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In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl

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

Bethany R. Berger*

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 is ostensibly about a dispute between prospective adoptive parents and a biological father. This Article demonstrates that it is about a lot more than that. It is 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Drawing on published and unpublished court records and testimony, this Article reveals that the Court’s portrayal of the facts of the case was wrong.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 fiancé was pregnant and was initially prevented from learning of the adoption plan by the actions of the parties and their attorneys. The decision distorted the law as well, doing violence to long-accepted interpretations of the statute. Why did the Court mischaracterize the facts and the law? The 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 Copabianco to the couple that ultimately adopted her—who was removed when she was two years old from the couple that wished to adopt her to be placed with her father, then removed from her father 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 and those claims and argues that the Supreme Court decision that decided her fate 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 and Matthew Copabianco (“the Copabiancos”). Although Maldonado had begun negotiating with the Copabiancos months before, it was not until Veronica was almost four months old that anyone 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.

Eighteen months later, however, the United States Supreme Court held that Brown had no right to object to the adoption under ICWA.5 In July 2013, without a factual hearing, the South Carolina Supreme Court ordered

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1 Although usually referred to as Melanie Copabianco by the press, Melanie’s professional name and the name by which her attorneys referred to her in a recent pleading is Melanie Duncan. See Motion for Attorney Fees and Costs and Brief in Support, Adoptive Couple v. Baby Girl, No. FA-2013-4, Nov. 1, 2013 (D. Ct. Notawa Cty Okla.).
2 Section I.A., infra.
3 Id.
4 Id.
Veronica immediately taken from her father and his wife for the adoption to be finalized. 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 Copabiancos.

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. This Article seeks instead to examine the lenses of race, gender, and economics through which the story has been filtered and understood, and their influence on the opinion of the United States 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 children themselves.

Most striking is the role of race. In the Supreme Court, the attorneys for the Copabiancos and the Guardian ad Litem (star Supreme Court litigators Lisa Blatt and Paul Clement) argued that ICWA was unconstitutional race-based legislation. The Supreme Court’s majority opinion rested on statutory rather than constitutional arguments, only briefly noting that its interpretation avoided unspecified “equal protection concerns,” but 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.” 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 sovereignty by facilitating the assimilation and absorption of Native individuals. In Adoptive Couple, however, this longstanding campaign is repackaged in the service of color-blindness. This Article examines this trend as well as its conflict with constitutional law, which has consistently,
if not always coherently, recognized that federal recognition of descent-based tribal identity does not violate the constitution.

Gender played an important role in the case too. 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 emerge from the backlash against poor single mothers in the 1980s and 1990s and the proffering of adoption as a solution to both illegitimacy and increasing numbers of children in foster care. In most states, as a result, the rights of both birth fathers and birth mothers in adoptions have been sharply limited; before Adoptive Couple v. Baby Girl, ICWA cases were among the few not subject to this trend.

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. 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. Despite a decades-long policy shift, therefore, as well as billions of dollars spent on adoption subsidies and adoption promotion, only one-fifth of children exiting foster care leave through adoption, almost all to foster parents and a significant fraction to extended family foster parents. The determination that Brown had no right to consent, in other words, was connected to policies that denigrate poor single mothers, diminish ability of both mothers and fathers to contest adoption, and reduce financial and parenting support to poor families, without meaningfully affecting rates of adoption. Their net effect has been to harm both mothers and children, particularly those of color.

That brings us to the economic divides in who is benefitted by these policies. First, class divides the two paths to parenthood presented in the case and shapes the value attached to each path. The situation of the Copabiancos—married, highly educated, seeking adoption after years of unsuccessful treatment for infertility—is familiar and sympathetic to upper

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14 Section IV.B., infra.
15 Id.
16 Section II, infra.
17 Section IV.B, infra.
18 Id.
middle class judges and lawyers. (Chief Justice John Roberts, for example, is an adoptive father himself.)

The situation of Dusten Brown—unplanned father of a child whose mother didn’t want to marry him—is perhaps more common but less familiar to upper middle class decision makers, and certainly less valorized in popular media. Are the Copabiancos baby-buyers or the family any right-thinking bio 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.

Perhaps more important than class are the economic interests of those facilitating private adoptions. Outside of foster care and adoptions by relatives, adoptions are conducted largely 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, and highs around $100,000 have long been possible. These private interests depend on a supply of adoptable babies—an increasingly rare commodity in the U.S.—and on completed adoptions. It is not surprising, therefore, that both the Academy of Adoption Attorneys and the National Council on Adoption (which represents private adoption agencies), filed amicus briefs on behalf of the Copabiancos.

Finally, states may have economic interests in having children adopted by upper middle class families rather than remaining with low income ones. Because TANF payments follow the child, removing children from a poor family greatly reduces the obligation to provide state 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 Copabiancos. Instead, eighteen states submitted an amicus brief agreeing that according full rights to birth fathers under ICWA was in the interests of children and just and stable adoptions.

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19 Section V.C, infra.
22 National Council on Adoption FY2013 Annual Report at 6 (n.d.) (describing membership as largely adoption agencies, but including some adoption attorneys and “advocates”).
This Article explores the role that race, gender, and economics played in the case and its popular reception. Section One outlines the facts and law of the decision. Second Two challenges the idea that the result in the case served the best interests of children, relying on the facts of the case, statistics regarding adoption generally and Indian adoptions and foster care specifically, as well as the amicus briefs of eighteen child welfare organizations and another eighteen states arguing that the lower court’s ruling furthered the best interests of children. Section Three discusses the role of race and the ways that assertions of racial egalitarianism were used to replicate racial colonialism of Indian peoples. Section Four 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. Section Five discusses the role of economics, both the class divides between adoptive parents and birth parents and the economic interests of those who facilitate adoptions and states charged with support of poor families.

I: FIXING THE FACTS, EXPLAINING THE LAW

A. Facts

Most of the facts in Adoptive Couple v. Baby Girl are undisputed, but they have been frequently misrepresented. This section therefore presents the facts in the case at some length, trying to the extent possible to rely on those 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. They began dating again, however, and in December 2008, Brown and Maldonado became engaged. At that time, Brown, a soldier who has received a Bronze Star for his service in Iraq, lived at the Army Base in Fort Sill, Oklahoma, about four hours away from Bartlesville, where Brown had grown up, and where his family and Maldonado both lived. In January 2009, Maldonado told Brown she was pregnant; he responded by asking her to move up their planned wedding. The family court found that Brown was excited to learn of the pregnancy and “instead of shirking his responsibilities, he implored her to move the

26 Id. at 552-553.
27 Id. at 553.
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.”

Maldonado refused, stopped taking his calls, and in May 2009, broke off their relationship by text message. 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. He later testified that he hoped that this would cause her to rethink the decision not to marry him. The family court found that Brown understood himself only to be agreeing to Maldonado’s sole custody, and did not find Maldonado’s testimony that he was trying to avoid child support credible. Maldonado testified that he did not contact her after June. Brown testified that she did not respond to multiple text messages or open the door when he drove to Bartlesville to see her, and his mother testified that she called to offer her money and hand-knitted baby things (twenty-four beaded baby socks), but Maldonado did not reply. 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.”

Financially struggling, Maldonado sought to place the baby for adoption. Through a maze of adoption service providers she was connected with the Copabiancos of Charleston, South Carolina. The Copabiancos had been through seven unsuccessful rounds of IVF, and were now seeking to adopt. Melanie Duncan Copabianco has a Ph.D. in developmental

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29 731 S.E.2d at 553.
30 Id.
31 Id.
33 Id. at 555 n.9; Suzette Brewer, The Fight for Baby Veronica Part II: The Devil’s in the Details, May 13, 2013).
35 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, August 12, 2013 (discussing court records of child custody and child support disputes showing that she paid $252 a month in child support to the father of her other children, who are being raised by their paternal grandmother).
36 731 S.E.2d at 570.
psychology and works at home consulting on children’s therapies, while Matthew Copabianco is an automotive technician with Boeing.\(^{37}\) During Maldonado’s pregnancy, the Copabiancos paid her “rent, car payments, and utilities,”\(^{38}\) and allegedly gave Maldonado about $10,000 in financial assistance, not including her medical fees, which were covered by the state.\(^{39}\)

The notes of Maldonado’s pre-placement interview with the Nightlight Christian Adoption Agency report that “[i]nitially the birth mother did not wish to identify the father, said she wanted to keep things low-key as possible for the [Appellants], because he’s registered in the Cherokee tribe. It was determined that naming him would be detrimental to the adoption.”\(^{40}\)

On August 21, 2009, the attorney the Copabiancos 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 Dale Brown
(1/8 Cherokee, supposedly enrolled)
DOB:XX, XX, 1983
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?”\(^{41}\)

The letter misspelled Brown’s name as “Dustin” rather than “Dusten,” got his day of birth wrong, and wrote his birth year as 1983, rather than 1981.\(^{42}\) (Maldonado claimed that she told the attorney this information was incorrect,\(^{43}\) the Cherokee Nation did not, however, receive correct information until five months later.)\(^{44}\) The Cherokee Nation responded that they could not find records of Brown’s enrollment, but that “[a]ny incorrect

\(^{37}\) Id. at 553.


\(^{41}\) Letter from Phyllis Zimmerman to Myra Reed, Cherokee Nation Indian Child Welfare Division, Aug. 21, 2009, excerpted in Brewer, The Devil’s in the Details, supra.

\(^{42}\) Id.; see also Adoptive Couple v. Baby Girl, 731 S.E.2d 550, 552 (S.C. 2012).

\(^{43}\) 731 S.E.2d at 552.

\(^{44}\) Id. at 555.
or omitted family documentation could invalidate this determination.”

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. Second, if Maldonado had in fact been working with the Copabiancos for four to five months, she had selected the family even before she ended her relationship with Brown.

On September 15, 2009, Maldonado gave birth to a little girl. She had checked herself into the hospital as “strictly no report,” meaning that anyone who called to enquire about her would be told that she was not there. She testified that she had done this with her two previous births to avoid having the father of those children contact her. Brown did not know that she was in the hospital and did not try to contact her there. The Copabiancos, however, were present at the birth. In a much repeated fact, Matthew Copabianco cut the umbilical cord. Maldonado relinquished her parental rights the next morning. After filing papers with Oklahoma’s Interstate Compact on Child Placement agency that did not indicate the baby’s Native American heritage, the couple received permission to remove her from the state, and took her home to South Carolina later that month.

The Copabiancos filed a petition to adopt Veronica on September 18, 2009, but did not provide notice to Brown of the planned adoption until almost four months later, six days before Brown was scheduled to deploy to Iraq. 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 widespread non-compliance with ICWA. Some of this non-compliance is due to ignorance or carelessness, but there is evidence that it is also part of a

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45 Id.
46 Melanie, however, testified that they first got into contact with Maldonado in late June. Adoptive Mother Testimony, 202:25, Sept. 12, 2011.
47 731 S.E.2d at 554.
48 731 S.E.2d at 554 n.4.
49 731 S.E.2d at 554.
50 Id
51 Id. As discussed below, had the papers indicated her Cherokee heritage, the couple would not have been permitted to remove the baby from the state. See infra note ___.
52 731 S.E.2d at 554.
common technique to facilitate private adoptions of Indian children by non-Indians.\textsuperscript{54} By putting a child with a hopeful family before providing notice to a child’s parents or tribe, agencies may create “facts on the ground”\textsuperscript{55} 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.\textsuperscript{56}

The failure to establish the applicability of ICWA until the Copabiancos had returned to South Carolina may have been a key legal move as well. Had Oklahoma authorities known that ICWA was involved, they would have refused to permit Veronica to be removed from the state until they were satisfied that the placement was in compliance with ICWA.\textsuperscript{57} Had the required notice to Brown and the tribe been made before Veronica’s placement with the Browns, the Oklahoma courts would almost certainly have determined that Brown was entitled to custody under the act.\textsuperscript{58} Even had the Oklahoma courts determined that Brown did not have

\textsuperscript{54} See Brief for the Association of American Indian Affairs at 17-19, Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013) (No. 12–399) (discussing adoption practices). Brief of Amici Curiae Wisconsin Tribes, 37-38, supra (discussing practices in Wisconsin); John Echohawk, et al., The Adoption Industry’s Ugly Side, http://www.politico.com/story/2013/04/the-ugly-side-of-the-adoption-industry-90091.html; In Re Bridget R., 49 Cal. Rptr. 2d 507, 517 (Cal. Ct. App. 1996) (father did not admit that he was Indian on an adoption form after being told that “the adoption would be delayed or prevented if [Father's] Indian ancestry were known”); In the Matter of the Adoption of Infant Boy Crews, 803 P.2d 24, 26 (Wash. Ct. App. 1991) ([Adoption counselor] advised Crews not to mention her Indian blood to anyone, stating, “What I don't hear, I don't know.”).

\textsuperscript{55} “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 (Gregory Alexander & Eduardo Peñalver, eds. 2010).

\textsuperscript{56} See In re Adoption of B.G.J., 111 P.3d 651, 657–58 (Kan. App. 2005), aff’d, In re Adoption of B.G.J., 133 P.3d 1 (Kan. 2006); see also 10 Okla. Stat. § 7003–5.6h(B) (long placement relevant to determining best interests).

\textsuperscript{57} 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).

\textsuperscript{58} See, e.g., In re Baby Boy L., 103 P.3d 1099 (Okla. 2004) (ICWA applied to unmarried mother’s attempt to place her child for adoption without the consent of the Indian unmarried father); see also Adoptive Couple v. Baby Girl, No. 2009-DR-10-03803 at 10 (S.C. Fam. Ct. September 29, 2011) (“I find that Oklahoma never would have given consent for the child to be removed from the state through the Oklahoma Interstate Compact had the Interstate Compact Application been correct.”). Brown did initially file his action seeking custody in the Oklahoma courts, but the court properly dismissed the
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. Most important, had the case been considered without the backdrop of Veronica’s long placement with the Copabiancos, 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, Maldonado’s attorney called and told him he had to come to Bartlesville to sign some paperwork. 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. There, he was served with papers stating that he was not contesting the adoption of Baby Girl. He signed, thinking that he was agreeing to relinquish his rights to Maldonado, but immediately realized his mistake. 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.”

Immediately upon returning to base, Brown contacted the base Judge Advocate General lawyer, and with his assistance retained an attorney the next day. On January 11, 2010, Brown filed papers seeking a stay under the Servicemembers’ Civil Relief Act, and on January 14 filed a complaint to establish paternity, custody, and child support of his daughter. Brown left for Iraq on January 18, leaving his father with power of attorney. In the meantime, the Cherokee Nation intervened in the case in March 2010, and court-ordered paternity testing in May confirmed that Brown was Veronica’s father.

Brown returned from Iraq in December 2010, but the family court did

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59 10 Okl.St.Ann. § 7505-4.1 & § 7505-4.2[D].
61 Id.
62 731 S.E.2d at 555.
63 Id.
64 Id.
65 Id. The complaint was originally filed in Oklahoma, but the Oklahoma courts dismissed the law suit in favor of the case pending in South Carolina. Id. at 571 n.42 (Kittredge, J. dissenting).
66 731 S.E.2d at 555-556.
not hold a hearing on the matter until September 2011. On September 29, 2011, Judge Deborah Malphrus issued an order from the bench finding that ICWA applied, that terminating Brown’s parental rights would not be in Veronica’s interests, and that it would be best for all concerned if she could be transferred quickly, on October 15, 2011. The court 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. The court declared that “[a]lthough the adoptive couple has had this child in their care for two years, a child is not property, and the right to custody cannot ripen simply from the passage of time. Custody and parental rights cannot be gained by adverse possession.”

The family court issued a written opinion reiterating in most respects its earlier order on November 25, 2011. Although she reversed the finding that Brown was a thwarted father under South Carolina law, 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.” The court 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.”

The court also rejected the “existing Indian family” exception, which some courts have used to deny application of ICWA when they find that the family involved does not have a meaningful connection with an Indian tribe, but also found that even if it was good law, it would be “inapplicable to the facts of this case,” given Brown and his families 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

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67 Id. at 555.
69 Id. at 14.
70 Id. at 17-18.
71 See Email from Chrissi Nimmo, Assistant Attorney General for the Cherokee Nation, February 2, 2014; § IV.B, infra.
72 Pet. App. at 126a-127a (quoted in Appellate Brief in Opposition to Certiorari at 9).
73 731 S.E.2d at 566 (quoting family court).
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pride and connection to the [Cherokee] Nation and the Wolf Clan. I find that [Father] has a strong cultural tie to the Cherokee Nation.”

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

Although the details of the legal dispute will be discussed below, the subsequent proceedings have also become an important part of the factual understanding of the case. On August 22, 2012, the South Carolina Supreme Court affirmed the family court. On June 25, 2013, the Supreme Court reversed. 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 Copabiancos. On August 8, 2013, Brown turned himself in to Oklahoma authorities rather than hand her over. Oklahoma initially refused to extradite Brown, but ordered the parties to submit to mediation. Finally, after mediation broke down and the Oklahoma Supreme Court lifted its emergency stay of execution, Brown relinquished Veronica to the Copabiancos on September 23, 2013, eight days after her fourth birthday.

There is no question that the Copabiancos provided a good home for Veronica. Because there has been no hearing since the transfer in December 2011, there are no judicial findings regarding her family with the Browns (Brown had remarried since 2009; Veronica knows his wife Robin as “Mommy”). Newspaper articles suggest that Veronica thrived there as well, and was a happy, bubbly child who loved her parents, enjoyed her

75 Suzette Brewer, The Fight for Baby Veronica Part 3, Indian Country Today June 4, 2013. The Copabiancos’ attorney had changed the location from their home to the Omni Hotel at the last minute. Upon checking it out and seeing the swarm of cameras, Sharon Jones refused to conduct the handoff there, and told the Copabiancos to meet Brown where he was waiting at her office. Id. Brown and Veronica remained in Jones’ office until the reporters gave up and went away. Id.
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 other children. Although some of these reports are in sympathetic fora like *Indian Country Today*, others come from the Oklahoma TV News and the Charleston, South Carolina *Post and Courier*. All the evidence we have suggests that Veronica has had two loving, happy, homes, and at almost four years old has 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 “chicken-shit” cases. Not so *Adoptive Couple v. Baby Girl*. 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. Guardian ad Litem Jo Prowell, who has been an aggressive participant in the litigation, was represented by Paul Clement. 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 and the Voting Rights Act and for the constitutionality of DOMA. Maldonado submitted an amicus brief authored by former U.S. Solicitor General and Rehnquist clerk Gregory Garre and former Ginsburg clerk Lori Alvino McGill. Amicus briefs

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supporting reversal were also filed by the Academy of Adoption Attorneys, National Council on Adoption, law professors Joan Heifetz Hollinger and Elizabeth Bartholet, a passionate advocate of transracial adoption, and the County Welfare Officers of California.\footnote{Amicus Brief of the Nat’l Council for Adoption, Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013) (No. 12–399); Amicus Brief of the Academy of Adoption Attorneys, Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013) (No. 12–399); Amicus Brief of Brief of Professor Joan Heifetz Hollinger, Professor Elizabeth Bartholet, Center for Adoption Policy, and Advokids as Amici Curiae in Support of Respondent Baby Girl and Reversal, Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013) (No. 12–399).}

Brown was represented by the Yale Law School Supreme Court Clinic, led by Charles Rothfeld, another star Supreme Court litigator.\footnote{Brief of the Week: Star advocates face off in high-profile adoption case, The National Law Journal, December 4, 2012.} The United States also weighed in on the respondents’ behalf, with Deputy Solicitor General Edwin Kneedler arguing.\footnote{Id.} The twenty-two amicus briefs supporting Birth Father and Baby Girl included not only many briefs from Indian tribes and organizations, but also ones on behalf of the ACLU, current and former members of congress (this last by Kathleen Sullivan, former dean of Stanford Law School, and another Supreme Court superstar), the attorneys general of eighteen different states, a number of churches and religious organizations, the Minnesota Department of Human Services, and eighteen leading child welfare organizations\footnote{For a helpful compilation, see Turtle Talk Guide to the Amici Supporting Respondents in Baby Veronica Case (Adoptive Couple v. Baby Girl), Posted on March 29, 2013 by Matthew L.M. Fletcher, http://turtle talk.wordpress.com/2013/03/29/turtle-talk-guide-to-the-amici-supporting-respondents-in-baby-veronica-case-adoptive-couple-v-baby-girl/.} (this last by Patricia Millett, the woman who has argued the second most cases before the Supreme Court).\footnote{O’Connell, A Chat with Lisa Blatt, supra.}

This concentration of attorney firepower was not a reflection of the complexity or conflict below regarding the legal issues in the cases. The issues appeared to be dry ones of statutory construction, and, as SCOTUSblog opined, the “plain language of the statute” appeared to encompass this situation.\footnote{Amy Howe, Argument preview: Court to take on law and emotion in Indian adoption case, SCOTUSblog.com, Posted Sat, April 13th, 2013, available at http://www.scotusblog.com/?p=162343.} The first question was whether Brown was a “parent” under § 1903(9) of ICWA, which defines the term to mean “any biological parent . . . of an Indian child,” but excludes “the unwed father where paternity has not been acknowledged or established.”\footnote{25 U.S.C. § 1903(9).} 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.\(^9\) The Supreme Court did not even resolve this question, assuming without deciding that Brown was a parent under the Act.\(^9\)

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. Section 1912 as a whole governs involuntary child welfare proceedings in state court.\(^1\) (Section 1913, in contrast, governs voluntary consent to foster care and termination of parental rights.)\(^2\) 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.\(^3\) 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.\(^4\) 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 family.\(^5\) 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.\(^6\)

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 required by §§ 1912(d) and (f), parental rights could not be terminated.\(^6\) The petitioners argued, however, that even if Brown was a parent, and so required to receive notice and court-appointed counsel in a termination of parental rights proceeding under § 1912, none of the standards § 1912

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\(^8\) See Bruce L. v. W.E., 247 P.3d 966, 978 (Alaska 2011) (summarizing cases); see also Amicus Brief of the States of Arizona et al. at 16-22 (discussing cases and arguing that Brown satisfied standards established by state courts).

\(^9\) 133 S.Ct. at 2558-2559.

\(^1\) 25 U.S.C. § 1912.


\(^3\) 25 U.S.C. § 1912(a).

\(^4\) 25 U.S.C. § 1912(b) & (c).


\(^6\) 25 U.S.C. § 1912(e) & (f).

required for involuntary termination applied because he did not presently have custody of Veronica.\textsuperscript{107} 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.\textsuperscript{108} The proposition seems ludicrous—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.

Starting with the words “continued custody” at the end of the statute, the Court determined that they included only custody by someone who already had legal or physical custody.\textsuperscript{109} This certainly is one meaning of the term. As Justice Scalia pointed out in dissent, however, “continued custody” could also refer to custody that was “not merely initial or temporary” but protracted or without interruption in the future.\textsuperscript{110} It is also far more consistent with the structure of § 1912 as a whole, which deals generally with involuntary terminations, and gives unmarried fathers who have acknowledged paternity significant rights in such proceedings.\textsuperscript{111}

The Court then defined custody to mean physical or legal custody as defined by state law.\textsuperscript{112} Because, absent court order, legal custody of illegitimate children is in their mothers, the substantive requirements of § 1912(f) did not apply.\textsuperscript{113} This was actually a far more radical proposition than argued by the 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 with the right to contest termination of parental rights in adoptions. State laws differ on when unwed fathers have such rights, with a number according greater rights than South Carolina.

Virtually all state statutes, however, provide that legal custody is in the unmarried mother until otherwise established. Because at least 67\% of Indian children are born to unmarried parents,\textsuperscript{114} this would prevent most

\begin{footnotes}
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 2560.
\textsuperscript{110} 133 S.Ct. 2552, 2571-72 (Scalia, J., dissenting); see also 133 S.Ct. at 2577, n.6 (Sotomayor, J. dissenting) (agreeing with this proposition).
\textsuperscript{111} See also 133 S.Ct. 2573 (Sotomayor, J. joined by Scalia, Ginsburg, and Kagan, JJ. dissenting) (interpreting § 1912 through two words at the end of the statute is a “textually backward reading” that “misapprehends ICWA’s structure and scope”).
\textsuperscript{112} 133 S.Ct. at 2561.
\textsuperscript{113} Id.
\textsuperscript{114} See Centers for Disease Control and Prevention, Births: Final Data for 2012, 62:9 Nat’l Vital Statistics Report, Table 13 (2014). This report undercounts as it tracks nonmarital births by the race of the mother, not the father, and thus misses cases in which
\end{footnotes}
fathers who don’t live with their children from seeking custody under 1912(f). 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,” and Justice Breyer stated in concurrence that they were 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.” Nothing in the legal rule announced by the majority, however, would exclude such cases—such fathers do not have “legal or physical custody” under state law, and therefore would not appear to have any rights under the standards applied in the case.

The Court also held that fathers like Brown were not entitled to any protections under Section 1912(d), which requires that “active efforts be made to prevent the breakup of the Indian family” before termination or foster care placement. 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’ requirement.” 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.

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

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115 See also Brief of Amici Curiae Wisconsin Tribes 20-21 Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013) (No. 12–399) (noting that 95% of all voluntary relinquishments are by unmarried mothers).
116 See 133 S.Ct. at 2562 & 2563 n.8.
117 133 S.Ct. at 2571 (Breyer, J. concurring) (quoting Sotomayor, J. dissenting, 133 S.Ct. at 2578 & 2578-2579 n.9).
118 133 S.Ct. at 2561.
120 133 S.Ct. at 2563.
121 Id. 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.” 731 S.E.2d at 562. The majority understandably had some fun with such a requirement. 133 S.Ct. at 2563-64. 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.
involuntary termination proceedings, it rendered those rights essentially meaningless. While state law might or might not require some kind of substantive showing before parental rights could be terminated, the substantive standards of ICWA simply did not apply.

A few state courts in the 1980s had limited the application of ICWA 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. The first of these cases, Baby Boy L., the Kansas Supreme Court held that ICWA did not apply at all in a case where the father had never had custody of his child, because there was no “existing Indian family” to break up. But courts and legislatures have since generally rejected what was became called the “existing Indian family exception,” including in several of the states that originally adopted it.

Like those early state court decisions, the Supreme Court rested its opinion in part on its finding that “the Act was primarily intended to stem the unwarranted removal of Indian children from intact Indian families.”

State courts had been forced to acknowledge that Congress had other important goals in ICWA, particularly after 1989, when the Supreme Court decided Mississippi Choctaw v. Holyfield, its sole previous case on ICWA, strongly affirming application of ICWA to twins voluntarily relinquished for adoption at birth. But although the Court in Adoptive Couple v. Baby Girl declined the petitioners’ invitation to adopt the existing Indian family exception, by echoing the pre-Holyfield narrow interpretation

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123  Id. at 175; see also In re Baby Boy D., 742 P.2d 1059 (Okla. 1985), superceded by statute as stated in Steltzlen v. Fritz, 134 P.3d 141, 2006 OK 20 (Okla. Apr 04, 2006) (non-custodial unmarried father did not have standing to object to adoption or invoke protections of §§ 1911, 1912, & 1913, because the child had not been part of an “existing Indian environment”); In re S.A.M., 703 S.W.2d 603, 608 (Mo. App. 1986) (refusing to apply § 1912(d) and (f) to a case both because the unmarried father did not qualify as a parent in part because there was no “Indian family” to preserve.) In re S.A.M did state briefly that the child there was not in the appellant’s “continued” custody, but did not rest its opinion on this holding. 703 S.W.2d at 607.
126 See 25 U.S.C. § 1901(2)-(5) & § 1902 (referring to congressional “responsibility for the protection and preservation of Indian tribes,” that “there is “no resource 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”).
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. 25 U.S.C. § 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.128

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.129 The Supreme Court, 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.”130

If taken at face value, this holding completely undermines the statutory requirement; henceforward, in order 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 “the “unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.”131 State statutes,132 judicial

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129 See, e.g., 25 U.S.C. § 1915(c) (providing that parental preference could be considered in appropriate circumstances); In re Appeal in Maricopa Cnty. Juvenile Action No. A–25525, 667 P.2d 228, 234 (Ct.App.1983) (finding good cause where child had resided with adoptive mother for three years); In the Adoption of F.H., 851 P.2d 1361 (Alaska 1993) (holding mother’s preference for placement with non-Indian, adoptive parents was appropriate factor in finding good cause). But see In re T.S.W., 276 P.3d 133, 144 (Kan. 2012) (parental preference alone cannot constitute good cause); Matter of Custody of S.E.G., 521 N.W.2d 357 (Minn. 1994) (error to find that long placement alone constituted good cause).
130 133 S.Ct. at 2564.
132 See, e.g., California Welf. & Inst.Code. § 361.31, subd. (k) (requiring documentation of efforts to find placement complying with the preferences); Iowa Code section 232B.9(8) (requiring documentation of “active efforts” to comply with the preferences); Wis. Stat. § 48.028(7)(e).
It might be possible to avoid this bizarre result by reading the majority 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. 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 § 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.”

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,

[At] 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.’

Although the language refers to “the time the Adoptive Couple [seeks] 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. 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 held he had a right to until a couple of months earlier, this condemnation of the “midnight hour” petitions seems bizarrely punitive.

Why did the Court thus do violence to ICWA’s statutory text and purpose? Justice Thomas’ concurrence states that both the 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.

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


135 133 S.Ct. at 2571 (Breyer, J., concurring).

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.\textsuperscript{137} Without elaboration, the majority opinion referred vaguely to potential “equal protection concerns,”\textsuperscript{138} but when examined, these concerns are legally evanescent. For the four justices beside Thomas, this essay 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 the case was about the best interests of a child, not her or her parents’ race, gender, or anything else. The claim has two parts: first, that ICWA undermined Veronica’s interests in this particular case; and second, that holding that ICWA applied to cases like this would harm Indian children in general. Both claims fall apart on examination.

With respect to this case, the family court specifically found after a four-day hearing with numerous witnesses and two experts, that placement with her birth father was in Veronica’s interests.\textsuperscript{139} The evidence was “undisputed” that Brown was an “excellent father” and would love and care for Veronica.\textsuperscript{140} The family court 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.’”\textsuperscript{141} The family court and South Carolina Supreme Court also found—consistent with psychological literature—that the healthy attachment Veronica presumably had to the Copabiancos would likely enable her to bond to Brown and his family without lasting harm.\textsuperscript{142} All the reports suggest that they were correct, and that Veronica thrived with her birth father and his wife. 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.

There is also no evidence that ICWA generally has interfered with

\textsuperscript{137} See 133 S.Ct. at 2565-2570 (arguing that the Indian Commerce Clause does not support ICWA, or indeed any congressional action not having to do with commerce and trade).


\textsuperscript{140} Pet. App. at 126a-127a (quoted in Appellate Brief in Opposition to Certiorari at 9).


\textsuperscript{142} Id. at 564.
warranted adoptions or permanency for Indian children. Although Justice Alito wrote forebodingly that the 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,” this assertion is simply implausible given the great demand for healthy adoptable babies. Since the 1920s, a continuous “baby famine” has led to repeated scandals regarding black market and illegal adoptions. Decreasing stigma attached to single motherhood; far greater employment, child care, and welfare options for women; and greater availability of birth control and abortion have radically reduced the supply of adoptable infants since the 1970s. 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; 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. In this same period, the percentage of births to unmarried mothers has not even doubled.

While the supply of adoptable infants is just a small fraction of what it was in 1972, there have been no such decreases in demand for adoption. One estimate is that there are about six families seeking to adopt for every completed adoption. Although the excess demand for adoptable babies led adopters to look overseas for children, the supply there is dwindling as well a result of the United States’ 2008 accession to the 1993 Hague Convention on Protection of Children and Intercountry Cooperation in Adoption, as well as efforts by important sending countries such as South

143 133 S.Ct. at 2565.
144 Briggs, supra, at 6-7.
145 Id.; see Evan B. Donaldson Adoption Institute, Safeguarding the Rights and Well-Being of Birth Parents in the Adoption Process 7 (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 in Section V, infra, is that today infertility is not simply a biological issue, but a class issue, as upper middle class women like Melanie are far more likely to defer child-bearing for education or work.
148 Jones at 19, Table 1.
Korea, Liberia, Russia, China, and Guatemala 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. While race-matching was once both the law and practice of adoption, the reality is that race-matching is today live and well as a function of private adopters and the market. Seeking to cater to the preferences of private adopters, agency websites advertise racial segmentation, charging thousands less for less

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152 Moriguchi at 16; Rachel L. Swearns, A Family for a Few Days a Year, N.Y. Times, December 8, 2012 (discussing effect of Guatemalan shut down of adoptions, as well as U.S. restrictions on adoptions from countries like Vietnam and Cambodia).

153 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 hurtful superstitions, and reinforce 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 the 1974 statement by the National Association of Black Social Workers against placement of African American children in White homes. This argument overlooks the lack of evidence of any effect of the statement. The highpoint of the first wave of transracial adoptions was in 1970, at 1,743 adoptions. By the time NASBW issued its statement four years later, the number had already dropped to 591. Briggs, supra, at 57.

154 Mary Eschelbach Hansen & Daniel Pollack, Transracial Adoption of Black Children: An Economic Analysis in Michele B. Goodwin, Baby Markets: Money and the New Politics of Creating Families 134 (2008). The Inter-Ethnic Provisions of the Multi-Ethnic Placement Act prohibited race-matching in public adoptions in 1996. See 42 U.S.C. § 1996b(1)(a). 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. Hansen & Pollack at 142-143.

155 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.”).

racially desirable babies.\textsuperscript{156} 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.\textsuperscript{157} A recent empirical analysis of applications to adopt available infants, for example, found that those with African American heritage are seven times less likely to be sought after by adoptive parents, but that there were no differences between rates of application for White and Hispanic babies.\textsuperscript{158}

In short, the demand for babies like Veronica is such that prospective adoptive families will not be deterred by procedural hurdles. As evidence of this, ICWA was enacted in 1978; since then multiple high profile cases have overturned adoptive placements that failed to comply with its mandates.\textsuperscript{159} Yet the demand for babies is great enough that individuals like the Copabiancos wait for months if not years and spend upwards of $40,000 to adopt children with Indian heritage and barely register the potential implications of the law.\textsuperscript{160}

But what of 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 General Accounting Office evaluated this concern and found it unfounded. Children subject to ICWA did not remain without permanent placements longer or experience more changes in placements than other children in foster care.\textsuperscript{161}

Indeed, even thinking of adoption as a significant option for such children suggests unawareness of 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,

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\textsuperscript{156} Quiroz at 68-69.
\textsuperscript{157} Id. at 76.
\textsuperscript{158} Baccara, supra, at 4. Girls like Veronica are also preferred over boys, but only by about 50%. Id. at 30.
\textsuperscript{160} Melanie initially estimated in her testimony that they had spent $20,000-40,000 for the adoption before the litigation arose, but later said that those figures were probably too low. Testimony of Adoptive Mother, 198:22-199:4, Sept. 12, 2011. 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 181:16-18, 215:1-216:4.
only about one in five children in foster care exits via adoption, and only about half of the children whose placement goal is adoption do so. These children are older and less desirable adoptees than those relinquished at birth, and all but 15% of the adopters had been foster care parents prior to adoption. A quarter of the adopters, accounting for much of the increase in adoptions from foster care since 1997, were related to the child.

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. 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.

The consistency between children’s interests and ICWA and its application in cases like this was underscored by the child welfare organizations’ amicus brief. Eighteen of the leading child welfare organizations in the country joined the brief. They included Casey Family Programs, the largest foundation focused on foster care and the child welfare system; the Child Welfare League of America, whose members include 800 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.

The amici agreed that “legitimate, regularized adoptions are an extremely important part of the child welfare system.” 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

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163 Moriguchi, supra, at 18-19.
164 Id. at 18.
165 In Adoptive Couple v. Baby Girl, for example, the Cherokee Nation had identified several approved Cherokee families who would be interested in adopting her if her family did not want custody.
167 Id. at 1A-9A.
168 Id. at 27.
with an adoption placement made at birth,” calling this a “bedrock principle of child welfare.” In particular, fully involving birth fathers regardless of whether they had been previously involved with the child, was important both to ensure stable permanent placements and allow children to build relationships important for their well-being.

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.”

They called the “acknowledged heartbreak” of the removal of Veronica from the Copabiancos “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.”

The amicus brief submitted by eighteen states from California to New York, and including most of the states with the highest Indian populations in the U.S., agreed that according full rights to birth fathers under ICWA was in the interests of children and stable adoption. Because states have different standards regarding the rights of unmarried birth fathers in adoption, an adoption without paternal consent might be legal or illegal depending on whose law applied, which might depend on the residence of the mother, father, or adoptive parent, as well as the child’s place of birth and current residence. Such a situation could create confusion, lead to disruptive challenges to placement, and to an “an adoption brokerage business” to game whose state’s law would be chosen. It would also undermine state interests “in ensuring that their children’s and adoptive

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169 Id. at 9-10.
170 Id. at 3.
171 See id. at 9-10.
172 Id. at 18.
173 Id. at 19.
176 Id. at 22, quoting Mississippi Choctaw v. Holyfield, 490 U.S. at 45-46 n.20.
parents’ rights are protected regardless of where a child is born, where the father resides, or where the adoption ultimately takes place.”

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 standing in *parens patriae* to them—agreed that both in Veronica’s case and in general, ICWA’s protections served the best interests of children. The Court’s suggestion that they did not—that indeed, they raised equal protection concerns—was based on untested intuitions rather than fact or expert opinion. The next section shows the ways that these intuitions emerged from distinctions of race, gender, and class that are damaging to fathers, mothers, and ultimately children as well.

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

Paul Clement’s mantra in arguing the case was that ICWA only applied because Veronica had “3/256ths of Cherokee blood.” Unfortunately for Dusten 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 Indian peoples.

A. The Making of a Meme

The 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 appears in the record through the letter to the Cherokee Nation stating that father was “one-eighth Cherokee, supposedly enrolled.” In their reply brief arguing for a writ of certiorari, the Petitioners stated in a footnote that “Baby Girl is ½ Hispanic and 1/16 Cherokee.” (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 the petitioners and their allies to reduce ethnic and cultural identity to biology.) In their first brief on the merits, the Petitioners stated, again in a footnote, “we have since reviewed

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177 *Id.*
179 731 S.E.2d 550, 555.
records from Baby Girl's paternal grandparents reflecting that Baby girl is 3/256 Cherokee.”  

It was left for Paul Clement on behalf of the Guardian ad Litem to turn this assertion into a battle cry. He began his amicus 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.” He repeated the 3/256ths assertion five more times in his brief. He began his argument before the Court with the statement, and was in such a haste to repeat it again before he closed that he stumbled and had to substitute the easier to say “one percent.”

By the time Clement sat down, the seed had taken root. When Charles Rothfeld stood up to argue for the Respondents, the Justices took up the refrain. 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 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.” 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?” After several volleys in which Rothfeld sought to establish the facts of the Cherokee citizenship criteria, which rely on proving descent from an individual on federally created “Dawes Rolls,” 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.” Justice Sotomayor finally intervened, giving Rothfeld the opportunity to turn the final minutes of his argument back to interpretation

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183 Id. at 2, 8, 16, 20, 21.
185 Id. at 29:12.
186 Students who have been told to have a “theme of the case” and work your legal arguments into it should take note: it works!
188 Id. at 42:20-24.
189 Id. at 43:6-9.
Focusing on the portion of the oral argument dealing with statutory interpretation, one might predict a win for the Respondents. The justices generally poked holes in the statutory arguments of the Petitioners, but not those of 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.” 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.” One did not need to read the statutory analysis to know that the Petitioners would win.

B. Disputing the “Undisputed”

The reality is that blood quantum had nothing to do with the application of ICWA to Veronica, and that 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.” The definition is predominantly political. While children who are not yet enrolled in an Indian tribe must be biological children of members of the tribe, it is membership or eligibility for membership in an Indian tribe that defines Indian status. Indeed, the South Dakota Supreme Court has held that a child without Indian heritage who had been adopted by a Lakota family and become a member of their tribe is an “Indian child” for purposes of the act.

Veronica was an Indian child under ICWA because her father was a citizen of the Cherokee Nation of Oklahoma and she herself was eligible for enrollment. This eligibility did not depend on blood quantum. Like a significant plurality of tribes, the Cherokee Nation does not require any

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190 Id. at 45-51.
191 133 S.Ct. at 2556.
192 Id. at 2559.
196 Kirsty Gover, Genealogy as Continuity Explaining the Growing Tribal Preference for Descent Rules in Membership Governance, 33 Am. Indian L. Rev. 243, 270 (44% of tribal constitutions reviewed in comprehensive study followed a lineal descent rule).
particular degree of heritage, but instead requires establishing one lineal descendant from particular historical census rolls. 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.\textsuperscript{197}

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,\textsuperscript{198} and for many with some African heritage, they failed to include any Cherokee heritage at all.\textsuperscript{199} In addition, many of the most traditional Cherokee citizens—often those with higher blood quantum—refused to enroll at all, resisting the destruction of the tribe the Dawes Rolls sought to facilitate.\textsuperscript{200} Those who did enroll had incentives to misrepresent their blood quantum to avoid the federal property restrictions imposed on those of Cherokee blood.\textsuperscript{201} Therefore, many, like Dusten 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 many of these reports are accurate.\textsuperscript{202}


\textsuperscript{198} See Cully v. Mitchell, 37 F.2d 493 (10th Cir. 1930); Angie Debo, \textit{And Still the Waters Run: The Betrayal of the Five Civilized Tribes} 47 (1984).

\textsuperscript{199} Spruhan, supra, at 41.

\textsuperscript{200} Debo, supra, at 37. Allotment was imposed despite Cherokee steadfast objection, Debo at 32-33, and would ultimately result in most of the Cherokee Nation being sold to non-Indians. After completed, moreover, Cherokee Nation courts would be dissolved and Cherokee Nation laws would no longer be recognized. 30 Stat. 504-505 (June 29, 1898).

\textsuperscript{201} After 1904, only allottees without Indian blood could alienate their lands, 33 Stat. 189 (April 21, 1904), while after 1906, only allottees with less than full Indian blood could do so. 34 Stat. 145 (April 26, 1906).

\textsuperscript{202} See Dan Littlefield, \textit{Study of historical facts clarifies Freedman issue}, Cherokee Phoenix, undated, available at http://www.cherokeephoenix.org/19194/Article.aspx (“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 Stephen Herrington, Elizabeth Warren: Record of American Indian Heritage Was Destroyed in 1906, posted May 22, 2012 at 5:27 pm, available at http://www.huffingtonpost.com/stephen-herrington/re-elizabeth-warren-ameri_b_1535095.html (discussing his 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 determinations regarding an enrollee’s other family members establish the inaccuracy of the records. See, e.g., Cully v. Mitchell, 37 F.2d 493 (10th Cir. 1930) (refusing to change legal determination that daughter had one-quarter Indian blood, although her mother was
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,”\textsuperscript{203} 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 to be believed, some Cherokee heritage from her as well. Second, her fraction of Cherokee blood was irrelevant to her citizenship in the Cherokee Nation. Therefore, third, under federal law, her “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 3/256\textsuperscript{th} 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 classifications by race are inconsistent with American ideology, or at least with its recasting as color-blindness in recent decades. The justices’ focus on the alleged small degree of heritage casts the lie on this answer. If the real objection was to classification by race, there should not be such objection to the application of ICWA to a child like Veronica, who was not obviously racially Indian. This objection was not a product of America’s relatively recent rejection of racial classifications, but instead of a much older ideology: the expectation and insistence on absorption and disappearance of indigenous peoples.

One could see Adoptive Couple v. Baby Girl 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 \textit{Shelby County v. Holder}\textsuperscript{204} and narrowed the eye of the needle that universities must thread to consider race in admissions in \textit{Fisher v. University of Texas}.\textsuperscript{205} Chief Justice 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 \textit{Rice v. Cayetano},\textsuperscript{206} a case regarding voting for the trustees of Native Hawaiian trust land, was a case in which he argued in favor of affirmative action.\textsuperscript{207} But understanding classifications of Indians in this way is a

\textsuperscript{203} 133 S.Ct. at 2559.
\textsuperscript{204} \textit{Shelby County v. Holder}, 133 S. Ct. 2612 (2013).
\textsuperscript{205} \textit{Fisher v. University of Texas}, 133 S. Ct. 2411 (2013).
\textsuperscript{207} \textit{See N. Bruce Duthu, American Indians and the Law} (2008).
distortion of the different racial logics applied to African Americans and Indians. The discussion of race in the 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. 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. As 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 been highly vulnerable to dilution.” The result is 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.”

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. Thomas Jefferson, in the same year he proposed forcible removal of Indian tribes beyond the Mississippi, advised the Delawares to “mix with us by marriage, your blood will run in our veins, and will spread over this great island.” Later, in 1888, the height of Jim Crow, Congress enacted a statute providing citizenship to Indian women who married white men as a means of encouraging assimilation.

Vine Deloria wrote that when he worked in Washington, D.C. with the National Congress of American Indians, “it was

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211 Id.
213 Berger, Red at 627.
a rare day when some white didn't visit my office and proudly proclaim that he or she was of Indian descent." 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 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. Although the federal program itself did not cover many children, 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 19 times more likely to be adopted than other children.

There is no credible argument that the Copabiancos 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, and 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. If a child could remain politically Indian after generations of intermarriage, it undermined the assumption that Indian tribes would eventually disappear. This concern is reflected in the questions of Justices Roberts and Alito: would recognizing Veronica as Cherokee mean that tribes could be “open for, you know, people who think culturally they’re a Cherokee or – or any number of

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215 Deloria, supra, at 3. Deloria noted that these claimed ancestors were always women. Id.
219 Students who have been told to have a “theme of the case” and work your legal arguments into it should take note: it works!
fundamentally accepted conversions,”220 or “anybody who, as a result of a DNA test, can establish any Indian ancestry, no matter how slight.”221 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.222 Second, they were geographically part of the Nation. Although Justice Thomas’s opinion asserted that the Browns did not live on a reservation,223 the Cherokee Nation no longer has a formal reservation.224 What is does have is a fourteen-county jurisdictional area in Northeastern Oklahoma and Bartlesville where Dusten Brown, his parents, and Maldonado live is part of it.225 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 coming back from Iraq.

Finally, the Supreme Court ignored the evidence that Brown was very much culturally Cherokee as well. His family owned Indian trust land in Prior and Cayuga Oklahoma, had traditional ties with their extended relatives, and were proud of their membership in the Wolf Clan.226 They regularly prepared traditional foods such as “grape dumplings, buckskin bread, Indian cornbread, Indian tacos, wild onions, fry bread, polk salad and deer meat,” attended Cherokee holidays in Tahlequah, Oklahoma (the capitol of the Cherokee Nation).227 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 had been.”228

221 Id. at 43:6-9.
224 See Frequently Asked Questions, Cherokee Nation, http://www.cherokee.org/AboutTheNation/FrequentlyAskedQuestions.aspx (“Where is the Cherokee Nation? The Cherokee Nation is not a reservation; it is a 7,000 square mile jurisdictional area covering all of eight counties and portions of six additional counties in Northeastern Oklahoma.”).
227 Id. (quoting family court).
228 Id. at 566 (quoting family court).
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 they just weren’t 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 for once and for all.

D. Equal Protection Evasions

But doesn’t the role of Indian heritage at all 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 both 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 discrimination against African Americans. More importantly, as the Court first began to confront questions of reverse discrimination under the Equal Protection Clause, it decided in Morton v. Mancari 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’ unique obligation toward the Indians.”

There the Court upheld an employment preference for Indians in the Bureau of Indian Affairs, reasoning that given the unique degree of control of the BIA over Indians lives, such a measure was rationally related to the goal of increasing tribal self-governance, and that because the application of the preference required membership in a federally recognized Indian tribe, the measure was “political rather than racial in nature.”

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. One of these cases, see Bethany R. Berger, Reconciling Equal Protection and Federal Indian Law, 98 Calif. L. Rev. 1165, 1172-80 (2010).

230 417 U.S. at 554.  
231 417 U.S. at 553 n.24.  
In the Name of the Child

Fisher v. District Court, 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. Most recently, in 2000, Rice v. Cayetano struck down a state scheme giving Native Hawaiians special voting rights in state elections, but reaffirmed the validity of Mancari and its progeny, stating, “[o]f 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 and needs.”

ICWA easily fits within the Mancari precedent. The provisions regarding exclusive tribal jurisdiction over Indian children domiciled on the reservation are largely a codification of Fisher v. District Court. The provisions that seek to ensure that any consent to relinquish custody of Indian children is truly voluntary and to prevent unnecessary involuntary separation of parents from their children both seek to stop the thoughtless and deliberate removal of children from Indian communities and ensure that Indian tribes do not lose their future generations without cause. Because, as Congress recognized, “there is no resource that is more vital to the continuous existence and vitality of Indian tribes that their children,” these goals are well within “Congress’ unique obligation toward the Indians.” In addition, because ICWA applies only to children who are themselves tribal citizens, or whose parents are tribal members and who themselves are eligible for membership, it accomplishes these goals through a classification that rests squarely on “political rather than racial” belonging.

463 (1979) (civil and criminal jurisdiction).

235 Id. at 390–91.
237 528 U.S. at 517.
243 See Morton v. Mancari, 417 U.S. 535, 554 n.24 (1974). Although some raised concerns about ICWA’s coverage of children who had not themselves formally enrolled in their tribes, Congress determined that “the 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, 16 n.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
Therefore, although ICWA has faced several state and lower federal court challenges under the equal protection implications of the Fifth Amendment, and all but one court has rejected such challenges. The one court to uphold a constitutional challenge is the fourth division of the California appellate courts, which, in a split with the other divisions, has found that ICWA may be unconstitutional as applied to “children whose biological parents do not have a significant social, cultural or political relationship with an Indian community.” 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 are the Browns here. The Court’s ominous reference to “equal protection concerns,” therefore, was deliberately vague; to uncover its foundation would reveal that it was built upon air.

IV. MARGINALIZING MOTHERS

The decision in Adoptive Couple v. Baby Girl 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 to be founded in ideas about parenthood that are destructive of women, particularly women of color, and their children. This Section shows the links between the rise and fall of the constitutional rights of nonmarital fathers with those of nonmarital mothers and children, and their links to policies reducing support for families headed by single women and facilitation 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 both 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, and such children had economic and legal

right with respect to those fathers. Children of unmarried parents, however, were historically considered *filius nullius*, children of no one, and even their custodial mothers were denied many parental rights. Even after unmarried mothers and children began to be recognized as family units in the nineteenth century, they were denied many of the legal rights attached to the parent-child relationship; unmarried fathers, moreover, were accorded no rights at all.

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

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, too, had interests in the care and welfare of their children, whether they were married to the mothers of their children or not. By the 1980s, however, the Court had begun to reassert the distinctions of legitimacy, reducing parental rights of

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248 Id. at 1038.


250 Id.

251 See Centers for Disease Control and Prevention, Births: Final Data for 2012, 62:9 Nat’l Vital Statistics Report, Tables 13 & 14 (2014) (showing percentage of births to unmarried mothers to be 35.9% for Whites, 71.6% for Blacks, 66.9% for American Indians or Alaska Natives, 17% for Asians and Pacific Islanders, and 53% for Hispanics of any race).

252 The boarding school system was the greatest symptom of this notion regarding Native people. *See, e.g.*, In re Can-ou-Couqua, 29 F. 687, 690 (D. Alaska 1887) (rejecting an Alaska Native mother’s habeas corpus action for the release of her eight year old son after four 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*, 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’ willingness or ability to raise their own children, and practices of separating children from their parents to put them to work continued long after. Briggs, supra, at 49-52; *see also* Dorothy Roberts, *Shattered Bonds: The color of Welfare* 65 (2002) (discussing demigration and disregard for relationship between Black mothers and their children in welfare reform discourse).
unmarried fathers to facilitate the claims of married husbands.

The Supreme Court first affirmed the constitutional rights of nonmarital children and mothers with a pair of 1968 cases. Levy v. Louisiana invalidated Louisiana’s law preventing nonmarital children from suing for the wrongful death of their mother,253 while Glona v. American Guarantee and Liability Insurance Co. invalidated the law preventing nonmarital mothers from suing for the wrongful deaths of their children.254 In 1972, the Court affirmed the connection between nonmarital fathers and their children soon after, 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.255

Stanley v. Illinois, the first case to acknowledge the parental rights (as opposed to simply obligations) of unmarried fathers, was decided later that year.256 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.”257 Over the next 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,258 for example, invalidated a Texas law providing that only marital children could demand child support from their fathers, while Trimble v. Gordon259 struck down an Illinois law

253 Levy v. Louisiana, 391 U.S. 68, 72 (1968) (“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.”).

254 Glona v. American Guarantee & Liability Insur. Co., 391 U.S. 73 (1968). In that case, 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: “We 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. at 75.


256 405 U.S. 645 (1972).

257 Id. at 651.


providing that nonmarital children could not be the intestate heirs of their fathers. Others supported the desire of nonmarital fathers to care for their children. Thus *Jimenez v. Weinberger* allowed fathers to claim Social Security disability benefits for nonmarital children born after the disability had begun, while *Weinberger v. Wiesenfeld* held that fathers were entitled to survivor’s Social Security benefits after the death of their wives.

In *Wiesenfeld*, the Social Security Administration sought to restrict survivor’s benefits to women on the grounds that they 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.” 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.”

Ruth Bader Ginsburg litigated *Weinberger* for the Women’s Rights Project of the ACLU, and the reason why was clear. Breaking down the legal presumption that only mothers had interest in or responsibility for childcare was a key goal of the feminist movement.

In 1978, on the eve of the passage of ICWA, *Quilloin v. Walcott* 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. *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 Court reiterated that it was “‘cardinal with us that the custody, care and nurture of the child reside first in the parents,’” 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.’”

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 in which “the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the 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.” In this situation, the Court found, 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

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262 Id. at 651-652.
264 Id. at 255 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).
265 Id. (quoting Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-640 (1974)).
266 Id.
The next year the Court illustrated the narrowness of the *Quilloin* holding. *Caban v. Mohammed* 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. 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, and the New York Court of Appeals had 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.”  

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.” 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.”  

The Court soon beat a retreat from its rejection of distinctions based on illegitimacy, upholding exclusion of unmarried mothers from survivor’s benefits after the death of the father of their children, as well as a number of technical state requirements before nonmarital children would be considered to have a legal relationship to their parents. The parental rights of unmarried fathers suffered a similar blow. In 1983, *Lehr v. Robertson* held that an 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, or added his name to New York’s putative father registry.  

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. Over the next two years Lehr repeatedly searched for Jessica, occasionally finding and visiting her before her mother would move again, then, after being unable to locate Jessica for a year, finally locating her with the aid of a detective agency after her mother had married. Before Lehr learned of the adoption petition, he had filed to establish paternity and visitation, and the judge in the adoption case knew this. Nevertheless, the U.S. Supreme Court found, he 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, his lawyer, nor many family court clerks were aware. Where previous cases could be read to establish a distinction 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 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 were all cases in which states sought to facilitate 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 about 40% of all adoptions; because it usually involves a man adopting the children of his new wife; it is the reason that men are twice as likely to adopt as women. Limitations on the rights of unmarried fathers to object to such adoptions were designed in part to encourage other men

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276 463 U.S. at 269 (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.
277 Id.
278 Id.
279 See 463 U.S. at 264 (declaring that the father’s ignorance of the registry was not an excuse).
280 Evan B. Donaldson Adoption Institute, Safeguarding the Rights and Well-Being of Birth Parents in the Adoption Process 17 (2007). In the last decade or so, stepparent adoptions have stopped being tracked by courts, but have long constituted about 40% of all adoptions. Id. at 16 & n.1.
281 Jo Jones, Centers for Disease Control, Adoption Experiences for Women and Men and Demand to Adopt Children to Adopt by Women 18-44 years of Age in the United States, 2002 at 1, 16 (2008).
take advantage of the “noble” laws that permitted them to rescue children from the “social stigma and consequences of bastardy,”282 permitting them to secure “a normal home for a child,”283 and legitimate children who are otherwise “at risk” economically, medically, emotionally, and educationally.”284

In 1989, the Court even more firmly established the rights of husbands over biological unmarried fathers in *Michael H. v. Gerald D.*285 In that case, Victoria had been born of an affair between Michael and Carole while Carole was married to Gerald.286 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. A blood test showed with 90% certainty that Michael was Victoria’s father. Michael supported Carole and Victoria when he was permitted to, and Victoria knew Michael as “Daddy.”287 Later, however, Carole reunited with Gerald.288 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.289

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 he nor Victoria had any due process rights requiring a hearing on paternity or visitation. Emphasizing the “historic respect—indeed, sanctity” that the law accorded the “unitary family,” a family “typified, of course, by the marital family,”290 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.”291 When confronted with marriage, the biology-plus of the earlier cases lost hand.

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.

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284 See *Lehr*, 463 U.S. at 266 n.25.
286 *Id.* at 114.
287 491 U.S. at 143-144.
288 *Id.* at 115.
289 *Id.*
290 *Id.* at 123 & n.3.
291 *Id.* at 125.
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.\(^292\) Daniel Moynihan, Assistant Secretary of Labor under Presidents Kennedy and Johnson, had already made concern about illegitimacy safe for liberals with the 1965 Report, *The Negro Family: The Case for National Action*, calling the “matriarchy” of unmarried black women a key part of the “tangle of pathology” that left black communities poor and crime-ridden.\(^293\) In assuming the presidency in 1980, 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.\(^294\) In the late 1980s, media frenzies over “crack babies”—presumptively black, possibly Latino—and children with Fetal Alcohol Syndrome (FAS)—presumptively Native American—demonized poor single mothers of color.\(^295\) Although meta-analysis of scientific studies later showed that crack use in fact had no consistent effects on cognitive or psychomotor development,\(^296\) and FAS was rare among even babies of alcoholic women who drank excessively throughout their pregnancies,\(^297\) hundreds of women were criminally prosecuted and tens of thousands lost their children to foster care.\(^298\)

In 1993, 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.\(^299\) 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 a ‘Lord of the Flies’ writ large.”\(^300\) The reason for the

\(^{292}\) See Briggs, supra, at 95.


\(^{295}\) Briggs, supra, at 99-108.

\(^{296}\) *Id.* at 100-101.

\(^{297}\) *Id.* at 108.

\(^{298}\) *Id.* at 102 & 107.


\(^{300}\) *Id.*
trend: with the advent of welfare, a single woman could actually afford to keep her child. The response: “end all economic support for single mothers.”301 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. 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.”302 Second, adoption should be “easy for any married couple who can show reasonable evidence of having the resources and stability to raise a child.”303

The result of these successive campaigns was to shift the blame for child suffering from poverty and socio-economic disadvantage to poor single mothers. By the mid-1990s, these trends bore significant policy fruit.304 As Murray had urged, their effect was twofold—to take away financial support from single mothers and offer adoption as the solution for the children impoverished as a result. In 1996, the Personal Responsibility and Welfare Reform Act sought to “end welfare as we know it,”305 creating five year life-time caps on receipt of welfare or less at a state’s option, requiring women to work rather than take care of their children or even, depending on the state, better their chances of employment through education, authorizing states to cap welfare payments at a certain number of children, and providing states with financial incentives to remove families from the welfare rolls.306 In 1996, the Interethnic Provisions of the Multiethnic Placement Act (MEPA) prohibited consideration of race in placements of children for foster care and adoption.307 Finally in 1997, the Adoption and Safe Families Act (ASFA) sought to vastly increase adoption by terminating federal funding for family reunification and requiring states to plan for adoption if a child had not exited the child welfare system in 15 months, providing substantial tax credits to adopting parents, and providing states with significant financial subsidies for each child adopted from the system.308 In other words, biological families were stripped of financial

301 Id.
302 Id.
303 Id.
304 See Briggs, supra, at 115-117 (discussing Speaker of the House Newt Gingrich’s 1994 plan to put the children of mothers receiving AFDC in orphanages as part of welfare reform as part of the Contract with America, and its implementation with PWROWA and ASFA).
305 See Jason de Parle, Welfare Limits Left Poor Adrift as Recession Hit, N.Y. Times, April 7, 2012 (quoting President Clinton’s iconic phrase in announcing welfare plans).
306 See Gustafson at 44-47.
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. 309 Harvard Law Professor Elizabeth Bartholet, an active participant in the ASFA and MEPA debates, called her 1993 paean to adoption Nobody’s Children, 310 erasing the parents of the child, and echoing the old description of illegitimate children as filius nullius. 311 Since then, members of the Christian Right adoption movement have explicitly adopted the filius nullius concept, asserting that because the term “orphan” in the bible means fatherless child, children of single mothers are by definition orphans... and therefore eligible for adoption. 312 The thousands of Christian Right “crisis pregnancy counseling 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 “higher and less selfish form of love,” and a way to defeat “‘evil’ within themselves.” 313 Many private adoption facilitators are also affiliated with the Christian Right, including both the Nightlight Christian Agency that helped arranged Veronica’s adoption and Raymond Godwin, the attorney that represented the Copabiancos in the South Carolina courts, who co-founded Carolina Christian Hope Adoption Agency with his wife, Laura. 314 (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 in In

670 et seq.
309 See Joyce, supra, at xvi & 98; Briggs, supra, at 16-17.
310 Elizabeth Bartholet, Nobody’s Children: Abuse, Neglect, Foster Care Drift and the Adoption Alternative (1993).
311 Briggs, supra, at 18.
312 Joyce, supra, at 107. This translation of children with a single parent into orphans may also be less explicit. In Russell D. Moore’s Adopted for Life: The Priority of Adoption for Christian Families and Churches (2009), a book by one of the founders of the modern Christian adoption movement, Moore goes from a paragraph discussing the need to persuade single mothers to choose adoption to the plight of the “orphan,” (who apparently is likely to wind up a prostitute and later kill herself). Moore at 83.
314 See Raymond W. Godwin, http://www.scadopt.net, describing the founding of Carolina Hope Christian Adoption Agency, and including a page on “Miracles in Adoption” featuring an article describing adoption as “a very important concept for a Jesus follower.” Carolina Hope in 2007 hired Dan Cruver, one of the leading figures in the Christian adoption movement, as its Ministry Outreach Coordinator in 2007. See Tim Brister, 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.
Vitro Fertilization (IVF).\textsuperscript{315}

Unmarried fathers lost further rights in this period as well. Following two high profile challenges to adoptions by unmarried fathers in the 1990s,\textsuperscript{316} thirty-four states have now adopted putative father registries like that upheld in \textit{Lehr}, many providing unmarried fathers only 30 days after a child’s birth to register.\textsuperscript{317} South Carolina does not have a putative father registry, but its statutes require unmarried fathers to show they either lived with or supported their child or the child’s mother to have standing to object to adoption of their infant children.\textsuperscript{318}

This shift is even clearer in the uniform laws on the subject. In 1988, the drafters of the Uniform Putative and Unknown Fathers Act had 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,”\textsuperscript{319} and 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.\textsuperscript{320} 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 or lose any right to notice of adoption of a child less than one year old.\textsuperscript{321} While states did not widely adopt any of these uniform laws, they reveal the accepted 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 by statute (including notably Oklahoma)\textsuperscript{322} permit unmarried fathers to assert rights if they can show they were thwarted in their desire to parent or support a child.\textsuperscript{323}

Although South Carolina’s statute does not create an exception for thwarted fathers, the South Carolina Supreme Court found in \textit{Abernathy v. Baby Boy} that the constitution compelled such an exception to protect the rights of fathers who had been denied the opportunity to parent.\textsuperscript{324} The facts

\textsuperscript{315} http://www.nightlight.org/snowflake-embryo-adoption/.

\textsuperscript{316} 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, 160-170 (2006).

\textsuperscript{317} \textit{Id.} at 170-71, 180.

\textsuperscript{318} S.C. Code § 63-9-310(A)(5).

\textsuperscript{319} Uniform Parentage Act (2002), art. 4, comment.

\textsuperscript{320} Uniform Adoption Act § 3-401(3). 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.” Uniform Adoption Act § 2-401(1) and comment.

\textsuperscript{321} Uniform Parentage Act § 402 (2000).

\textsuperscript{322} 10 Okl.St.Ann. § 7505-4.2; In re Baby Boy W., 988 P.2d 1270 (Okla. 1999).

\textsuperscript{323} Oren, Thwarted Fathers at 163.

\textsuperscript{324} \textit{Abernathy v. Baby Boy}, 437 S.E.2d 25 (S.C. 1993).
of *Abernathy* have an eerie similarity to those here, 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.\(^\text{325}\) In 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.\(^\text{326}\)

Oddly, although no further evidence or pleadings were presented, Judge Malphrus reversed this finding in her formal November 25, 2011 order in the case, and the South Carolina Supreme Court did not revisit the issue, resting its opinion on ICWA alone.\(^\text{327}\) It seems even odder that a majority of the Supreme Court in response to this same set of facts declared, not just once but seven times in its opinion, that Brown had “abandoned” his child.\(^\text{328}\) Given the decades of law and policy treating non-custodial 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 on 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 a year, the percentage of children leaving foster care through adoption remains at about 20%.\(^\text{329}\) Much of the difference, moreover, is due to increases in adoptions by relatives.\(^\text{330}\)

Because more than half of children still exit foster

\(^{325}\) *Id.* at 27, 29. There are facts in *Abernathy* not present here: while overseas, he gave the birth mother access to his bank account and car in case she needed anything (she didn’t 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.


\(^{327}\) Email from Chrissi Nimmo, Assistant Attorney General for the Cherokee Nation, February 2, 2014.

\(^{328}\) Adoptive Couple v. Baby Girl, 133 S.Ct. 2552, 2557, 2558 n.7, 2562, 2563 n.8 (twice), 2563, 2564 (2013).

\(^{329}\) Administration for Children and Families, U.S. Dep’t Health & Human Serv., Trends in Foster Care and Adoption, FY2002-2012 at 3.

\(^{330}\) Moriguchi, supra, at 6 (noting that 23% of adoptions from foster care in 2007 were to related adoptive parents).
care by parental reunification, shifting federal funds from family preservation to adoption lessens the chance that these children receive effective parenting. 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. Since then, the number has dropped to 400,000, but this reduction is wholly accounted for by the smaller number of children entering the system.

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

In essence, in the name of reducing illegitimacy and helping children in foster care, we have 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 and have had no effect on the vast majority of children in foster care. *Adoptive Couple v. Baby Girl* 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 stem the hungry tide of prospective adoptive parents. No part of this narrative supports the rights

333 See Administration for Children and Families, U.S. Dep’t Health & Human Serv., Trends in Foster Care and Adoption, FY2002-2012 at 1. This table shows that since FY2006, an average of 34,500 fewer children per year (or a total of 242,000 fewer children) have entered foster care since 2006. Increasing ratios of exit from foster care to entry have little impact. Between 2006 and 2012, only about 1,280 more children exit than enter per year (a 0.5% difference). For the entire decade between 2002 and 2012, moreover, an average of 5,270 more children entered than exited foster care each year (a 1.8% difference).
334 See Gustafson at 44-45.
or interests of women, or of the children they care for.

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. The private adoption agencies and attorneys who facilitate most adoptions in the U.S. are interested in maintaining a steady supply of completed adoptions on behalf of the parents that pay them. Finally, the trends toward expensive private adoptions and later child-bearing 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. Because most needs-based welfare assistance is tied to the support for minor children, removing the children often means removing financial support. These policies were not directly at issue in Adoptive Couple v. Baby Girl—while the state paid for her medical services, Christy Maldonado was employed as a casino worker by the Osage Tribe, and Dusten Brown was first a soldier and then worked in private security—but they helped to shaped the legal and policy background of the case.

As 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. Native children had always been vulnerable to removal from 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. But these efforts had not been focused on adoption—instead, Indian children would be taught to be non-Indians and then released to support themselves and provide an

336 See, e.g., Royce 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).
337 Briggs, supra, at 7-8.
example to their families. Economic assistance did not come from states or municipalities, but was provided by the federal Indian Department (later the Bureau of Indian Affairs or BIA) in the form of rations doled out by reservation agents pursuant to treaty agreements. There were links between economic assistance and child removal—parents could have their rations docked if they did not send their children to school—but they were largely indirect.

The Social Security Act of 1935 required states to provide Aid to 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. Although states and counties vigorously resisted provision of welfare to families on reservations, by the 1950s, Indian children and families started receiving state welfare assistance, and with it contact with state social workers. This began a tide of children flowing from reservations into the child welfare system and from there into white adoptive homes. The BIA encouraged this tide with its Indian Adoption Project, which placed a federal stamp of approval on the goal of responding to poverty of Indian children by removing the children. 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. In 1974, Congress began holding hearings on the issue; finally, after four years of hearings without action, the Indian Child Welfare Act was enacted in 1978.

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 in large numbers for the first time. 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. Removing children from these women would end both their entitlement to economic support and the threat of social contagion from

339 Id. at § 22.06[1].
340 Id. at § 23[1][a].
342 Briggs, supra, at 71.
343 Id.
344 Prucha at 1154.
345 Briggs, supra, at 77-82.
346 Id. at 90-91.
347 Id. at 38-41.
these demonized mothers to their children.\textsuperscript{348}

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 to adoption by middle income families.\textsuperscript{349} But ASFA created federal subsidies for adoptions from foster care that can incentivize states to remove and seek adoption anyway.\textsuperscript{350} 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 non-compliance with ICWA, has designated all Indian children special needs.\textsuperscript{351} At least officially, moreover, states did not support the adoptive couple’s position in this case. As discussed above, 18 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.\textsuperscript{352} The perceived links between adoption, child welfare, and state financial assistance, however, likely helped shaped the legal and policy assumptions Dusten Brown faced in the Supreme Court.

\textbf{B. Adoption Industry Interests}

More powerful than state interests were the interests 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 non-profits first entered into the practice of coordinating adoptions in the 1900s after unlicensed “baby brokers” began trying to fulfill the demand.\textsuperscript{353} Even after official organizations got into the business, major scandals of “baby snatching” and “baby buying” gained congressional attention in the 1920 and 1950s.\textsuperscript{354} Both adoption facilitators and adoptive parents, however, beat off proposals to create national regulation of the industry, leaving private adoptions to lighter state

\begin{footnotesize}

\textsuperscript{348} See Section IV.B.
\textsuperscript{349} Section II, \textit{infra}.
\textsuperscript{354} Briggs, \textit{supra}, at 7.

\end{footnotesize}
IN THE NAME OF THE CHILD

Despite similar concerns regarding private adoptions of the past and the present, 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. Although adopting parents were encouraged to make donations to adoption agencies, adoptions were not themselves a source of profit. Even once agencies began to charge fees, as late as the 1970s these were often on a sliding scale based on the income of the adopters.

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

Melanie Duncan’s testimony gives some insight into the multiplicity of private entities involved in a typical adoption. The Copabiancos decided to work with a private attorney rather than an agency, but in fact they wound up working with multiple agencies, with attorney Raymond Godwin essentially acting as a contractor managing many interests. First, there was Adoption Advertising, Inc., to which they paid $8,700 to connect them to

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355 Spar, supra, at 172.
357 Id. at 13-14.
359 Baccara, supra, at 9 (average cost of infant adoption in 2009 was $32,500); Mansnerus, supra, A1 (reporting adoptions costing over $100,000).
360 Spar, supra, at xv (writing both about adoption and fertility practice); see also id. at 160 (“Of course, baby selling is illegal . . . In practice, though, adoption is indeed a market, especially in its international dimensions.”).
361 See, e.g., Michelle B. Goodwin, Preface, in Baby Markets, supra, at xiii; Quiroz at 6 (describing adoption as “a business . . . driven by market forces”), Freundlich, supra, at 3, Sanford Katz, Adoption Law in Cross Currents: Family Law and Policy in the United States and England 284 (Sanford Katz et al. eds 2000); Jeanne A. Howard, Untangling the Web: The Internet’s Transformative Impact on Adoption, Evan B. Donaldson Institute 4 (2012) (finding a “growing ‘commodification’ of adoption and a shift away from the perspective that its primary purpose is to find families for children”).
362 Spar, supra, at xvi.
Maldonado.\textsuperscript{363} There was also over $2,000 to Adoption Advocacy, Inc. for pre-placement and post-placement home studies.\textsuperscript{364} Then there was Phyllis Zimmerman, the attorney they hired to represent Maldonado in the case.\textsuperscript{365} 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.\textsuperscript{366} Through Godwin, the Copabiancos also paid for a number of Maldonado’s “expenses” including her rent, utility, and car payments.\textsuperscript{367} In her testimony, Melanie initially guessed that they had spent $20,000-40,000 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.”\textsuperscript{368}

Not surprisingly, the number and kind of entities offering private adoption services have multiplied since the advent of fees for adoptions.\textsuperscript{369} One study by the National Adoption Information Clearinghouse found that the number increased by several hundred, to 1,764, just between 1995 and 1998.\textsuperscript{370} Today, increased used of the internet has multiplied the number and diversity of entities facilitating adoption.\textsuperscript{371} There are no uniform national statistics regarding adoption service providers, or even consistent tracking of the total number and kind of private adoptions.\textsuperscript{372}

Although the different entities providing adoption services are in professional competition,\textsuperscript{373} 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 tool for those seeking a regulatory environment that protects their interests.\textsuperscript{374} 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 two weeks after birth before a mother could finally agree to relinquishment.\textsuperscript{375} After defeating the proposal, the NCFA contributed

\textsuperscript{363} Testimony of Adoptive Mother, 191:13-21, Sept. 12, 2011.
\textsuperscript{364} Id. at 190:16-24.
\textsuperscript{365} Id. at 173:19-25.
\textsuperscript{366} Id. at 178:3-5;
\textsuperscript{368} Id. at 189:13-16 & 198:22-199:4.
\textsuperscript{369} Freundlich, supra, at 3.
\textsuperscript{370} Mansnerus, supra.
\textsuperscript{371} See Howard, Untangling the Web, supra, at 4.
\textsuperscript{372} Quiroz, supra, at 10.
\textsuperscript{373} Katz, supra, at 283-285.
\textsuperscript{374} See Kimberly Kraswiec, in Baby Markets, supra, at 42.
\textsuperscript{375} Nat’l Council for Adoption, Who We Are: History, available at
substantially to the Uniform Adoption Act of 1994, which provides for permanently sealed adoption records, relinquishment for adoption immediately after birth, and limited rights of unmarried fathers. It has also consistently, and successfully, opposed federal regulation that would set limits on adoption fees.

The result of this successful advocacy is that although all states regulate private adoptions to some degree, many claim the industry is largely unregulated. These regulations also vary widely from state to state, with some states known for loose adoption regulations. 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. 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 cat.”

Ironically, Moore intended this as a condemnation of the humane society, rather than the system in place to ensure adequate families for children.

ICWA may serve children and tribal and parental interests, but it is contrary to the interests of private providers. ICWA’s placement preferences are likely to result in a child becoming entirely unavailable for a high-priced adoption, and being placed instead with a suitable family unlikely to afford the agency fees. 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. 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

https://www.adoptioncouncil.org/who-we-are/history.html.
378 Briggs, supra, at 113.
380 Briggs, supra, at 114; Mansnerus.
381 See Andrew Knapp, Skeptics of Veronica, Desaray cases call for closer look at private adoptions, laws, (Charleston, S.C.) Post and Courier, Sept. 21, 2013
382 Moore, supra, at 116.
384 In re T.S.W., 276 P.3d 133, 144 (Kan. 2012).
consent. In general, moreover, ICWA reflects a different era of adoption law, one in which the US was coming to terms with the harms of closed, coerced adoptions of nonmarital children, and before the focus of adoptions shifted from finding homes for needy children to finding children for infertile couples.\textsuperscript{385} It is not surprising that both NCFA and the Academy of Adoption Attorneys filed amicus briefs on behalf of the Copabiancos,\textsuperscript{386} and celebrated at the result.\textsuperscript{387}

\textit{C. Class and Paths to Parenthood}

The most obvious economic factor in the case was the ways 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 middle and 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 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 to working women, however, neither the economies of the workplace nor those of the home shifted to accommodate care for children.\textsuperscript{388} In response, women with significant educational and career opportunities began to delay childbearing to balance the demands on their time.\textsuperscript{389} The result was a

\textsuperscript{385} See, e.g., Katz 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.”)


\textsuperscript{388} Briggs, \textit{supra}, at 96

\textsuperscript{389} \textit{Id.}; see also Kaye Hymowitz et al., Brookings Institution, Knot Yet: The Benefits and Costs of Delayed Marriage in America 2-3 (2013) (trend in delaying marriage with significant economic benefits all women, but those without a college education are having children without marriage).
growth in structural rather than biological infertility, disproportionately affecting upper middle class women.\textsuperscript{390} 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.

The three youngest Supreme Court justices illustrate this trend. The two women, Justices Elena Kagan and Sonia Sotomayor, are both unmarried and without children. The man, Chief Justice John Roberts, married another high-powered lawyer when they were both in their forties and adopted two children.\textsuperscript{391} In fact, 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 non-residents to adopt,\textsuperscript{392} to allege that President Obama used the supposed illegality of the adoptions to blackmail Roberts into voting to uphold the Affordable Care Act.\textsuperscript{393}

Adoption has become not just a matter of class, but also gender equality, even reproductive rights.\textsuperscript{394} Adoption 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 Dan Quayle’s attack on Murphy Brown.\textsuperscript{395} A telling example of this Elizabeth Bartholet herself,

\textsuperscript{390} Briggs, \textit{supra}, at 96.


\textsuperscript{392} (Irish) Adoption Act of \textit{2010}, Ch.3, art.3 § 5.

\textsuperscript{393} Unraveling the Mystery Behind Chief Justice Roberts Sudden Switch to Rule in Favor of ObamaCare Posted by Helen, available at http://www.troom.us/2013/01/unraveling-the-mystery-behind-chief-justice-roberts-sudden-switch-to-rule-in-favor-of-obamacare/#sthash.md9WY38r.dpuf.

\textsuperscript{394} Briggs, \textit{supra}, at 97.

\textsuperscript{395} See, e.g., Mikki Morissette, \textit{A Response to Ann Coulter}, Huffingtonpost.com, Jan. 12, 2009 (critiquing 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 I could ask about the process before I got pregnant, and have gotten nothing but support for my decision, and some questions from parents of 30-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
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 1985. Adoption gained more traction as a civil and reproductive rights question as the LGBT movement raised claims of rights of same-sex families to adopt and parent. Of course the foil for all of these claims was that children were served by being moved into middle class families, even if those families were non-biological, older, female-headed, or LGBT. 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.

This class narrative affected the case from the beginning. Christinna Maldonado selected the Copabiancos 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.” 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 Copabiancos were, what a beautiful home they had, and how they could send Veronica to any private school and college they chose. She allegedly said that they need to “get down on their knees and have their children, that I realized the class distinction implicit in the phrase.


398 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, it misses the profound implications of the line the Court chose to draw here for historically disadvantaged families, whether affective or not, and the prioritization of marital families over even affective families in cases like Michael D. and Nguyen v. INS, 533 U.S. 33 (2001) (holding that a son born out of wedlock in Viet Nam but who had resided in the U.S. with his citizen father for years could not claim citizenship through his father, although one could through a citizen mother in similar circumstances). 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.


pray to make the right decision for this baby.”

The South Carolina Supreme Court, although it ruled against the Copabiancos, called them “ideal parents.” Dusten Brown, despite his loving and supportive parents, close relationship with his other daughter, and decorated service in the military, could only be less than “ideal.” In the media circus the Copabiancos’ public relations team created, he became just another deadbeat dad who was careless with his sperm and bad for his daughter, while they 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 Copabiancos, Brown decided to end all appeals in the case. 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.” Baby Girl is now, and will likely remain, Veronica Copabianco.

Although there was no hearing about what would be in Veronica’s best interests, we can hope that she will come out of this well. In general, adoptees, including transracial adoptees, have similar outcomes to non-adoptees, and there is nothing to suggest that Copabiancos will not provide her with a stable, loving family. While transracial adoptees grapple with distinctive ethnic identity issues, with supportive families they otherwise thrive. 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.

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404 Id.
406 See id. at 5-7, 17-19 (reporting results of study comparing Korean and White adoptees, and summarizing studies regarding adoption generally).
407 See Rita James 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 sense that Indian children should ideally be placed with Indian families); Sindelar, Negotiating Indian Identity: Native Americans and Transracial Adoption, Master’s Dissertation 50-51 (2004). The UN Rapporteur on the Rights of Indigenous Peoples has also raised concerns about denial of her right to cultural identity. See UN
legal and media battle between the Copabiancos and the Browns and the Cherokee Nation, of course, makes it harder to imagine a healthy relationship here. In particular, the decision to serve Brown with a demand for half a million dollars from him and the Cherokee Nation for attorney fees and costs two days after Brown relinquished Veronica,\(^\text{408}\) (raised to over one million dollars a month later),\(^\text{409}\) seems gratuitously vindictive, particularly as 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.\(^\text{410}\) Like them, the Browns have lost a child against their will, and will 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 all members of the adoption triad—children, birth parents, and adoptive parents. The decision, particularly without Justice Breyer’s gloss on it, has the potential to wipe out the ICWA rights of almost all Indian birth fathers and even birth mothers without 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 didn’t adopt the existing Indian family exception, it may breathe life into what had become a dying and discredited doctrine.\(^\text{411}\)

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 the act,\(^\text{412}\) there will be other parents that learn of these unsanctioned placements and challenge them, just as Brown did, with the potential for

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410 Joyce, supra, at 93.

411 The decision has already been repeatedly cited regarding the limitations of the application of ICWA to noncustodial mothers and fathers. See In re Elise W., 2014 WL 98674 (Cal.App. 1 Dist.) (using Adoptive Couple v. Baby Girl to argue for limitation of applicability of ICWA to termination of a mother’s rights because the mother was non-Indian and the Indian father had never had custody of the child); In re Laird, 2014 WL 308868 n.4 (Mich.App. 2014) (using Adoptive Couple v. Baby Girl as affirmation of earlier decision that active efforts were not required when family was already broken up at time of petition).

more disruption and heartache for their children and prospective and birth families.

Ultimately, moreover, 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 and framing all measures that accomplish that goal as in 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.