under ICWA,<sup>493</sup> there will be other parents that learn of these unsanctioned placements and challenge them, just as Brown did, with the potential for more disruption and heartache for their children and prospective and birth families.

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488. Suzette Brewer, *Capobiancos Sue Dusten Brown for Nearly Half a Million in Fees*, INDIAN COUNTRY TODAY (Sept. 25, 2013), <http://indiancountrytodaymedianetwork.com/2013/09/25/capobiancos-sue-dusten-brown-nearly-half-million-fees-151444>.

489. Motion for Attorney Fees and Costs and Brief in Support, *supra* note 1.

490. JOYCE, *supra* note 182, at 93.

491. *See supra* notes 143, 164 and accompanying text.

492. The decision has already been repeatedly cited regarding the limitations of the application of ICWA to noncustodial mothers and fathers. *See, e.g., In re Elise W.*, No. A136845, 2014 WL 98674, at \*9 (Cal. App. Dep't Super. Ct. Jan. 10, 2014) (using *Adoptive Couple* to argue for the limitation of applicability of ICWA to termination of a mother's rights because the mother was non-Indian and the Indian father never had custody of the child); *In re Laird*, No. 315895, 2014 WL 308868, at \*3 n.4 (Mich. App. 2014) (using *Adoptive Couple* as affirmation of an earlier decision that active efforts were not required when family was already broken up at the time of the petition).

493. *See* 25 U.S.C. § 1912(a) (2012).

Ultimately, the decision and its aftermath place the stamp of approval on a long process of recasting adoption as a system to provide children to well-off families, while framing measures that accomplish that goal as furthering the children's interests. This reframing threatens all vulnerable communities and families. For Native communities—small, without the resources to pay hefty adoption fees, and struggling with generations of child removals—the impact is even greater. For them, the false narratives surrounding this case have combined to condone and perpetuate centuries of real intergenerational loss.