PERSPECTIVES

HARD FACTS, MUDDLED LAW: DECIPHERING THE BABY VERONICA DECISION

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Adoptive Couple v. Baby Girl[1] marks an unwise retreat from the Supreme Court's earlier embrace of the Indian Child Welfare Act (ICWA).[2] Animated by understandable empathy for the adoptive parents, Justice Alito's majority opinion devalues the Indian identity of the child (Veronica) and her relationship with her Indian father. In so doing, the majority's opinion undermines the very goals that the ICWA was meant to achieve. With Indian children still among the most vulnerable of our nation's youth,[3] this message from our highest Court is unfortunate indeed.

Although the Court did not endorse the "existing Indian family doctrine,"[4] the majority opinion echoes that doctrine's objective of carving out a statutory exception for children who are not in the care of an Indian parent. The majority gave the ICWA an unnecessarily cramped interpretation by holding that key protections under the ICWA did not apply to the father because he had "abandoned the Indian child before birth"[5] and never had legal or physical custody of the child under state law.

[1] Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013).

[2] *See* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 37 (1989) (emphasizing that the ICWA "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society" (quoting H.R. REP. NO. 95-1386, at 23 (1978))).

[3] *See, e.g.*, CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., RACE/ETHNICITY OF PUBLIC AGENCY CHILDREN ADOPTED: OCTOBER 1, 2011 TO SEPTEMBER 30, 2012 (2013), *available at* http://www.acf.hhs.gov/programs/cb/resource/race-2012 (showing that American Indian/Alaska Native children represent disproportionately high percentages of public agency children placed for adoption in particular states, including, among others, Alaska (48.9%), Montana (24.0%), North Dakota (18.1%), and South Dakota (36.5%)); Michelle Sarche & Paul Spicer, *Poverty and Health Disparities for American Indian and Alaska Native Children: Current Knowledge and Future Prospects*, 1136 ANNALS N.Y. ACAD. SCIENCES 126 (2008), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2567901.

[4] *See In re* A.J.S., 204 P.3d 543, 549-51 (Kan. 2009) (surveying the doctrine and abandoning it as inconsistent with the statutory language and goals of the ICWA).

[5] *Adoptive Couple*, 133 S. Ct. at 2557.

In the ICWA, Congress focused on preventing the removal of Indian children from their families and, critically, on remedying the destructive effects of past governmental policies on Indian parents, including their commitment to parenthood.[6] Congress, through the ICWA, created procedural safeguards to prevent both unjustified terminations of parental rights and illconsidered relinquishments.[7] Here, the father's resolve to raise his daughter, despite initial ambivalence, comes within the ICWA's remedial framework. In her dissent, Justice Sotomayor hewed more closely to the congressional design and refuted the majority's reading of the Act step by step.[8]

Given the result, the Court's specific holdings should be narrowly confined to facts like those presented in the case, consistent with Justice Breyer's concurrence.[9] Nevertheless, the potential reach of the decision is unsettling. In limiting the ICWA's procedural protections under § 1912, the opinion is unclear as to whether it applies beyond the private-adoption context to any situation in which the Indian parent has not exercised custody. Likewise, the Court's holding that the ICWA's placement preferences under § 1915 were irrelevant because no other potential adoptive placements were identified may encourage anti-ICWA strategies.[10] At best, *Adoptive Couple* will be construed narrowly, constricting the rights of noncustodial, unwed Indian fathers who

oppose adoptions initiated by non-Indian birth mothers. At worst, the decision will operate more generally in the child-welfare context by eroding the ICWA's protection for parental rights and its preference for Indian foster and adoptive homes for Indian children.

Justice Alito's opinion also denigrates the social and legal meaning of the child's Cherokee heritage. Because eligibility for membership in the Cherokee

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[6] H.R. REP. NO. 95-1386, at 11-12 ("One of the effects of our national paternalism has been to so alienate some Indian patents [sic] from their society that they abandon their children at hospitals or to welfare departments rather than entrust them to the care of relatives in the extended family.").

[7] *See* 25 U.S.C. §§ 1912, 1913 (2012).

[8] *See Adoptive Couple*, 133 S. Ct. at 2572-86 (Sotomayor, J., dissenting) ("Unlike the majority, I cannot adopt a reading of ICWA that is contrary to both its text and stated purpose." *Id.* at 2572.).

[9] For a summary of the three distinct holdings and their limitations, see ASS'N ON AM. INDIAN AFFAIRS & NAT'L INDIAN CHILD WELFARE ASS'N, A BRIEF SUMMARY ON THE DECISION IN *ADOPTIVE COUPLE V. BABY GIRL* (12-399) (2013), *available at* http://www.nicwa.org/babyveronica/documents/LegalAnalysisofAdoptiveCouplevBabyGirl decision.pdf. Justice Breyer, in concurrence, observed that the case did not involve a father who had paid support, possessed visitation rights, or was deceived about the existence of the child. As he put it, "[t]he Court need not, and . . . does not, now decide whether or how §§ 1912(d) and (f) apply where those circumstances are present." *Adoptive Couple*, 133 S. Ct. at 2571 (Breyer, J., concurring).

[10] *Adoptive Couple*, 133 S. Ct. at 2565 (majority opinion) ("Nor do § 1915(a)'s rebuttable adoption preferences apply when no alternative party has formally sought to adopt the child.").

Nation depends solely on a lineal blood relationship with a tribal ancestor and not on blood quantum, Veronica was indisputably an "Indian child" within the meaning of the ICWA.[11] Nevertheless, the majority rejected the notion that her Indian identity justified any increased protection for the parent-child relationship or any regard for the interests of the Cherokee Nation. Instead, Justice Alito worried that the ICWA would give an absentee Indian father an unfair advantage, permitting him to "play his *ICWA trump card* at the eleventh hour to override the mother's decision and the child's best interests. . . . Such an interpretation would raise equal protection concerns . . . ."[12]

The majority opinion never acknowledges that Veronica's life might be enriched by joining her father and growing up within her tribal community, despite findings to that effect in the South Carolina family court.[13] To the contrary, the majority presumed that the child's interests would be served only by remaining in the adoptive placement. Justice Alito's casual suggestion that the Court's holding was necessary to avoid constitutional problems,[14] moreover, will surely fuel such challenges in the future.[15] The majority and dissenting opinions in *Adoptive Couple* offer sharply competing visions of family and tribal relations. In Justice Alito's well-ordered world, "abandon[ment]" – a conclusory term he uses multiple times in the opinion but never defines[16] – extinguishes an unwed father's right to the procedural protections of the ICWA. Intact Indian families are entitled to remedial services, but this is not the case for single wayfaring fathers who fail

to assert paternal rights by state law timetables. Once a birth mother places an Indian child for adoption, Justice Alito sees interference in the adoption process by a less-than-perfect Indian father as rightly foreclosed.

Justice Sotomayor, in contrast, views the world as far from ideal. She acknowledges the messiness of the human condition and the fallibility of

[11] *Id.* at 2557 n.1.

[12] *Id.* at 2565 (emphasis added). Concurring, Justice Thomas advanced the surprising argument that the entirety of the ICWA is unconstitutional as beyond Congress's authority. *Id.* at 2567-71 (Thomas, J., concurring).

[13] Adoptive Couple v. Baby Girl, 731 S.E.2d 550, 566 (S.C. 2012) ("The family court order stated, '[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.'").

[14] *Adoptive Couple*, 133 S. Ct. at 2565.

[15] The biological mother has filed her own federal court action claiming that the ICWA is racially discriminatory and violates the equal protection and due process rights of birth mothers. *See* Complaint for Declaratory and Injunctive Relief, Maldonado v. Holder, No. 2:13CV02042 (D.S.C. July 24, 2013), 2013 WL 3859821.

[16] *Adoptive Couple*, 133 S. Ct. at 2557, 2562, 2563, 2565.

parents.[17] The imperfect father is a father nonetheless under the ICWA.[18] Through her more textured lens, Indian children's fragile relations with their families and tribes deserve protection, even if state law says otherwise.[19]

Just as Justice Sotomayor predicted,[20] a heartrending struggle ensued in the aftermath of the Court's decision, culminating in Veronica's return to her adoptive parents.[21] As I have explored elsewhere,[22] open adoption and more fluid conceptions of parental rights – childrearing approaches common to many tribes – are ways of accommodating children's attachments to multiple caregivers. If the adults who have fought so fiercely over Veronica take her interests seriously, they will find a way for her to maintain the multiple bonds she has formed going forward.

[17] *Id.* at 2584 (Sotomayor, J., dissenting) ("In an ideal world, perhaps all parents would be perfect.").

[18] *Id*. ("Even happy families do not always fit the custodial-parent mold for which the majority would reserve ICWA's protections; unhappy families all too often do not. They are families nonetheless.").

[19] *Id.* ("They are families nonetheless. Congress understood as much. ICWA's definitions of 'parent' and 'termination of parental rights' provided in § 1903 sweep broadly. They should be honored.").

[20] *Id.* at 2585-86.

[21] *See* Brown v. DeLapp, No. 112116, 2013 WL 5373272, at *1 (Okla. Sept. 23, 2013) (dissolving the emergency stay and clearing the way for enforcement of the South Carolina adoption decree). For a summary of the litigation between Veronica's biological father and her adoptive parents, see *id.* at *4-5 (Gurich, J., dissenting). The biological father recently announced he would withdraw his bid for custody. *See* Michael Overall, *Father Is Ending Battle for Custody*, TULSA WORLD, Oct. 11, 2013, http://www.tulsaworld.com/news/fatheris-ending-battle-for-custody/article_125eb3a1-77db-57d5-9f4a-e71612be7502.html.

[22] BARBARA ANN ATWOOD, CHILDREN, TRIBES, AND STATES 232-40, 273-81 (2010).