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## Adoptive Couple V. Baby Girl: The Supreme Court's Distorted Interpretation Of The Indian Child Welfare Act of 1978

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### Cover Page Footnote

J.D. Candidate, May 2014, Loyola Law School, Los Angeles; B.A. English, University of California, Santa Barbara, June 2008. I would like to thank Professor Seagull Song for her guidance and feedback on this Comment. Thank you to the talented and dedicated editors and staff of the Loyola of Los Angeles Law Review. Finally, I am forever grateful to my parents and sister for their unconditional love and support.

# **ADOPTIVE COUPLE v. BABY GIRL: THE SUPREME COURT'S DISTORTED INTERPRETATION OF THE INDIAN CHILD WELFARE ACT OF 1978**

*Jessica Di Palma\**

## I. INTRODUCTION

Congress enacted the Indian Child Welfare Act of 1978 (ICWA)<sup>1</sup> to establish federal standards governing state-court child-custody cases involving Indian children.<sup>2</sup> The statute attempted to remedy the unwarranted removal of Indian children from their biological parents by nontribal public and private agencies, by creating “minimum Federal standards for the removal of Indian children from their families . . . .”<sup>3</sup> Most Americans had likely never heard of this statute, until a highly publicized child custody case thrust the ICWA into the media spotlight.<sup>4</sup>

In *Adoptive Couple v. Baby Girl*,<sup>5</sup> a case that received more publicity for its soap opera-like facts and heart-wrenching drama than for its impact on the law, a 5-4 majority of the Supreme Court held that the ICWA does not apply in cases where the biological

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1. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 (2006).

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

3. 25 U.S.C. § 1902. See also Carol Schultz Vento, Annotation, *Construction and Application of Indian Child Welfare Act of 1978*, 89 A.L.R. 5th 195 (2013) (analyzing cases where the courts have applied the ICWA to child custody proceedings).

4. This dramatic legal saga has been a continuing focus of the media. See, e.g., *Adoption Controversy: Battle over Baby Veronica*, DR. PHIL (June 6, 2013), <http://www.drphil.com/shows/show/1895> (featuring Veronica’s adoptive parents telling Dr. Phil’s nationwide audience their emotional story of losing custody of Veronica); *Veronica May Not Be Saved*, ABC NEWS 4 (July 26, 2012), <http://www.abcnews4.com/story/19121303/veronica-may-not-be-saved> (explaining that updates about the legal saga were posted on a “Save Veronica” Facebook page).

5. 133 S. Ct. 2552 (2013).

“parent abandoned the Indian child before birth and never had custody of the child.”<sup>6</sup>

A superficial read of this case and the media reports surrounding it would likely lead to the conclusion that this holding involves a straightforward case of statutory interpretation applied cautiously to a set of unfortunate facts.<sup>7</sup> But with a deeper examination of the ICWA’s text, structure, and legislative purpose, it becomes clear that the Court oversimplified the law and overlooked the legislative purpose behind this statute. As Justice Sotomayor observed in her dissenting opinion, “[i]n truth, however, the path from the text of the [ICWA] to the result the Court reaches is anything but clear, and its result anything but right.”<sup>8</sup>

This Comment examines *Adoptive Couple*’s interpretation of the ICWA in detail. Part II of this Comment presents the historical framework behind the ICWA’s enactment and an overview of the statutory provisions at issue in this case. Part III outlines the facts and procedural history that led to the Court’s decision. Part IV summarizes and compares the Court’s conflicting majority, concurring, and dissenting opinions. Part V argues that this case was wrongly decided because the Court ignored the legislative intent of the ICWA and distorted its plain language to reach what the majority felt was the correct *moral* result. This Comment further argues that the Court’s results-oriented holding unnecessarily complicates the straightforward language of the ICWA, which will result in many unintended consequences.

## II. HISTORY OF THE INDIAN CHILD WELFARE ACT OF 1978

Pursuant to its enumerated power under the Indian Commerce Clause of the Constitution,<sup>9</sup> Congress enacted the ICWA in 1978 to establish minimum federal standards applicable to state-court child-custody proceedings involving Indian children.<sup>10</sup>

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6. *Id.* at 2557.

7. *See id.* at 2572 (Sotomayor, J., dissenting) (“A casual reader of the Court’s opinion could be forgiven for thinking this is an easy case, one in which the text of the applicable statute clearly points the way to the only sensible result.”).

8. *Id.*

9. U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have the power . . . to regulate Commerce . . . with the Indian Tribes.”).

10. *Adoptive Couple*, 133 S. Ct. at 2557. Under the ICWA, an Indian child is defined as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is

Before *Adoptive Couple, Mississippi Band of Choctaw Indians v. Holyfield*<sup>11</sup> was the first and only Supreme Court case to address the ICWA.<sup>12</sup> There, the Court explained that the ICWA was the “product of rising concern in the mid-1970s over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement usually in non-Indian homes.”<sup>13</sup> In 1969 and 1974, the Association on American Indian Affairs conducted studies showing “that 25 to 35 [percent] of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions.”<sup>14</sup>

In 1974, these findings were presented to the legislature in Senate hearings, and further testimony was presented in hearings in 1977 and 1978 on the bill that eventually became the ICWA.<sup>15</sup> This testimony provided the basis for the congressional findings expressly stated in § 1901 of the ICWA.<sup>16</sup> Congress found “that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies . . . .”<sup>17</sup> The ICWA thus “seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.”<sup>18</sup> The statute does so by establishing numerous protections of the rights of

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eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” 25 U.S.C. § 1903(4) (2006).

11. 490 U.S. 30 (1989) (holding that an Indian couple’s voluntary placement of their two Indian children with non-Indian adoptive parents violated the ICWA).

12. See Marcia Zug, *Adoptive Couple v. Baby Girl: Two-and-a-Half Ways To Destroy Indian Law*, 111 MICH. L. REV. FIRST IMPRESSIONS 46, 49 (2013), <http://www.michiganlawreview.org/assets/fi/111/Zug.pdf>.

13. *Holyfield*, 490 U.S. at 32.

14. *Id.* (citing *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior & Insular Affairs*, 93d Cong. 15 (1974) (statement of William Byler)).

15. *Id.* at 33–34 (citing *Hearing on S. 1214 before the Subcomm. on Indian Affairs & Public Lands of the House Comm. on Interior & Insular Affairs*, 95th Cong. (1978); *Hearing on S. 1214 before the Senate Select Comm. on Indian Affairs*, 95th Cong. (1977)).

16. 25 U.S.C. § 1901 (2006).

17. *Id.* § 1901(4).

18. H.R. REP. NO. 95-1386, at 23 (1978).

Indian parents so that “where possible, an Indian child should remain in the Indian community.”<sup>19</sup>

Three provisions of the ICWA are particularly relevant to this case, two of which are found in § 1912.<sup>20</sup> Section 1912 of the ICWA sets out procedural and substantive standards applicable to “any involuntary proceeding in a [s]tate court,”<sup>21</sup> including involuntary termination of parental rights proceedings—the type of proceeding at issue in *Adoptive Couple*.<sup>22</sup> Specifically, under § 1912(d), “Any party seeking to effect a foster care placement of, or termination of parental rights to an Indian child under state law” must demonstrate that “active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.”<sup>23</sup> Under § 1912(f), a state court may not involuntarily terminate parental rights to an Indian child “in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”<sup>24</sup> Finally, where Indian children are separated from their biological parents by foster care or adoption, § 1915(a) sets forth a list of preferred adoptive placements for the child.<sup>25</sup>

### III. STATEMENT OF THE CASE

This case involves a four-year-old child, named Veronica Rose—referred to as “Baby Girl” by the Court—who is 1.2 percent Cherokee Indian and therefore classified as an Indian under the ICWA.<sup>26</sup> Veronica is the biological child of Christy Maldonado,<sup>27</sup>

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19. *Id.*

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

21. 25 U.S.C. § 1912.

22. *See Adoptive Couple*, 133 S. Ct. at 2560.

23. 25 U.S.C. § 1912(d).

24. *Id.* § 1912(f).

25. *Id.* § 1915(a) (“In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.”).

26. *Adoptive Couple*, 133 S. Ct. at 2556, 2557 n.1.

who is primarily Hispanic, and Dusten Brown,<sup>28</sup> a registered member of the Cherokee Nation.<sup>29</sup> In January 2009, one month after their engagement, Maldonado told Brown that she was pregnant with Veronica.<sup>30</sup> After Brown issued an ultimatum, telling Maldonado that he would not provide financial support to her or the baby until they were married, the couple's relationship became strained; Maldonado ended the engagement in May 2009.<sup>31</sup>

One month after that, Maldonado issued an ultimatum of her own, asking Brown—via text message—whether he would rather pay child support or relinquish his parental rights.<sup>32</sup> Brown sent back a text message, telling Maldonado that he would give up his parental rights.<sup>33</sup> According to Maldonado, that was the last time she heard from Brown.<sup>34</sup>

Soon after, Maldonado decided to give Baby Veronica up for adoption.<sup>35</sup> Working with an attorney and a private adoption agency, Maldonado chose Matt and Melanie Capobianco, non-Indians living in South Carolina, to adopt Veronica.<sup>36</sup> The Capobiancos<sup>37</sup> provided financial support for Maldonado until Veronica was born on September 15, 2009.<sup>38</sup> The next day, Maldonado signed the adoption papers.<sup>39</sup> The Capobiancos then returned to South Carolina with

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27. See Christy Maldonado, *Baby Veronica Belongs with Her Adoptive Parents*, WASH. POST, July 12, 2013, [http://articles.washingtonpost.com/2013-07-12/opinions/40529306\\_1\\_matt-and-melanie-adoptive-parents-melanie-capobianco](http://articles.washingtonpost.com/2013-07-12/opinions/40529306_1_matt-and-melanie-adoptive-parents-melanie-capobianco).

28. See Robert Barnes, *Baby Veronica's Loved Ones Wait for the Supreme Court to Weigh In*, WASH. POST, Apr. 14, 2013, [http://www.washingtonpost.com/politics/baby-veronicas-loved-ones-wait-for-the-supreme-court-to-weigh-in/2013/04/14/7138b5f0-a526-11e2-a8e2-5b98cb59187f\\_story.html](http://www.washingtonpost.com/politics/baby-veronicas-loved-ones-wait-for-the-supreme-court-to-weigh-in/2013/04/14/7138b5f0-a526-11e2-a8e2-5b98cb59187f_story.html).

29. The Court's opinion refers to Maldonado as "Birth Mother" and Brown as "Birth Father." *Adoptive Couple*, 133 S. Ct. at 2558.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Maldonado, *supra* note 27.

35. For a first-person account of her reasons for making the "most difficult decision" of her life, see *id.*

36. *Adoptive Couple*, 133 S. Ct. at 2558. It should also be noted that during the adoption proceedings, Maldonado's attorney contacted the Cherokee Nation to inquire whether Brown was a formally registered member. *Id.* But because "[t]he inquiry letter misspelled [Brown's] first name and incorrectly stated his birthday," the Cherokee Nation was unable to provide confirmation that Brown was indeed a registered member. *Id.*

37. Maldonado, *supra* note 27.

38. *Adoptive Couple*, 133 S. Ct. at 2558.

39. *Id.*

Veronica, where they began adoption proceedings in the South Carolina Family Court.<sup>40</sup> During the first four months of Veronica's life, Dusten Brown "made no meaningful attempts to assume his responsibility of parenthood."<sup>41</sup>

Approximately four months after Veronica was born, the Capobiancos served Brown with notice of the pending adoption, which was the first time that either they or Maldonado had notified Brown of the adoption proceedings.<sup>42</sup> "Brown signed the papers stating that he accepted service and that he was 'not contesting the adoption.'"<sup>43</sup> Brown later admitted that he believed by signing the papers he relinquished his parental rights to Maldonado, not to the Capobiancos.<sup>44</sup> Soon after signing the papers, Brown hired a lawyer who subsequently initiated court proceedings to stay Veronica's adoption.<sup>45</sup> In these proceedings, Brown testified that he did not consent to the adoption, and he petitioned for custody of Veronica.<sup>46</sup>

In September 2011, following a trial, the Family Court denied the Capobiancos' petition for adoption and awarded Brown custody of then two-year-old Veronica.<sup>47</sup> The court held that the Capobiancos "had not carried the heightened burden under § 1912(f) of proving that Veronica would suffer serious emotional or physical damage if [Brown] had custody."<sup>48</sup> Veronica was officially placed in his custody on December 31, 2011—the first time that she met her biological father.<sup>49</sup>

On appeal, the South Carolina Supreme Court affirmed the Family Court's decision to deny the adoption petition and to award custody to Brown.<sup>50</sup> The court held that both ICWA § 1912(d) and

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40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 2558–59. During this time, the Cherokee Nation confirmed that Brown was indeed a registered member, and therefore Baby Veronica qualified as an "Indian Child" under the ICWA. *Id.* at 2559 n.2. See also *supra* Part II (explaining the history of the ICWA, as well as its relevance and application to *Adoptive Couple v. Baby Girl*).

46. *Adoptive Couple*, 133 S. Ct. at 2559.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 552 (S.C. 2012).



§ 1912(f) barred the termination of Brown’s parental rights.<sup>51</sup> First, the court concluded that Brown qualified as a “parent” under the ICWA’s definition of this term.<sup>52</sup> Next, the court held that under § 1912(d), the Capobiancos had not shown that “active efforts [had] been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family.”<sup>53</sup> Further, the court held that under § 1912(f), the Capobiancos had not met the steep burden of proving that Brown’s custody of Veronica would “result in serious emotional or physical harm to her beyond a reasonable doubt.”<sup>54</sup> On January 4, 2013, the United States Supreme Court granted certiorari.<sup>55</sup>

#### IV. REASONING OF THE COURT

##### A. *The Majority Opinion*

Writing for a majority of the Court, Justice Alito reversed the South Carolina Supreme Court’s decision, holding that even if Brown met the ICWA’s definition of “parent,” neither § 1912(f) nor § 1912(d) barred the termination of his parental rights because those provisions do not apply when the “relevant parent never had custody of the child.”<sup>56</sup> The Court further held that while the congressional policy behind the statute was to “preserve the cultural identity and heritage of Indian tribes,” the ICWA was not meant to “put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian.”<sup>57</sup>

Working in reverse textual order, the Court began its interpretation of the relevant statutory provisions with § 1912(f). The Court explained that § 1912(f) conditions the involuntary termination of parental rights on a showing regarding the merits of “*continued*

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51. *Id.* at 562–63.

52. *Id.* at 560 n.18.

53. *Id.* at 562.

54. *Id.* at 562–63.

55. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 831 (2013). *See also* Robert Barnes, *Supreme Court to Examine Indian Child Welfare Act Requirements in Adoption Dispute*, WASH. POST, Jan. 13, 2013, [http://www.washingtonpost.com/politics/supreme-court-to-examine-indian-child-welfare-act-requirements-in-adoption-case/2013/01/04/b3a0cb44-56b1-11e2-8b9e-dd8773594efc\\_story.html](http://www.washingtonpost.com/politics/supreme-court-to-examine-indian-child-welfare-act-requirements-in-adoption-case/2013/01/04/b3a0cb44-56b1-11e2-8b9e-dd8773594efc_story.html) (reporting that the Supreme Court agreed to review the ICWA requirements in the case involving Veronica).

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

57. *Id.* at 2565.

custody of the child by the parent.”<sup>58</sup> The Court cited the Oxford English Dictionary’s definition of “continued”—meaning “carried on or kept up . . . without interruption or breach of connection”—and therefore concluded “the adjective ‘continued’ plainly refers to a pre-existing state.”<sup>59</sup> Thus, under this reading of “continued custody,” Brown should never have been able to invoke the protection of § 1912(f) in the lower court proceedings because he did not have legal or physical custody of Veronica when the adoption proceedings began.<sup>60</sup>

The majority next addressed § 1912(d), holding that similar to the word “continuing” in § 1912(f), this provision “applies only in cases where an Indian family’s ‘breakup’ would be precipitated by the termination of the parent’s [existing] rights.”<sup>61</sup> Citing to the dictionary definition of “breakup”—meaning the “discontinuance of a relationship”—the Court concluded that for there to be a “breakup,” there must have been a preexisting relationship.<sup>62</sup> The Court explained that this interpretation of the provision conforms to Congress’s intent to prevent the unwarranted *removal* of Indian children from an existing family unit.<sup>63</sup> But it would be “unusual to apply § 1912(d) in the context of an Indian parent who abandoned a child prior to birth and who never had custody of the child.”<sup>64</sup>

Finally, the Court addressed § 1915(a), which lists the “preferences for the adoptive placement of an Indian child.”<sup>65</sup> The Court held that § 1915(a)’s preferences do not apply “in cases where no alternative party had formally sought to adopt the child.”<sup>66</sup> The Court further explained that logically, there is “simply no ‘preference’ to apply if no alternative party . . . under § 1915(a) has come forward.”<sup>67</sup> The Court therefore concluded that because the Capobiancos were the only party who “formally sought to adopt”

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58. *Id.* at 2557–58 (emphasis added) (quoting 25 U.S.C. § 1912(f) (2006)).

59. *Adoptive Couple*, 133 S. Ct. at 2560 (citing COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 909 (1981 reprint of 1971 ed.)).

60. *Id.* at 2562.

61. *Id.*

62. *Id.* (citing AMERICAN HERITAGE DICTIONARY 235 (3d ed. 1992)).

63. *Id.* at 2563.

64. *Id.*

65. *Id.* at 2564–65.

66. *Id.* at 2564.

67. *Id.*

Veronica, the § 1915(a) adoption preferences did not apply.<sup>68</sup> Section 1915(a) did not apply to Brown because he did not seek to *adopt* Veronica.<sup>69</sup> Rather, Brown’s main argument to the South Carolina Family Court was that his parental rights should not be terminated.<sup>70</sup> Further, § 1915(a) did not apply because neither Veronica’s paternal grandparents nor a member of the Cherokee Nation sought to adopt Veronica.<sup>71</sup> Therefore, the Court held that when the South Carolina Supreme Court held that § 1915(a)’s adoption preferences *would have* applied had the court terminated Brown’s parental rights, the court failed to address this “critical limitation” on the applicability of § 1915(a): that this section’s “rebuttable adoption preferences” only apply when an alternative party seeks to adopt the Indian child.<sup>72</sup>

### B. Justice Thomas’s Concurrence

Justice Thomas joined the Court’s opinion, but wrote separately to explain what he considered the “significant constitutional problems” with the ICWA.<sup>73</sup> Beginning with the historical background of the Indian Commerce Clause during the drafting of the Constitution,<sup>74</sup> Justice Thomas explained that the history and the text of the Clause do not grant Congress “plenary power over Indian affair” but rather “conferred on Congress the much narrower power to regulate trade with Indian tribes.”<sup>75</sup>

He therefore concluded that because the ICWA regulates Indian child custody proceedings—not commerce—Congress lacked the enumerated power to “support Congress’ intrusion into this area of traditional state authority.”<sup>76</sup> Therefore, “application of the ICWA to these [state-court] child custody proceedings would be unconstitutional.”<sup>77</sup> Because Justice Thomas believed that the majority’s interpretation of the relevant ICWA provisions and

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68. *Id.* at 2564–65.

69. *Id.* at 2564.

70. *Id.*

71. *Id.*

72. *Id.* at 2564–65.

73. *Id.* at 2565 (Thomas, J., concurring).

74. *Id.* at 2568–69.

75. *Id.* at 2567.

76. *Id.* at 2566.

77. *Id.* at 2571.

conclusion that those provisions did not apply to this case avoided these constitutional problems, he concurred with the Court.<sup>78</sup>

### C. Justice Breyer's Concurrence

Justice Breyer joined the majority's opinion, but made several observations of potential issues that could arise in future ICWA cases because of the Court's opinion.<sup>79</sup> First, he observed that there is a risk that the majority's interpretation of §§ 1912(d) and (f), which excludes parents who never had custody of their children in the first place, may unintentionally exclude too many categories of Indian parents.<sup>80</sup> While the majority's interpretation of these provisions contemplates the exclusion of absentee parents, the provisions may now also be inapplicable to those parents who are involved in their child's life but may have never had physical custody of the child.<sup>81</sup>

Justice Breyer also warned that "[w]e should decide here no more than is necessary" and cautioned against the Court's extending the statutory interpretation to hypothetical factual scenarios.<sup>82</sup> Justice Breyer's opinion essentially acknowledged that while he concurs in the result of this case because Veronica will be returned to her adoptive parents, this result may have dangerous future consequences.

### D. Justice Scalia's Dissent

In a short yet powerful dissenting opinion, Justice Scalia stated that while he joined Justice Sotomayor in her dissent, he had different reasons for rejecting the majority's restrictive interpretation of the words "continued custody" in § 1912(f).<sup>83</sup> He argued that "there is no reason that 'continued' must refer to custody in the past rather than custody in the future."<sup>84</sup> Justice Scalia, who joined the majority opinion in *Mississippi Band of Choctaw Indians v. Holyfield*<sup>85</sup> and called it one of the most difficult decisions of his

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78. *Id.*

79. *Id.* at 2571 (Breyer, J., concurring).

80. *Id.*

81. *Id.*

82. *Id.*

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

84. *Id.*

85. 490 U.S. 30 (1989).

career,<sup>86</sup> added an additional thought to his *Adoptive Couple* opinion. He noted that the majority “needlessly demean[ed] the rights of parenthood” that were long respected by the common law.<sup>87</sup> The best interests of the child, he pointed out, are not in fact considered when a baby is born; unless there is some controversy about custody, the child ordinarily stays with his or her biological parents.<sup>88</sup> Some children, Justice Scalia said, might “be better off raised by someone else,” but “there is no reason in law or policy to dilute that protection” of parental rights that is inherent in having a biological child.<sup>89</sup>

### E. Justice Sotomayor’s Dissent

In her dissenting opinion and joined by Justices Ginsburg, Kagan, and Scalia, Justice Sotomayor accused the majority of turning the law upside down to reach the result it wanted—the morally appealing result of denying an absent dad custody of the daughter he gave away.<sup>90</sup> Justice Sotomayor said the point of the law was to keep Indian children with their parents and to make adoptions outside the tribe less likely.<sup>91</sup> She wrote that while “[t]he majority may consider this scheme unwise . . . no principle of construction licenses a court to interpret a statute with a view to averting the very consequences Congress expressly stated it was trying to bring about.”<sup>92</sup> She further predicted that “the anguish this case has caused will only be compounded by today’s decision.”<sup>93</sup>

## V. ANALYSIS

Despite the fact that Congress enacted the ICWA to protect the parental rights of biological Indian parents in state court actions, a majority of the Supreme Court concluded that none of the applicable statutory provisions “creates parental rights for unwed fathers where

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86. Barnes, *supra* note 55.

87. *Adoptive Couple*, 133 S. Ct. at 2572 (Scalia, J., dissenting).

88. *Id.*

89. *Id.*

90. *Adoptive Couple*, 133 S. Ct. at 2572 (Sotomayor, J., dissenting).

91. *Id.* at 2574.

92. *Id.* at 2583.

93. *Id.* at 2586.

no such rights would otherwise exist.”<sup>94</sup> This holding distorted the ICWA’s text and disregarded the will of Congress.

A. *The Court’s Interpretation of the ICWA Distorts the Text and Ignores the Statute’s Legislative Purpose*

While the Supreme Court’s majority opinion in *Adoptive Couple* attempts to prioritize the child by predicting the best long-term result for Veronica,<sup>95</sup> it does so by ignoring Congress’s intent as well as the plain language of the ICWA.

First, the majority opinion reached the legally incorrect result because it ignored the clear congressional findings and legislative intent behind the ICWA’s enactment. Adoption proceedings, along with most family law cases, are typically adjudicated in state court and are governed by state common law.<sup>96</sup> Congress enacted the ICWA—an exception to this general rule<sup>97</sup>—to address the very specific problem of the unwarranted removal of Indian children from their biological parents.<sup>98</sup> The ICWA thus “seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.”<sup>99</sup> It does so by establishing uniform federal standards to ensure that Indian child welfare determinations are not based on “a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family.”<sup>100</sup>

Therefore, a court interpreting the ICWA’s text must do so in a way that effectuates the legislative goal of keeping Indian children with their biological parents, or at least within the Indian culture. The Supreme Court failed to do so. Instead, a majority of the Justices

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94. *Id.* at 2563 (majority opinion).

95. *See id.* at 2565 (stating that the ICWA was not meant to “put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian”).

96. *See Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (“[D]omestic relations [is] an area that has long been regarded as a virtually exclusive province of the States.”); *In re Burrus*, 136 U.S. 586, 593–94 (1890) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.”).

97. *Adoptive Couple*, 133 S. Ct. at 2557.

98. *See* 25 U.S.C. § 1901(3) (2006) (“Congress finds . . . that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe.”).

99. H.R. REP. NO. 95-1386, at 23 (1978).

100. *Id.* at 24.

made a moral determination of what *they* believed was in Veronica’s best interest—that she should be raised by the Capobiancos instead of her noncustodial biological father—because Brown “abandoned” his child “prior to birth and . . . never had custody” of his own child.<sup>101</sup> This is not the correct legal result.

In *Mississippi Band of Choctaw Indians v. Holyfield*, the Court stated that “the [ICWA’s] *most important substantive requirement* imposed on state courts is that of § 1915(a), which, absent ‘good cause’ to the contrary, mandates that adoptive placements be made preferentially . . .” with an enumerated list of potential Indian guardians.<sup>102</sup> This is a logical connection between Congress’s intent behind the statute—to keep Indian children within the Indian community—and the location of this statutory provision as the subsection listed first within a long set of requirements. The Court ignored the logical structure and order of the statute by analyzing the applicable provisions of the ICWA in reverse order. This “textually backward reading,”<sup>103</sup> placed more importance on the words “continuing” and “breakup” in order to conform the text of the statute to fit the majority’s desired outcome.

The plain text of the statute also leads to a different result. Section 1912(f) contains a heightened burden of proof that must be met before a court will approve the adoption of an Indian child: the Indian parent’s continued custody of the Indian child would “result in serious emotional or physical harm to her *beyond a reasonable doubt*.”<sup>104</sup> Congress’s inclusion of this high evidentiary threshold demonstrates that the provisions of the ICWA must be interpreted as high hurdles to overcome before an Indian child may be placed with non-Indian adoptive parents.

### *B. The Potential Negative Consequences of the Court’s Opinion*

The Court disregarded the clear legislative intent behind the enactment of the ICWA and manipulated the statute’s plain language to reach what the majority of Justices felt was the “morally correct”

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101. See *Adoptive Couple*, 133 S. Ct. at 2563. See also *id.* at 2573 (Sotomayor, J., dissenting) (noting the “majority’s focus on [Brown’s] perceived parental shortcomings”).

102. 490 U.S. 30, 36–37 (emphasis added).

103. *Adoptive Couple*, 133 S. Ct. at 2573 (Sotomayor, J., dissenting).

104. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 562–63 (S.C. 2012) (emphasis added).

result. While the majority attempted to rationalize its opinion by stating that this holding is limited to the facts of this particular case,<sup>105</sup> this will not prevent the unintended consequences of the holding, particularly the issue of Indian children being removed from their biological parents because state agencies (or in this case, the U.S. Supreme Court) deemed the parents unfit.<sup>106</sup>

Indeed, as the dissent predicts, there is now a risk that the majority's interpretation of §§ 1912(d) and (f) will not apply to biological parents who never had physical custody of their children, but who have visitation rights or provide other financial and emotional support.<sup>107</sup> These parents will be precluded from the protections Congress intended to afford them under the ICWA.

In his concurrence, Justice Breyer cautioned that “[w]e should decide here no more than is necessary,” and also cautioned against the Court extending the statutory interpretation to hypothetical factual scenarios.<sup>108</sup> But even Justice Breyer recognized that the majority's interpretation could exclude too many absentee Indian fathers, and thus defeat the purpose and legislative intent behind the ICWA: to prevent the removal of Indian children from their biological parents and subsequent placement in non-Indian adoptive or foster homes.<sup>109</sup>

There are already negative consequences arising from the Court's decision in this case, as demonstrated by the lower court proceedings that have occurred since the Court remanded the case back to the lower courts on June 25, 2013. On July 17, 2013, the South Carolina Supreme Court, in accordance with the Court's interpretation of the ICWA, remanded the case to the “Family Court for the prompt entry of an order approving and finalizing Adoptive Couple's adoption of [Veronica], and thereby terminating [Brown's] parental rights.”<sup>110</sup> While the court also noted that “there is absolutely no need to compound any suffering that Baby Girl may

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

106. See Brief of Family Law Professors as Amici Curiae Supporting Respondents Birth Father and Cherokee Nation at 14, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12-399), 2013 WL 1308809, at \*14; Stan Watts, *Voluntary Adoptions Under the Indian Child Welfare Act of 1978, Balancing the Interests of Children, Families, and Tribes*, 63 S. CAL. L. REV. 213 (1989).

107. 133 S. Ct. at 2572–73 (Sotomayor, J., dissenting).

108. *Id.* at 2571 (Breyer, J., concurring).

109. *Id.* at 2557 (majority opinion).

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



experience through continued litigation,”<sup>111</sup> on July 22, 2013, Brown filed a petition for rehearing with the South Carolina Supreme Court, which the court denied.<sup>112</sup>

On September 3, 2013, the Oklahoma Supreme Court granted an emergency stay to keep Veronica with Brown.<sup>113</sup> But, on September 23, 2013, Brown turned over custody of Veronica to the Capobiancos.<sup>114</sup> Although Brown announced that he had dismissed all pending custody claims to spare Veronica continued public exposure,<sup>115</sup> the legal saga continues. On November 1, 2013, the Capobiancos filed a claim against Brown and the Cherokee Nation seeking recovery of more than \$1 million in costs accrued during the custody proceedings.<sup>116</sup> This drawn-out litigation demonstrates that while the Supreme Court attempted to reach a result it felt was in Veronica’s best interest, the decision is subjecting Veronica—and all of the parties involved—to continuing turmoil. This cannot be what is in Veronica’s “best interest.”<sup>117</sup>

## VI. CONCLUSION

In *Adoptive Couple v. Baby Girl*, a 5-4 majority of the Supreme Court issued what it felt was a “morally correct” result. But in reality, the Court’s interpretation of the ICWA was a legally incorrect, results-oriented holding that ignored the text and purpose

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111. *Id.* at 53.

112. *Adoptive Couple v. Baby Girl*, 746 S.E.2d 346, 346–47 (S.C. 2013).

113. “*Baby Veronica*” *Custody Case: Oklahoma Supreme Court Grants Stay to Keep Girl with Biological Dad*, CBS NEWS (Sept. 3, 2013, 10:45 AM), [http://www.cbsnews.com/8301-201\\_162-57601079/baby-veronica-custody-case-okla-supreme-court-grants-stay-to-keep-girl-with-biological-dad/](http://www.cbsnews.com/8301-201_162-57601079/baby-veronica-custody-case-okla-supreme-court-grants-stay-to-keep-girl-with-biological-dad/).

114. Robin Abcarian, *Legal Battle Over Native American Girl Comes to a Poignant End*, L.A. TIMES, Sept. 24, 2013, <http://www.latimes.com/local/lanow/la-me-ln-legal-battle-baby-veronica-native-american-20130924,0,584905.story?page=1#axzz2nxOjf8pE>.

115. “*Baby Veronica*” *Dad Dusten Brown, Cherokee Nation Drop Fight for Custody Rights*, CBS NEWS (Oct. 10, 2013, 3:11 PM), <http://www.cbsnews.com/news/baby-veronica-dad-dusten-brown-cherokee-nation-drop-fight-for-custody-rights/>.

116. *Adoptive Parents Sue Cherokee Nation, Dusten Brown for More Than \$1M*, NEWS9.COM (Nov. 5, 2013, 3:11 PM), <http://www.news9.com/story/23886301/adoptive-parents-sue-cherokee-nation-dusten-brown-for-more-than-1m>.

117. See Editorial Board, *Indian Child Welfare Act May Need Some Limits*, WASH. POST, Apr. 15, 2013, [http://www.washingtonpost.com/opinions/indian-child-welfare-act-may-need-some-limits/2013/04/15/8db00cae-a613-11e2-b029-8fb7e977ef71\\_story.html](http://www.washingtonpost.com/opinions/indian-child-welfare-act-may-need-some-limits/2013/04/15/8db00cae-a613-11e2-b029-8fb7e977ef71_story.html) (“Imagine one of those wrenching custody cases in which every side seems to have the child’s interests at heart but almost every fact is disputed. Many people—including the child in the middle of the fight—have pain ahead of them, no matter the outcome.”).

of the statute. The Court's distorted and oversimplified interpretation of the ICWA will likely lead to legal consequences for families dealing with the already complex and emotionally turbulent adoption and custody proceedings. These consequences are exemplified by the harsh practical result of the Court's decision—Veronica has twice been separated from her families, first from the Capobiancos and now from Brown, whom she lived with for nearly two years.<sup>118</sup> She is a true victim of this law.

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118. Abcarian, *supra* note 114.