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***ADOPTIVE COUPLE V. BABY GIRL: ERASING THE LAST
VESTIGES OF HUMAN PROPERTY***

JAMES G. DWYER

The Indian Child Welfare Act (ICWA) should be named the Indian Tribal Preservation Act. Although the ICWA was partly a reaction to practices in the 1970s that harmed some children,¹ its primary purpose was to promote the perpetuation of Native American tribes,² which were threatened by the large-scale exodus of autonomous adult tribe members from reservations to urban areas in pursuit of a better life.³ Neither tribes nor Congress could force adults living on reservations to stay there, nor could either compel adults living in mainstream society to move onto reservations or to form families with active tribe members. It was, however, unlikely that children would resist involuntary transfer from mainstream society onto reservations and placement into family relationships with tribe members, even when that was not best for them.

With the ICWA, Congress empowered tribes to tag children as their members even if the children have no connection with tribal life and only the slightest Indian component to their genetic ancestry.⁴ Congress also gave adult tribe members priority over the rest of the adult American population in claiming such children who become available for adoption, even if those members are not kin of the children.⁵ Further, Congress gave tribe members, regardless of whether they participate in tribal life, greater insulation against

¹ 25 U.S.C. § 1901 (2012) (detailing congressional findings “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”).

² See *infra* note 7 and accompanying text.

³ In 1940, eight percent of Native Americans lived in urban areas. This number rose to forty-five percent in 1970, and to seventy percent in 2012. Timothy Williams, *Quietly, Indians Reshape Cities and Reservations*, N.Y. TIMES, Apr. 14, 2013, at N14. Significantly, post-ICWA histories of the Cherokee Nation do not even mention the ICWA or the removal of children from tribal families. See, e.g., ROBERT J. CONLEY, THE CHEROKEE NATION: A HISTORY (2005); RUSSELL THORNTON, THE CHEROKEES: A POPULATION HISTORY 144 (1990) (stating that, by 1970, most Cherokees “were really only ‘census Cherokees’”).

⁴ 25 U.S.C. § 1903(4) (“‘Indian child’ means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is [sic] eligible for membership in an Indian tribe and is [sic] the biological child of a member of an Indian tribe . . .”).

⁵ *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.”).

state efforts to protect their offspring from maltreatment.⁶ Undoubtedly the ICWA has benefited some children, but it has also harmed many children by trapping them in bad homes and delaying and disrupting good adoptions.

The text of the ICWA makes clear the primacy of the tribal preservation aim. The first explanation provided for the law's existence is this: "Congress . . . has assumed the responsibility for the protection and preservation of Indian tribes and their resources . . . [and] there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . ."⁷ Congress thus lumped children together with things like land, water, and welfare payments, thereby treating children as another resource for tribes to use rather than as persons whose rights and interests, objectively assessed, should completely control state decisionmaking about their family life. In contrast, adults, regardless of their ancestry, have an absolute right to dissociate themselves from family members who mistreat them; to refuse a new family relationship they deem not the best available to them; and to refuse to live on a reservation where opportunities are low, crime and dysfunction are high,⁸ and the Bill of Rights does not apply.⁹ Adults are not forced to sacrifice their wellbeing to any degree in order to help tribes survive.

Reflecting Congress's prioritization of tribal preservation over a child's wellbeing, the ICWA's scope is grossly excessive, treating many children as "Indian children" who have little or no connection with any Native American tribe,¹⁰ little or nothing to gain by being handed over to tribal authorities or tribal members, and much to lose by being branded Indian children. Congress itself did not actually try to identify the particular children who would bear this label.¹¹ That would be quite difficult to accomplish in any rational fashion. Imagine how difficult it would be to identify which children a new law would cover, if, for example, Congress decided to enact special legislation for

⁶ See *id.* § 1912(e)-(f) ("No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, 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.").

⁷ *Id.* § 1901(2)-(3); see also *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 566 (S.C. 2012) ("[T]he clear purpose of the ICWA . . . is to preserve American Indian culture by retaining its children within the tribe."), *rev'd*, 133 S. Ct. 2552 (2013).

⁸ See Fernanda Santos, *Some Find Path to Navajo Roots Through Mormon Church*, N.Y. TIMES, Oct. 31, 2013, at A12 (describing the pervasive "dysfunction and despair" of the Navajo reservation in Arizona); Williams, *supra* note 3, at N14.

⁹ See *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (stating that the governmental powers of Indian tribes "existed prior to the Constitution" and "are not operated upon by" constitutional rights provisions).

¹⁰ 25 U.S.C. § 1903(4).

¹¹ See *id.*; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.").

parentage and protection of black children – the Black Child Welfare Act – relegating jurisdiction over those children to a separate court system run by black adults. Instead Congress empowered tribes to decide which children are tribe members and ensured that federal and state law would give the tribes presumptive right to possession of whichever children they chose.¹²

*Adoptive Couple v. Baby Girl*¹³ illustrates the absurdity of this federal effort to channel nonautonomous persons into tribal communities. A Latina woman in Oklahoma (Birth Mother) was impregnated by her boyfriend (Biological Father), who is 125/128 non-Native American (most likely ninety-eight percent European-American). Neither Birth Mother nor Biological Father ever lived in a Native American community. After their relationship dissolved and Biological Father appeared indifferent to the child, Birth Mother placed the child (Veronica) for adoption with a married couple with an Italian surname.¹⁴ Yet solely because Veronica's 3/256 Cherokee ancestry satisfied the Cherokee Nation's self-set criteria for membership, the South Carolina courts undid the adoption placement, ordering Veronica's transfer to Biological Father after she spent over two years with and formed an attachment to Adoptive Couple.¹⁵ The South Carolina courts believed Congress had empowered the tribe to make her legally an Indian child, one of theirs, no longer a citizen of South Carolina with the statutory and constitutional rights she enjoyed there.¹⁶

No reasonable person could maintain that the tiny Native American element of Veronica's ancestry altered the calculus of her best interests with regard to who would raise her and where she would grow up. It is astonishing how many academics, advocacy groups, and politicians sympathetic to Native American tribes have characterized Veronica as a Native American child and made absurd claims about her supposed need for connection to "her cultural heritage."¹⁷ For all anyone knows, Veronica is twenty-five percent Italian! In

¹² See 25 U.S.C. §§ 1903(4), 1915(a)-(d).

¹³ *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013).

¹⁴ Allyson Bird, *Birth Mom Explains Adoption Decision*, POST & COURIER, Mar. 23, 2012, <http://www.postandcourier.com/article/20120104/PC1602/301049905> (identifying "Matt and Melanie Capobianco" as the child's adoptive parents).

¹⁵ *Adoptive Couple*, 133 S. Ct. at 2559 ("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.").

¹⁶ Cf. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (holding that certain human beings, though born in the United States, were, because of their ancestry, not citizens within the meaning of the U.S. Constitution and therefore not entitled to the rights, privileges, and immunities that the Constitution bestows on individuals), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

¹⁷ See, e.g., Brief for the ACLU & the ACLU of South Carolina as Amici Curiae Supporting Respondents, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12-399), 2013 WL 1326960, at *31-32; Brief for the National Latina/o Psychological Ass'n et al. as Amici Curiae Supporting Respondents, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12-399), 2013 WL 1279460, at *15-28; Brief for the Hamline University School of Law Child Advocacy Clinic

fact, we know that a far greater part of her ancestry is Hispanic.¹⁸ Yet these academics, advocates, and politicians express no concern that Veronica would be deprived of her Hispanic cultural heritage if she grows up in a Cherokee community, or about her potential loss of connection to the other elements of her ancestry that constitute a far greater percentage of her biological makeup than her Cherokee ancestry. What if eight generations ago, 13 of her 256 biological ancestors were Polish? Will she suffer from the absence of something important if she is not steeped in Polish culture? This absurdity that the ICWA creates, and that many Native American sympathizers blithely accept as sacred truth, would be comical if it did not cause tragedies like two-year-old children being taken away from their parents.

The Supreme Court's decision in *Adoptive Couple* is a welcome corrective, imposing a limiting interpretation that will spare many children from lingering in foster care, from being wrenched away from foster or adoptive parents with whom they have begun to form an attachment, and from forced residence on a reservation when they have little or no connection to the tribe that wants to claim them. It is not, however, a complete corrective, because the law will still capture many children who cannot rationally be characterized as Native American. If Veronica had spent any time living with Biological Father, it seems the Court would have ruled that the ICWA applied to her.¹⁹ Despite the limits of the Court's decision, *Adoptive Couple* will have a significant impact. Veronica's case presents the common scenario in which a mother places a child for adoption with non-Indians immediately after birth. From now on, state courts will decide such children's fate based on what is best for those children and without regard to the potential impact on Native American tribes.

as Amicus Curiae Supporting Respondents, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12-399), 2013 WL 1247775, at *4-5.

¹⁸ *Adoptive Couple*, 133 S. Ct. at 2558.

¹⁹ *Id.* at 2562 (“Under our reading of § 1912(f), Biological Father should not have been able to invoke § 1912(f) in this case, because he had never had legal or physical custody of Baby Girl as of the time of the adoption proceedings.”).