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# Adoptive Couple v. Baby Girl: Two-and-a-Half Ways to Destroy Indian Law

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# *ADOPTIVE COUPLE V. BABY GIRL*: TWO-AND-A-HALF WAYS TO DESTROY INDIAN LAW

*Marcia Zug**

In December 2011, Judge Malphrus of the South Carolina family court ordered Matt and Melanie Capobianco to relinquish custody of Veronica, their two-year-old, adopted daughter, to her biological father, Dusten Brown.[1] A federal statute known as the Indian Child Welfare Act ("ICWA")[2] mandated Veronica's return. However, the court's decision to return Veronica pursuant to this law incited national outrage and strident calls for the Act's repeal.[3] While this outrage was misplaced, it may nonetheless have influenced the U.S. Supreme Court's decision to hear the appeal. The case of *Adoptive Couple v. Baby Girl* is emotionally complicated, but it is not legally complex. Therefore, the Court's interest is surprising and likely means that this case will determine more than the fate of a single child.

The court returned Veronica Capobianco to her biological father because the termination of his parental rights and the subsequent adoption attempt did not comply with the requirements of ICWA. South Carolina law would have permitted the involuntary termination of Brown's parental rights, but ICWA supersedes state law and forbids such involuntary terminations. Consequently, because Brown never relinquished his rights, the family court held that Veronica was not eligible for adoption and that she must be returned to Brown. The South Carolina Supreme Court subsequently affirmed this decision. The court agreed that under the clear

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1. Adoptive Couple v. Baby Girl, 731 S.E.2d 550, 550, 556 (S.C. 2012) *cert. granted*, No. 12-399 (Jan. 4, 2013); Allyson Bird, *Broken Home: The Save Veronica Story*, CHARLESTON CITY PAPER, Sept. 26, 2012, *available at* http://www.charlestoncitypaper.com/charleston/broken-home/Content?oid=4185523.

2. Indian Child Welfare Act of 1978, Pub. L. 95-608, 92 Stat. 3069 (codified in scattered sections of 25 and 43 U.S.C.).

3. *See, e.g.*, Bird, *supra* note 1; *Veronica May Not Be Saved*, ABC NEWS 4 (July 26, 2012, 6:20 PM EST), http://www.abcnews4.com/story/19121303/veronica-may-not-be-saved (last updated July 27, 2012, 2:16 AM); *Anderson Cooper 360°: Baby Veronica's Story* (CNN television broadcast Feb. 21, 2012); *Dr. Phil: Adoption Controversy: Battle over Baby Veronica* (NBC television broadcast Oct. 18, 2012), *available at* http://www.youtube.com/watch?v=hdWzeOzdhaw.

language of the Act, Brown qualified as a "parent" and that the termination of his parental rights must comply with ICWA.[4]

According to the grant of certiorari, the *Baby Girl* Court will address two questions: "(1) [w]hether a non-custodial parent can invoke ICWA to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law[;]" and "(2) [w]hether ICWA defines 'parent' in 25 U.S.C. § 1903(9) to include an unwed biological father who has not complied with state law rules to attain legal status as a parent."[5] These questions are strange because they have already been answered, and the answer to both is clearly yes. The Supreme Court addressed the first question in *Mississippi Band of Choctaw v. Holyfield*, in which the Supreme Court held that ICWA could block an adoption voluntarily initiated by a parent under state law.[6] The clear language of ICWA answers the second question by specifically defining a "parent" as "any biological parent or parents of an Indian child."[7] Therefore, given that the issues presented by this case are not in dispute, it is likely that the Court intends to address a different question in *Baby Girl*.

Some suggest that the Court may have granted certiorari to determine whether ICWA applies to children, like Veronica, who have never been part of an Indian family; however, this is unlikely given that this question has also been resolved.[8] The 1982 Supreme Court of Kansas case *In re the Adoption of Baby Boy L* first raised the issue of ICWA's applicability to Indian children removed from non-Indian homes.[9] In *Baby Boy L*, the Kansas court became the first of many to adopt an exception to ICWA for cases in which the "Indian child" had never been part of an Indian home.[10] This doctrine became known as the "existing Indian family exception." After Kansas, a number of other states also adopted this exception, and for a time, this doctrine created a significant circuit split. However, there is now almost unanimous agreement that the existing Indian family exception violates the clear purpose of ICWA.[11]

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4. *Baby Girl*, 731 S.E.2d at 550.

5. Questions Presented at 1, Adoptive Couple v. Baby Girl, *cert granted* (Jan. 4, 2013) (No. 12-399), *available at* http://www.supremecourt.gov/qp/12-00399qp.pdf (last visited Mar. 3, 2013).

6. 490 U.S. 30, 42–54 (1989).

7. 25 U.S.C. § 1903(9) (2006).

8. *See, e.g.*, Adam Liptak, *Justices Take Case on Adoption of Indian Child*, N.Y. TIMES, Jan. 4, 2013, at A11, http://www.nytimes.com/2013/01/05/us/supreme-court-takes-case-on-adoption-of-indian-child.html?_r=0 ("Some lower courts have said the law kicks in only if the adoption breaks up an existing Indian family . . . .").

9. 643 P.2d 168 (Kan. 1982).

10. *Id.* at 206.

11. *See*, *infra* text accompanying notes 13–17 (noting that the exception is only recognized in seven states, two with limited application.); *see also* Dan Lewerenz & Padraic

Congress enacted ICWA to ensure the survival of Indian tribes by removing Indian family issues from state control after concluding that abusive state practices had created an "Indian child welfare crisis."[12] The existing Indian family exception directly subverts this goal by giving states, rather than tribes, the power to determine who is an Indian child. Now, nearly all states, including Kansas, recognize this problem with the existing Indian family exception and view the exception as erroneous.[13]

Seven states currently recognize the doctrine, but two of these states have expressly limited its application. It has been explicitly rejected by nineteen states, including five since 2000.[14] Consequently, given that the Court had three decades to address a split that is now rapidly disappearing without its intervention, it seems highly unlikely that the Court accepted the appeal to suddenly recognize the existing Indian family exception. Instead, the Court's decision to hear *Baby Girl* most likely signifies that at least some members of the Court wish to re-examine the constitutionality of the entire Act—and maybe even all of Indian law.

In a recent Charlie Rose interview regarding *Baby Girl*, Justice Scalia hinted at these broader implications when he described his decision to join the majority in *Mississippi Band of Choctaw v. Holyfield* as the biggest

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McCoy, *The End of "Existing Indian Family" Jurisprudence:* Holyfield *at 20,* In the Matter of A.J.S. *and the Last Gasps of a Dying Doctrine*, 36 WM. MITCHELL L. REV. 684, 690 (2010) (describing the doctrine as "little more than a troublesome footnote in a handful of states").

12. H.R. REP. NO. 95-1386, at 9 (1978) ("[In some states] the risk run by Indian children of being separated from their parents is nearly 1,600 percent greater than it [was] for non-Indian children."). The House report suggested several reasons states could be responsible for this disparity, including the

> fundamental misunderstanding by state officials of the importance of extended families in child-rearing within tribal communities[,] . . . the economic incentive for child placement agencies to remove children, basic racial discrimination, . . . [or unwillingness] to recognize the value of direct "parent"-like relationships between an Indian child and his or her extended family or larger tribal community.

Lewerenz & McCoy, *supra* note 11, at 691 n.49 (citing H.R. REP. NO. 95-1386, at 10–12).

13. Lewerenz & McCoy, *supra* note 11, at 686–88 (noting that three other states that had also initially accepted the doctrine—Oklahoma, South Dakota, and Washington—have now rejected it, and no new states have accepted the doctrine in over a decade).

14. Brief in Opposition at 16–19, Adoptive Couple v. Baby Girl, *cert granted* (Jan. 4, 2013) (No. 12-399), 2012 WL 5994979, at *16–*19, *available at* http://www.law.yale.edu/documents/pdf/scac/Adoptive_Couple.BIO.pdf (last visited Mar. 17, 2013). *But see*, Dawn M. v. Nev. State Div. of Child & Family Servs. (*In re* N.J.), 125 Nev. 835, 848 (2009) (adopting the doctrine on a case-by-case basis and applying it in that case only because neither the Indian father nor the tribe objected to the adoption).

regret of his career.[15] *Holyfield* is the Court's sole ICWA case, and it concerned the adoption of twin Indian children by a non-Indian couple. In *Holyfield*, the Court held that the voluntary placement of the children by their Indian parents violated ICWA. Although the twins were born off the reservation, they were still domiciliaries of the reservation, and, as a result, the Court found that ICWA gave the tribe exclusive jurisdiction over their adoption.[16]

The *Holyfield* case answers the first question presented by *Baby Girl* and makes it clear that ICWA can block an adoption voluntarily initiated by a parent under state law. Scalia's statement nevertheless indicates that the Court may have decided to hear *Baby Girl* in order to overturn *Holyfield*. The difficulty with using *Baby Girl* for this purpose is that *Baby Girl* involves a different provision of ICWA. Both *Holyfield* and *Baby Girl* concern an Indian child placed in a non-Indian adoptive home, but only *Holyfield* raises the issue of tribal jurisdiction.[17] Veronica was born off reservation to a non-Indian mother, and thus, exclusive tribal jurisdiction is not an issue in *Baby Girl*. Because the two cases involve very different provisions of ICWA, the most likely way for *Baby Girl* to overturn *Holyfield* is if the Court were to find the entirety of ICWA unconstitutional.

The constitutionality of ICWA is based on two propositions: First, these special laws for Indians are not race based. And second, Congress has the authority to issue special laws with regard to Indian people and tribes. If the *Baby Girl* Court rejected either of these positions, not only would ICWA be unconstitutional, most of Indian law would fall as well.

There is no question that ICWA treats Indian children differently than non-Indian children. Nevertheless, under well-settled law, this distinction is not constitutionally problematic. In *Morton v. Mancari*, the Court explained that "Indian" is a political affiliation rather than a racial category.[18] It is uncertain whether the Roberts Court would agree with this distinction. The Roberts Court has indicated its strong disapproval of racial preferences, stating, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[19] The Court could reach a similar

15. Adam Liptak, *Case Pits Adoptive Parents Against Tribal Rights*, N.Y. TIMES, Dec. 24, 2012, at A12, http://www.nytimes.com/2012/12/25/us/american-indian-adoption-case-comes-to-supreme-court.html.

16. Miss. Band of Choctaw v. Holyfield, 490 U.S. 30, 48–54 (1989).

17. The *Holyfield* Court held that under ICWA's jurisdictional provisions, an Indian mother domiciled on the reservation could not avoid tribal jurisdiction by giving birth off the reservation. *Id.*

18. 417 U.S. 535, 554 (1974) (describing the preference as one granted to "quasi-sovereign tribal entities" as opposed to a racial group).

19. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

conclusion regarding ICWA in *Baby Girl*. But if the Court were to do so, this holding would not only destroy ICWA but it would almost completely eliminate existing Indian law.

As the Court explained in *Mancari*, "Literally every piece of legislation dealing with Indian tribes and reservations . . . single out for special treatment a constituency of tribal Indians living on or near reservations."[20] The Court went even further, saying, "If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized."[21]

Similarly, if the Court were to find that ICWA is unconstitutional because it exceeds Congress's authority under the Indian Commerce Clause, the impact of this decision on Indian tribes would be just as devastating.[22] The Indian Commerce Clause states, "[T]he Congress shall have Power . . . To regulate commerce with foreign Nations, and among several States, and with the Indian tribes."[23] In 1790, Congress used this provision to enact the first Trade and Intercourse Act, which included provisions regulating crimes on Indian lands.[24] Since then, it has been understood that Congress's power under the Indian Commerce Clause is broad and extends far beyond a narrow definition of commerce.[25]

During the one hundred years before Congress enacted ICWA, the Supreme Court repeatedly affirmed the idea that congressional power over

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20. *Mancari,* 417 U.S. at 552.

21. *Id.*

22. Congress attempted to hedge its bet when it described its authority for issuing the Act as both the Indian Commerce Clause and "other constitutional authority." This authority includes "statutes, treaties, and the general course of dealing with Indian tribes . . . ." 25 U.S.C. § 1901(2). However, it is clear the main authority for the Act rests on the Indian Commerce Clause.

23. U.S. CONST. art. I, § 8, cl. 3.

24. Ch. 33, 1 Stat. 137–38 (1790); *see also* Michael C. Blumm, *Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty and Their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country*, 28 VT. L. REV. 713, 725 (2004) ("Congress exercised that constitutional authority when it enacted the First Trade and Intercourse Act of 1790 . . . . ").

25. As Professor Akil Reed Amar notes,

> none of the leading clausebound advocates of a narrow economic reading of 'commerce' has come to grips with the basic inadequacy of their reading as applied to Indian tribes, or has squarely confronted the originalist implications of the Indian Intercourse Act of 1790, in which the First Congress plainly regulated noneconomic intercourse with Indian tribes.

*America's Constitution and the Yale School of Constitutional Interpretation*, 115 YALE L.J. 1997, 2004 n.25 (2006).

Indian affairs was plenary.[26] This remains the current understanding. The test for whether the Indian Commerce Clause authorizes an act of Congress is simply whether that statute "can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians."[27] Given this low threshold, it seems indisputable that ICWA—which Congress passed to prevent the breakup of Indian families, ensure the transmission of Indian culture and heritage, and prevent the extinction of Indian tribes—meets this test.

The two possibilities detailed above are the worst-case scenarios. They outline the ways in which the Court could use *Baby Girl* to essentially destroy not only ICWA but also the majority of Indian law. Such a course of action would be both legally and politically problematic. Either holding would require the Court to blatantly disregard history and precedent, and could further entrench the widely held belief that motivations other than law increasingly influence the Court. Journalist Dahlia Lithwick made this point last spring with regard to the Affordable Care Act ("ACA") when she argued that the constitutionality of the Act would not prevent the Court from "strik[ing] it down anyway."[28] Lithwick predicted that "70 years of precedent [and the *justices'*] own prior writings on federal power" would be irrelevant to the decision.[29] According to Lithwick, the decision would simply come down to "optics, politics and public opinion."[30]

Lithwick was not alone in holding this view of the Court's decisionmaking process, and in the end, it may have been the Chief Justice's desire to change this perception that determined the fate of the ACA. Although many reporters and pundits were surprised when Roberts joined the majority and upheld the Act, others explained this move as the result of Roberts's unwillingness to contribute to the image of the Court that commentators such as Lithwick presented. According to Jonathan Chait of *New York*, "Striking down the law at this moment would have brought the Court to a tipping point at which Roberts's political opponents, at least,

26. During this period, the Supreme Court never struck down any Indian legislation as exceeding congressional authority. *See* William Bradford, "*Another Such Victory and We Are Undone": A Call to an American Indian Declaration of Independence*, 40 TULSA L. REV. 71, 81 n.58 (2004) ("[N]o congressional exercise of regulatory jurisdiction over Indian affairs has ever been set aside by the courts, with the exception of Hodel v. Irving, 481 U.S. 704, 718 (1987), which declared specific statutory escheat provisions a taking as applied to Indian land and thus constitutionally invalid under the Fifth Amendment.").

27. Morton v. Mancari, 417 U.S. 535, 555 (1974).

28. Dahlia Lithwick, *It's Not About the Law, Stupid*, SLATE (Mar. 22, 2012, 7:58 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/03/the_supreme_court_is_more_concerned_with_the_politics_of_the_health_care_debate_than_the_law_.html.

29. *Id.*

30. *Id.*

would afford him no legitimacy at all as the 'umpire' he promised to be in his confirmation hearings. He stared into that abyss and recoiled."[31] *The Economist* made a similar point about the Roberts decision, stating, "Mr Roberts genuinely thinks continuity, stability, public approval, and a posture of deference to the legislature are crucial to the healthy functioning of the judicial branch."[32]

Such legitimacy concerns could also influence the *Baby Girl* decision. The Court may be reluctant to issue an opinion that overturns centuries of precedent and threatens to invalidate the majority of Indian law.[33] Instead, the Court may look for a more limited means of invalidating ICWA, and this would likely prompt a decision based on the Tenth Amendment. Invalidating ICWA under the Tenth Amendment would permit the Court to affirm Congress's broad power to enact Indian legislation but would carve out an exception for situations where such legislation creates a significant infringement on states' rights. Such a decision would invariably appeal to *justices* such as Justice Thomas, who has already indicated that he sees substantial Tenth Amendment concerns with much of Indian law.[34] The fact that concerns regarding ICWA and the Tenth Amendment are not new bolsters the likelihood of the Court using this approach.

At the time of ICWA's enactment, the Department of Justice suggested that the Act's application to off-reservation children could violate the Tenth Amendment. Specifically, the DOJ questioned whether

> Congress ha[d] power to control the incidents of child custody litigation involving nonreservation Indian children and parents pursuant to the Indian Commerce Clause sufficient to override the significant state interest in

31. Jonathan Chait, *John Roberts Saves Us All*, NEW YORK, (June 28, 2012, 11:33 AM), http://nymag.com/daily/intelligencer/2012/06/john-roberts-saves-us-all.html.

32. W.W., *John Roberts's Art of War*, THE ECONOMIST, (June 28, 2012, 21:01), http://www.economist.com/blogs/democracyinamerica/2012/06/obamacare-and-supreme-court-0.

33. It should be noted, however, that the pro-ICWA factions are most likely much smaller and certainly less powerful than the pro-ACA groups.

34. For example, in *Cass County v. Leech Lake Band of Chippewa Indians*, Justice Thomas used the Tenth Amendment–type argument to increase state power over Indian tribes. 524 U.S. 103 (1998). Thomas began with "the principle that state taxation of Indians on reservations is not authorized unless Congress 'has made its intention to do so unmistakably clear,' " and transformed it "into the principle that when Congress makes Indian land freely alienable, it is 'unmistakably clear' that Congress intends that land to be taxable by state and local governments, unless a contrary intent is 'clearly manifested.' " Alexander Tallchief Skibine, *Tribal Sovereign Interests Beyond the Reservation Borders*, 12 LEWIS & CLARK L. REV. 1003, 1016 (2008) (internal quotation marks omitted).

> regulating the procedure to be followed by its courts in exercising jurisdiction over what is traditionally a state matter.[35]

After considering this issue, the House of Representatives concluded that it had the authority to enact ICWA and explained that Congress could "impose certain procedural burdens upon state courts in order to protect the substantive rights of Indian children, Indian parents, and Indian tribes in state court proceedings for child custody."[36]

In addition, the House further supported its argument that ICWA was a valid exercise of congressional authority with the observation that although domestic relations is an area of historic state control, ICWA does not oust the state from this historic role. Instead, the Act simply reinforces the right of tribes to define their members. The House's conclusions are still correct today. Although domestic relations is one of the core areas of state authority, this traditional power has never extended to Indian family relations.[37] If the Court chooses to invalidate ICWA on the basis of the Tenth Amendment, it will need to address this domestic relations argument. Moreover, it will need to explain how these Tenth Amendment concerns justify an unquestionable infringement on tribal sovereignty.

A Tenth Amendment argument raises many legal difficulties, but if the Court is able to overcome these hurdles and hold that states have the right to apply state family law in cases involving Indian families, then it is possible that *Baby Girl* will turn out to be the first in a line of cases permitting the invalidation of federal Indian laws based on concerns regarding states' rights. Numerous areas of Indian law raise states' rights concerns, and it is easy to imagine how courts could apply such a holding to other areas of state–tribal conflict, such as criminal law or taxation. States have long objected to the idea that they are powerless to control a group of people and lands located within their borders, and many would welcome the opportunity to increase their jurisdiction over Indians. Consequently, the potential implications of this case are much greater than the fate of a single child.

Apart from intervening to affirm the "existing family exception," there are no non-far-reaching rulings that will return Veronica to her adoptive parents. The Court will either have to undermine significant portions of federal Indian law as race based, curtail Congress's Indian Commerce

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35. H.R. REP. NO. 95-1386, at 17 (1978).

36. *Id.* at 18.

37. The purpose of the Indian Commerce Clause was to eliminate the possibility of state power over Indian affairs. Absent a grant from Congress, states have no authority in this area. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 62 (1996) ("If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes.").

Clause power with far-reaching consequences, or embrace a Tenth Amendment limitation on the reach of Indian law that cuts a broad swath through many existing laws. Therefore, regardless of whatever might have motivated the Court to take this appeal, there is no good option but to affirm the South Carolina Supreme Court's decision to return Veronica to her father.