CASE COMMENT: *ADOPTIVE COUPLE V. BABY GIRL*, 133 S. CT. 2552 (2013)

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This Comment discusses the 2013 United States Supreme Court case of Adoptive Couple v. Baby Girl*, which involved an unwed Cherokee father's (Petitioner) journey to regaining custody of his child, after erroneously granting consent of the child's adoption to a non-Indian couple. This Comment further discusses the issues that arise within transracial adoptions, including "cultural authenticity" of adoptive parents and the significance of providing cultural outlets for a transracial adopted child. This Comment will also address the lack of constitutional protection for unwed fathers in family cases, specifically the "sub-class" of unwed fathers to which the Petitioner belongs. Generally, this Comment examines the intersectionality of race relations, racial identity and how society has become socialized to view fathers against mothers.*

I. INTRODUCTION

> "[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[1]

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[1] INDIAN CHILD WELFARE ACT, 25 U.S.C. §1901(3) (2016).

What is a "family?"

There is a rich and complex history of the United States Supreme Court's discourse on this particular question. Its past treatment of the liberty of familial relationships has varied from the privileges a parent is constitutionally afforded to exert over their child,[2] to discussing the visitation and custody rights of grandparents.[3] Ultimately, the underlying message is that the right to private and family life is rooted in a relatively fundamental doctrinal basis that comports with the United States Constitution.[4]

It has grown increasingly evident over the past several years that the social landscape of the United States has exponentially evolved, specifically in reference to how the family unit is defined. There are families with single parents, children raised by older siblings, and, at present, there are also recent developments regarding the rights of same-sex couples to build their family units.[5]

The experiences of adoptive families, especially cross-cultural adoptive families, have greatly enriched this dialogue of the ever-evolving family household. There are approximately two million adopted children in the United States, of which nearly seventeen percent are adopted into cross-cultural families.[6] Cross-cultural, cross-border and transracial adoptions have increased dramatically over the past twenty years.[7] *Adoptive Couple v. Baby Girl* brought the complex intersectionality of child custody laws and race relations to a national stage,[8] causing lines to be drawn in the sand between grassroots American Indian rights activists supporting tribal law against the Justices of the United States Supreme Court and their interpretation of tribal law. In reaching its holding, the Court goes beyond a surface discussion of the adoption system, centering its analysis on the statutory definition of a "parent" and whether Petitioner, the non-custodial biological father, had standing to object to Baby Girl's adoption.

This case highlighted the need for a closer examination on how the law dictating cross-cultural adoptions and parent-child relationships in the American Indian community are managed. This case also

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[2] Planned Parenthood v. Danforth, 428 U.S. 52, 72 (1976) (discussing a parent's right to veto a child's right to have an abortion); Parham v. J. R., 442 U.S. 584, 603 (1979) (addressing the parental role in committing a child for treatment of mental illness).

[3] Troxel v. Granville, 530 U.S. 57, 78 (2000) (Souter, J., concurrence).

[4] Courts have purported that the U.S. Constitution "protects the sanctity of the family precisely because the institutionof the family is deeply rooted in the Nation's history and tradition." Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977). *See* Skinner v. State of Oklahoma, 316 U.S. 535, 541 (1942) (discussing how the integrity of the family unit is rooted in protection afforded by the Equal Protection Clause of the Fourteenth Amendment); Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (discussing how the integrity of the family unit is also afforded protection by the Ninth Amendment) (Goldberg, J., concurrence).

[5] Baskin v. Bogan, 766 F.3d 648, 656–57 (7th Cir. 2014); *see* U.S. v. Windsor, 133 S.Ct. 2675, 2693–94 (2014) (noting the denial of spousal deduction to the surviving spouse of a same-sex couple); *see generally* Obergefell v. Hodges, 135 S.Ct. 1732 (2015) (discussing the constitutionality of legalizing of same-sex marriage).

[6] AMY COUGHLIN & CARYN ABRAMOWITZ, CROSS-CULTURAL ADOPTION: HOW TO ANSWER QUESTIONS FROM FAMILY, FRIENDS, AND COMMUNITY xii (2004).

[7] *Id.*

[8] *See* Aura Bogado, *The Cherokee Nation's Baby Girl Goes on Trial*, COLORLINES (Apr. 24, 2013 9:56 AM), http://www.colorlines.com/articles/cherokee-nations-baby-girl-goes-trial (noting that the Indian Child Welfare Act must be viewed with an understanding "that Natives hold a unique relationship with the federal government, one that is based on tribal sovereignty"); Abigail Perkiss, *Supreme Court's Upcoming Child-Custody Decision: The Baby Veronica Case*, YAHOO! NEWS (Mar. 4, 2013, 11:00 AM), http://news.yahoo.com/supreme-court-upcoming-child-custody-decision-baby-veronica-110206332--politics.html; Andrew Cohen, *Indian Affairs, Adoption, and Race: The Baby Veronica Case Comes to Washington*, THE ATLANTIC (Apr. 12, 2013), http://www.theatlantic.com/national/archive/2013/04/indian-affairs-adoption-and-race-the-baby-veronica-case-comes-to-washington/274758/; Josh Voorhees, *The Long, Complicated "Baby Veronica" Saga Comes to an Unsatisfying End*, SLATE (July 17, 2013, 8:54 PM), http://www.slate.com/blogs/the_slatest/2013/07/17/adoptive_couple_vs_baby_girl_south_carolina_court_sends_baby_veronica_back.html (illustrating the national media coverage of *Adoptive Couple v. Baby Girl*).

brought to attention the significance of preserving the racial and tribal ties of a community whose cultural heritage is growing increasingly insular, and also how the socialization of our view of fathers' and mothers' value in the family unit has arguably influenced how the adversarial system adjudicates family cases.

II. SUMMARY OF CASE

The Petitioner in *Adoptive Couple* was a man of Cherokee descent, whose girlfriend of primarily Hispanic descent (hereinafter referred to as "Birth Mother") gave birth to a baby girl (hereinafter referred to as "Baby Girl").[9] For the duration of the pregnancy (and the subsequent four months after Baby Girl's birth), Petitioner did not provide any financial assistance to Birth Mother.[10] The relationship between the two parties ended while the Birth Mother was still pregnant with Baby Girl.[11] Birth Mother proposed that Petitioner either pay child support for Baby Girl or relinquish his parental rights.[12] Petitioner agreed to relinquish his parental rights, and Birth Mother placed Baby Girl for adoption, using a private agency that selected a married couple that happened to be White.[13]

During the adoption proceedings, however, Petitioner asserted that he did not consent to the adoption.[14] Rather, he insisted that at the time he signed the legal papers, he was under the impression that he was waiving his parental rights in favor of Birth Mother, not that he was consenting to adoption proceedings of Baby Girl commenced by the adoptive couple (hereinafter referred to as "Adoptive Couple").[15] Petitioner subsequently filed suit to stay the adoption proceedings and sought custody of Baby Girl stating that he did not consent to Baby Girl's adoption.[16] Moreover, Petitioner took a paternity test that confirmed that he was the biological father of Baby Girl.[17]

The facts of this case were initially adjudicated under the South Carolina Family Court, which denied the adoption and required Adoptive Couple to transfer Baby Girl back to Petitioner.[18] The South Carolina Supreme Court subsequently affirmed the decision.[19]

A. South Carolina Supreme Court Decision

The South Carolina Supreme Court affirmed the decision of the South Carolina Family Court, denying the adoption and awarding Petitioner custody of Baby Girl.[20] This decision was largely rooted in the State Supreme Court's interpretation of the Indian Child Welfare Act.

The Indian Child Welfare Act (hereinafter referred to as "ICWA") was:

> [t]he product of rising concern in the mid-1970's 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.[21]

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[9] Adoptive Couple v. Baby Girl, 133 S.Ct. 2552, 2558 (2013).
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.* at 2559.
[17] *Id.*
[18] Adoptive Couple v. Baby Girl, 731 S.E.2d 550, 552 (S.C. 2012).
[19] *Id.*
[20] *Id.*
[21] Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989).

The State Supreme Court cited to evidence that twenty-five to thirty-five percent of American Indian children had been placed in adoptive families or foster care, and that approximately ninety percent of those placements were with non-Indian families.[22] Many of these removals of American Indian children from their natural parents were employed with no foundation to intelligently evaluate the "cultural and social premises underlying Indian home life and childrearing."[23] Congress subsequently employed the Indian Child Welfare Act, whose purpose was to put an end to the "culturally inappropriate removal of Indian children."[24]

The State Supreme Court first determined that application of the ICWA to the case was appropriate for two reasons: first, the case involved custody proceedings relating to an American Indian child,[25] and second, Petitioner qualified as a "parent" within the parameters of the ICWA. The ICWA defines a "parent" as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom."[26] This definition does not expressly mention an unwed father whose paternity has yet to be formally acknowledged or established.[27] The State Supreme Court found Petitioner to qualify as a "parent" within the parameters of the ICWA, contending that Petitioner *acknowledged* paternity through initiating court proceedings once he understood that Baby Girl had been put up for adoption.[28] Furthermore, Petitioner's biological paternity had been verified earlier by a DNA test during state court proceedings.[29] Petitioner therefore was a "parent" defined by the ICWA and as held by the State Supreme Court.[30]

Furthermore, the State Supreme Court's decision to deny Baby Girl's adoption was based on two distinct provisions of the ICWA: §1912(d) and §1912(f). The State Supreme Court held that these two sections barred the termination of Petitioner's parental rights.[31] Section 1912(d) stated that in order to effectively terminate parental rights under the ICWA, the party seeking termination has to demonstrate to the Court that "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."[32] The State Supreme Court held that Adoptive Couple failed to show that such efforts had been made and therefore had not satisfied this provision of the ICWA.

Section 1912(f) of the ICWA requires an expert finding "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."[33] Adoptive Couple erroneously interpreted the statute so that it applies to their specific set of facts, purporting that removing Baby Girl from their custody would be emotionally traumatic, thus qualifying as emotional damage that the ICWA statutorily requires.[34] The State Supreme Court countered Adoptive Couple's argument, stating that the plain language of the statute requires a showing that the "transferee parent's" legal and physical custody of an American Indian child would lead to her emotional and physical damage, not that the *removal from adoptive parents* would lead to such damage.[35] Consequently, the State Supreme Court held that Adoptive Couple failed to meet their burden of proving that Petitioner's custody of Baby Girl would result in

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[22] *Adoptive Couple*, 731 S.E.2d at 557.
[23] *Id.*
[24] *Id.*
[25] *Id.* at 556.
[26] *Id.* at 560.
[27] *Id.*
[28] *Id.*
[29] *Adoptive Couple*, 133 S.Ct. at 2573.
[30] *Adoptive Couple*, 731 S.E.2d at 560.
[31] *Adoptive Couple*, 133 S.Ct. at 2559.
[32] *Adoptive Couple*, 731 S.E.2d at 562.
[33] *Id.* at 562-63.
[34] *Id.* at 564.
[35] *Id.*

her subsequent physical and emotional harm.[36] Due to the aforementioned reasons, the South Carolina Supreme Court denied the adoption of Baby Girl and transferred custody to Petitioner.

Adoptive Couple appealed this holding, causing the case to reach the United States Supreme Court, which ultimately reversed South Carolina's decision.

B. United States Supreme Court Decision

The Court's reversal of the South Carolina Supreme Court decision—presented by Justice Samuel Alito—was based in the analysis of two above-mentioned provisions of the ICWA: §1912(d) and §1912(f). Justice Alito's stark, textualist approach to interpreting these provisions is quite evident here because he used Webster's Dictionary and the American Heritage Dictionary as the framework to analyze the statutory text.[37] Section 1912(d) provides that anyone seeking to terminate the parental rights to an Indian child must first demonstrate remedial efforts made to prevent the breakup of the American Indian family.[38] He argued that the term "breakup" refers in the context of *Adoptive Couple* to the "discontinuance of a relationship"[39] or a "disruption, separation into parts, disintegration"[40] of an entity. In other words, the term "breakup" must be prefaced with evidence that there was an example of a familial link or affiliation to begin with. Justice Alito stated that, when an Indian parent abandons its child prior to birth and never subsequently obtains legal or physical custody of that child, no relationship is ever solidified.[41] Therefore, any contention made by the South Carolina court that would suggest any discontinuance or disruption of Petitioner's familial link to Baby Girl would be obsolete as there was no relationship to begin with. Justice Alito concluded, therefore, that Section 1912(d) is not applicable in this case as Petitioner never had custody of Baby Girl and never established parental rights.[42] Accordingly, Adoptive Couple was not in error for failing to comport with the statutory text requiring remedial services to be provided to Petitioner.

Justice Alito proceeded by turning towards Section 1912(f) of the ICWA. This particular provision of the ICWA provides that no termination of parental rights shall be ordered in the absence of a finding that the continued custody of the child by the Indian custodian "is likely to result in serious emotional or physical damage to the child."[43]

Justice Alito placed emphasis on the qualifier "*continued*" when discussing custody, supplementing his opinion regarding Section 1912(d). He noted that the phrase "continued custody" refers to custody of a child that a parent already possesses or has possessed at some point in the past.[44] With this contextual explanation in place, Justice Alito re-emphasized the significance of Petitioner's absence of a familial connection with Baby Girl. If "continued" custody refers to some form of pre-existing custodial relationship between a child and its custodian,[45] Justice Alito concluded that Petitioner once more fails to exemplify any standing in his case, as he never had possession, access or custody of Baby Girl prior to his initiating this suit against her adoptive parents.[46]

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[36] *Id.* at 563.

[37] *Id.* at 11.

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

[39] *Id.* at 2555.

[40] *Id.*

[41] *Id.* at 2562.

[42] *Id.* But when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody, there is no "relationship" that would be "discontinue[ed]–and no "effective entity" that would have "end[ed]–by the termination of the Indian parent's rights. In such a situation, the "breakup of the Indian family" has long since occurred, and §1912(d) is inapplicable. *Id.* at 2555.

[43] *Id.* at 2556.

[44] *Id.* at 2555.

[45] *Id.* at 2560.

[46] *See id.* (noting that "§1912(f) does not apply in cases where the Indian parent *never* had custody of the Indian child").

His opinion contends that a reasonable understanding of the ICWA's purpose makes it evidently clear as to why Petitioner would not be eligible for standing against Adoptive Couple and why the South Carolina Supreme Court's decision was in error: its fundamental purpose is to preserve the standards for the removal of Indian children from their families,[47] not to *create* parental rights for noncustodial or unwed parents who otherwise would not possess such rights as the South Carolina Supreme Court suggests.[48]

Justice Alito further argued that §§1912(d) and 1912(f) should be interpreted harmoniously, emphasizing the significance of the "continued custody" requirement.[49] Additionally, he reiterated that the ICWA was enacted to preserve the cultural ties of the Indian community.[50] His concern, however, was that Petitioner utilized this culturally-sensitive purpose to his advantage as a "trump card" to override the decision of Biological Mother's decision to proceed with adoption of Baby Girl. Permitting Petitioner to frame his argument narrowly on this issue would ratify the decision of any Indian parent to intervene in the adoption of his child by non-Indians, even in the case when that Indian parent had no previous relationship with the child or showed any desire to have a relationship with the child.[51]

III. DISCUSSION

A. Narrow Interpretation of "Parent"

The initial reason why the Court's analysis is flawed is due to the rather hollow interpretation of the term "parent" as defined by the bounds of the Indian Child Welfare Act. This distorted interpretation is the Court's principal rationale for its holding. The Court's understanding of who qualifies as a "parent" is far too narrow, qualifying individuals as "parents" only if their behavior comports with having continued custody of the child or children subject to the suit. Section 1912(f) of the ICWA purports that there can be no termination of parental rights without a finding 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."[52]

The Court examines "continued custody" as a qualifier for an individual to have standing as a "parent" under the statutory language of the ICWA. This examination, however, is far too constricting. The Court contends that the phrase "continued custody" refers to custody that a parent presently has or has had at some point in the past.[53] Hence, their analysis concludes that an Indian parent who *never* had custody of an Indian child would not qualify as a parent.[54]

Applying this analysis to the facts of the case presents the idea that Petitioner would not have standing as a "parent" because he never had custody of Baby Girl either before or for the duration of the case. However, through this narrow examination, the Court, whether deliberately or not, created a separate class of individuals who should be afforded substantive protections under the ICWA.

There is a uniform understanding that the definition of "parent" bestows certain procedural and fundamental rights.[55] Illogically defining a parent by his or her ability to have *custody* of the child in question unfairly creates a sub-class of individuals who would not be recognized as parents under the law and

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[47] *Id.* at 2563.

[48] The Court's interpretation of the ICWA was not meant to create parental rights for Indian parents, but rather to protect "Indian parents who are already part of an Indian family." *Id.*

[49] *Id.*

[50] *Id.* at 2565.

[51] *Id.* at 2565–66.

[52] *Id.* at 2557–58.

[53] *Id.* at 2560.

[54] *Id.*

[55] *Id.* at 2575.

therefore would not be afforded the procedural and substantive protections that come with being a parent such as directing the child's religious upbringing or making decisions about the child's safety, health and welfare.[56]

Individuals who may not have physical custody or even legal custody of their child—such as those who may pay child support, or only have visitation rights—are still very much parents.[57] Such individuals may not have continued custody of the child in question as Justice Alito discusses, but still very much contribute to the child's well-being and emotional development. By the Court's logic, even *these* individuals should not be recognized as parents under the law.

The function of the U.S. Supreme Court is to interpret the law,[58] as they do here. But by interpreting the law as narrowly as the Court does in this case, the Court comes dangerously close to taking over the legislative role of defining legal terms and concepts by reformulating "parent" to really mean "custodial parent." By the Court's reasoning, the ICWA only protects the rights of a specific class of parents. The implicit argument is that Congress never intended to protect an Indian parent whose parental rights—for whatever reason—may have been terminated and who subsequently would make efforts through the courts to reinstate them.

B. Narrow Understanding of ICWA's Purpose

The other reason behind the Court's flawed opinion is their dismissive examination of the ICWA's central purpose: to preserve tribal familial ties.[59] The Court argues that their holding comports with this purpose.[60] However, this assertion is faulty considering the Court's narrow analysis of the ICWA's cultural and tribal-preserving objectives, coupled with its failure to understand the larger social context of the significance of fulfilling these objectives. Justice Alito insists that the Court's interpretation of the ICWA is congruent with the statute's intention to preserve cultural and social ties between children and their respective tribal communities.[61]

Historically, the judicial community has utilized various methods of statutory interpretation. Textualism and plain meaning are the two most prominent methods used by the Court in presenting its opinion.[62] Scholars, however, have proposed additional methods of interpreting statutory text such as utilizing "public values" as a backdrop in conducting analyses.[63] "Public values" refers to the fundamental

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[56] *See, e.g.*,TEX. FAM. CODE ANN. §151.001 (discussing the duties and rights of a parent, including the right to the care and control of the child, the right to represent the child in legal action, the right to direct the religious and moral training of the child and the right to determine the child's primary residence); CAL. FAM. CODE ANN. §3006 (noting that parents have the right to make decisions relating to the child's health and safety); MINN. FAM. CODE ANN. §518.17(3)(a)(1) (addressing a parent's right of access to information regarding the child's health and dental insurance, school reports and any other important documents).

[57] *See, e.g.*, *id.* at §§153.014–.015, 153.191–193 (noting the parental rights afforded to non-custodial or possessory parents including visitation); IND. FAM. CODE ANN. §31-17-4-1(a) (discussing the visitation rights of a non-custodial parent); *see also* S.C. FAM. CODE ANN. §63-15-250(A) (addressing a non-custodial parent's right to communicate with his child via telephone or electronically).

[58] U.S. CONST. art. III, §§ 1–2.

[59] Adoptive Couple v. Baby Girl, 133 S.Ct. 2552, 2553 (2013).

[60] *Id.* at 2555.

[61] *Id.*

[62] *See id.* at 2555, 2560, 2567 (noting Justice Alito's reference to the American Heritage Dictionary, Webster's Third New International Dictionary and the Oxford Dictionary in interpreting the statutory language of the ICWA).

[63] *See* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1007 (1989) (illuminating that "an important role of constitutional interpretation is to articulate and enforce 'public values' for our nation"); *see id.* at 1007–08 ("Public values . . . are legal norms and principles that form underlying precepts for our polity—background norms that contribute to and result from the moral development of our political community. Public values appeal to conceptions of justice and the common good . . . .").

commandments that underline our civic system—notions of common good and social justice that further the desires of the collective, rather than one particular group or individual.[64] The appeal of public values in statutory interpretation is two-pronged: first, such values may foster greater congruity in statutory law, and second, may update said statutes so that they better reflect modern public policy.[65] Such a method would be more appropriate to employ in the instant case (more so than the blunt quasi-textualist approach the Court utilizes) as it involves sensitive issues (race and family relations) that generally require scrutiny to be conducted with a more considerate, diplomatic approach.

Simply put, the Court's opinion exemplifies its lack of understanding of how and why the collective historical experience of the American Indian community provides it with the heightened necessity to protect and preserve its cultural ties arguably more so in contrast to other communities of color in the United States. The ICWA does not only protect the interests of Indian parents, but of the respective Indian tribe as a whole.[66] Justice Sotomayor's dissenting opinion emphasizes the significance of linking generational ties to sustain a tribal community's longevity by noting the adverse impact of placing Indian children in homes with no connection to tribal communities.[67]

The elephant in the discussion of transracial and cross-cultural adoptions is the issue of the "cultural authenticity" in selecting adoptive parents for these types of adoptions.[68] If, for example, Latinos are considered best suited to parent Latino children, the natural implication is that a non-Latino couple would be *less* suited to parent Latino children.[69] This is based on the assumption that a Latino couple would have a better comprehension of that child's racial experiences.[70]

The above-mentioned assertion does not equate to an absolute condemnation of cross-cultural adoptions. Such a suggestion would exponentially impede on the fundamental right to build a family unit, particularly for those individuals who may have to look to alternative resources.[71] However, for those who decide to move forward in a cross-cultural adoption, it is essential to reiterate the significance of the adopted child having close ties to his cultural community and preserving his racial identity.[72]

The African American,[73] Asian American[74] and Latino[75] experience have become so immersed into the American cultural Diaspora, that a child of color who may be adopted by a Caucasian family would easily

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[64] *Id.* at 1008.

[65] *Id.* at 1009.

[66] *Adoptive Couple*, 133 S.Ct. at 2561 ("the purpose of the [ICWA] is to . . . promote the stability and security of Indian tribes[.]").

[67] *Id.*

[68] Kevin Noble Maillard, *Parental Ratification: Legal Manifestations of Cultural Authenticity in Cross-Racial Adoptions*, 28 AM. INDIAN L. REV. 107, 120 (2003).

[69] *Id.*

[70] *Id.*

[71] *See* Meagan R. Marold, *Ice, Ice, Baby! The Division of Frozen Embryos at the Time of Divorce*, 25 HASTINGS WOMEN'S L.J. 179, 179–80 (2014) (discussing the numerous medical options available to families suffering with infertility, such as in vitro fertilization); *see also Fast Facts About Infertility*, RESOLVE: NAT'L INFERTILITY ASS'N, http://www.resolve.org/about/fast-facts-about-fertility.html?referrer=https://www.google.com/ (last updated Apr. 19, 2015) (noting that approximately twelve percent of married women "have trouble getting pregnant or sustaining a pregnancy").

[72] Deborah Beasley, 12 Ways to Honor the Culture, Ethnicity, and Heritage of Your Adopted Child, HOW DOES YOUR CHILD GROW—UNDERSTANDING YOUR CHILD FROM THE INSIDE OUT! (May 20, 2010), https://howdoesyourchildgrow.wordpress.com/2010/05/20/12-ways-to-honor-the-culture-ethnicity-and-heritage-of-your-adopted-child/#comments (listing ways to "fill the gap between the culture and ethnicity of [an adoptee child, her] adoptive parents and the development of their own ethnic and cultural identities").

[73] *See* EDWARD J. BLUM & JASON R. YOUNG, THE SOULS OF W.E.B. DUBOIS: NEW ESSAYS AND REFLECTIONS, 56 (Mercer University Press 2009) (proposing if "America [would] have been America without her Negro people?");

have access to resources that would create cultural ties between that child and her racial community. If, say, a non-African American couple were to adopt an African American child, that child would have access to many resources that would help create and sustain ties to his African American heritage such as attending a predominantly African American church or joining a cultural center. These might be somewhat superficial methods to fostering a link between the child and his community, but doing do would at least create a vehicle in providing cultural solidarity for that child.[76] These ties may be somewhat surfaced, but they at least create a bridge in which that child can develop multiple relationships with other African American, Asian American and Latino individuals. An American Indian child, however, would have a very different experience from his counterparts.

The culture and traditional practices of these tribal communities may be preserved, but have been preserved in *isolation* by the inherent nature of their living circumstances. The majority of American Indian individuals experience very insular living conditions by residing on reservations, which were historically put in place for the purpose of isolating the American Indian community from European-populated areas.[77] Both Indigenous and non-Indigenous communities around the country make efforts to present these cultural practices to a larger audience, by hosting festivals or curating museums that center on the American Indian experience; but these sorts of resources would not aid an adopted American Indian child in developing any form of solidarity with his heritage.

To further explain, these types of resources and programs, although educational, are somewhat superficial, designed to have the culture observed from a "fish-tank," quasi-tourist perspective rather than to generating an extensive understanding of the tribal community. This is not the fault of those who coordinate

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Gregory Rodriguez, *The Nation: Mexican-Americans; Forging a New Vision of America's Melting Pot*, NY TIMES (Feb. 11, 2001), http://www.nytimes.com/2001/02/11/weekinreview/the-nation-mexican-americans-forging-a-new-vision-of-america-s-melting-pot.html (noting one of the many significant ways the African American community contributed to the multicultural movement, notably through "its key moral impetus" in advocating for racial integration during the Civil Rights Movement); Americas Cultural Roots Traced to Enslaved African Ancestors, NAT'L GEOGRAPHIC (Oct. 28, 2010), http://news.nationalgeographic.com/news/2003/02/0205_030205_jubilee4_2.html (noting the African imprint on American cuisine, musical expression, even various forms of oral literature).

[74] *See generally* Leah Binkovitz, *From the Civil War to Civil Rights: The Many Ways Asian Americans Have Shaped the Country*, SMITHSONIAN.COM (May 3, 2013), http://www.smithsonianmag.com/smithsonian-institution/from-the-civil-war-to-civil-rights-the-many-ways-asian-americans-have-shaped-the-country-49762201/?no-ist (discussing Asian influence on American culture).

[75] *See* BECOMING AMERICAN: BEYOND THE MELTING POT, U.S. DEP'T OF STATE 7, http://photos.state.gov/libraries/korea/49271/march_2011/en_0111_immigration.pdf (discussing how immigrants from Latin America have helped transform "the American pluralistic culture"); *see also* Rodriguez, *supra* note 73.

[76] Darron T. Smith, *Raising Culturally Responsive Black Children in White Adoptive Homes: Uncovering the importance of Code-Switching in the Battlefield of Racial Identity Development*, HUFFPOST BLACK VOICES (Jan. 29, 2013, 12:08 P.M.), http://www.huffingtonpost.com/darron-t-smith-phd/adopted-black-children_b_2550751.html (last updated Mar. 30, 2013). Non-Black adoptive parents have many resources to bolster a Black adoptive child's to be culturally response by "mov[ing] into more racially integrated communities, attend an African American church and other social functions, and finally, increase friendships with more African Americans of equal status." *Id.*

[77] THE DAWES ACT OF 1887, 25 U.S.C. §349 (2016). The Dawes Act was a precursor to the "reservation system," first employed in 1887 to survey American Indian tribal land and apportion it to individual Indians. *See Life on the Reservations*, U.S. HISTORY: PRE-COLUMBIAN TO THE NEW MILLENNIUM, http://www.ushistory.org/us/40d.asp (last visited June 30, 2015) (noting that every "Native American family was offered 160 acres of tribal land to own outright"). Gary D. Sandefur, AMERICAN INDIAN RESERVATIONS: THE FIRST UNDERCLASS AREAS?, INST. FOR RESEARCH FOR POVERTY, 37–38, http://www.irp.wisc.edu/publications/focus/pdfs/foc121f.pdf (discussing the genesis of "reservations" in the United States, and its present function as both a reservoir to preserve Indigenous "sovereignty and cultural traditions" as well as a reminder of "Euro-American colonialism"). *Indian Reservations*, U.S. HISTORY IN CONTEXT, http://ic.galegroup.com/ic/uhic/ReferenceDetailsPage/ReferenceDetailsWindow?zid=2a87fa28f20f1e66b5f663e76873fd8c&action=2&catId=&documentId=GALE%7CCX3401802046&userGroupName=lnoca_hawken&jsid=f44511ddfece4faafab082109e34a539 (last visited November 10, 2015).

such programs, but because the cultural experiences of American Indians are packaged and presented in such a surfaced way, it would be difficult to properly develop a fortified relationship between the culture and the child who descends from that culture. Conversely, an African American child adopted by non-African American parents would have more substantive and cultural outlets, as his heritage has not been as historically secluded from that of his American Indian counterpart.

The Court's opinion makes it evident that it did not have a firm grasp of the historical context behind the ICWA's purpose. The opinion also demonstrates why, on a larger scale, cross-cultural adoptions must be handled conscientiously for the sake of the child's emotional and mental development and to facilitate the development, appreciation and identification with their culture.[78] The significance of an adoptee's relationship to her heritage is incontrovertible[79] and it is evident that the Court did not have an understanding of this when presenting its opinion.[80]

Furthermore, there are several times throughout the Court's opinion that Baby Girl is referred to repeatedly and unnecessarily as being only 3/256 Cherokee.[81] It is perhaps done unintentionally, but by doing so, the Court qualifies her Indian ancestry as insignificant, which informs their opinion that Baby Girl has no true link to her American Indian roots. This dismissive attitude of the racial identification of the child, coupled with Justice Alito's "trump card" reference[82] suggests that Petitioner is utilizing "race" as a commodity to obtain his parental rights. Not only is this suggestion off-putting and insensitive, but it also speaks to the broader issue of White privilege when these Supreme Court opinions are developed.

To suggest that a member of an oppressed social group would use his social identity to his "advantage" to override a legal decision or obtain whatever it is that he wants, adds to the collective rhetoric wrongfully impeded on oppressed communities—for example, communities of color, the queer community, women, the immigrant community—suggesting that they would exploit the racist, sexist or classist attitudes of others to obtain their desires. It paints the Petitioner's decision-making with a broad brush, dismissing the fact that he made his decision based on a number of relevant factors, including the fact that he never consented to the adoption of Baby Girl. However, the Court wrongfully minimizes Petitioner's decision-making to "playing the race card."

C. Larger Sociological View of Fathers v. Mothers

Family cases such as these bring to attention of the larger discussion of deciphering the constitutional framework of fathers' rights. As a society we have arguably been conditioned to view mothers very differently than fathers.[83] Some scholars suggest that this socialization has influenced the court system in

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[78] Beasley, *supra* note 72; *see generally*, Delma L. Francis, *Successful Transracial Adoptions Require Cross-Cultural Senstivity*, MINNPOST (Nov. 20, 2007), https://www.minnpost.com/arts-culture/2007/11/successful-transracial-adoptions-require-cross-cultural-sensitivity (outlining a "cross-cultural" approach in engaging with transracial adoptees).

[79] *Id.*

[80] *Supra* III.B.

[81] *Adoptive Couple*, 133 S. Ct. at 2556, 2559, 2566.

[82] *Id.* at 2565.

[83] *See Mothering vs. Fathering?*, WORD CHOICES (Feb. 26, 2015), http://wordchoicesoprfhs.blogspot.com/2015/02/mothering-vs-fathering.html (describing how the "concept of 'mothering' has become entirely female . . . that there is an increased separation between men and women because of their social location . . . "); *id.* (suggesting that "there is a reason why mothers and fathers have continued to maintain their current roles. . . . [t]here are certain things that only a mother can give to a child, just like there are certain things that only a father can give to a child."); Jennifer Senior, *Why Mom's Time is Different from Dad's Time*, WALL ST. J. (Jan. 24, 2014, 11:32 p.m.), http://www.wsj.com/articles/SB10001424052702304757004579335053525792432 (addressing how mothers are still primarily responsible for household even though they work roughly the same amount of hours as fathers); Sally S. Tusa, *Mom v. Dad: Whose Doing the Work?*, PARENTING, http://www.parenting.com/article/mom-vs-dad-whos-doing-the-work (discussing the arguably contrasting parenting skills between fathers and mothers in the household); John Piper, *Do Mothers and Fathers Have Different Roles in Parenting?*, Desiring God (Oct. 3, 2008),

yielding decisions that favor mothers over fathers, particularly in conservatorship cases.[84] This framework is not present in the instant case as Petitioner is seeking conservatorship from the adoptive parents rather than the biological mother of the child. Nevertheless, *Adoptive Couple v. Baby Girl* is still a very important case to add to the discourse about fathers' rights in familial cases—particularly in the discussion of the statutory definition of what a "parent" is and what the definition subsequently entails.

Stanley v. Illinois was the paramount U.S. Supreme Court case to first recognize fathers as their own class in need of constitutional protection underneath the Equal Protection Clause of the Fourteenth Amendment.[85] The Plaintiff was an unwed father who brought suit against the State of Illinois, challenging a statute that did not afford him the opportunity to a hearing on his parental fitness before his children were taken as wards of the State after the death of their mother.[86] The Court framed the Plaintiff's interest by contending that "[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."[87] The *Stanley* Court ultimately held that denying Plaintiff such a hearing when unwed mothers and divorced parents were afforded such hearing violated the Equal Protection Clause of the Fourteenth Amendment.[88] This case parallels with *Adoptive Couple*, as the definition of "parent" was also discussed by the Court as one of the more integral factors in determining the parental rights of the unwed father.[89]

This was the genesis of a series of cases litigated in the U.S. Supreme Court that brought to attention the rights of fathers in an institution that arguably had categorized their rights as expendable. *Caban v. Mohammed*,[90] *Quilloin v. Walcott*,[91] and *Michael H. v. Gerald D.*[92] were all post-*Stanley* decisions that added new voices to the constitutional rights of fathers on national platform.

However, the integral difference between the prominent *Stanley* case and *Adoptive Couple* is that the Plaintiff in *Stanley* had custody of his children *before* their mother's death, whereas the *Adoptive Couple* Petitioner never had custody of Baby Girl prior to the filing of his suit. *Stanley* affirmed the constitutional

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http://www.desiringgod.org/interviews/do-fathers-and-mothers-have-different-roles-in-parenting (suggesting that it is the father's responsibility to carry out discipline of children, not the mother's).

[84] Caban v. Mohammed, 441 U.S. 380, 381 (1979) ("Maternal and paternal roles are not invariably different in importance. Even if unwed mothers as a class were closer than unwed fathers to their newborn infants, the generalization concerning parent-child relations would become less acceptable to support legislative distinctions as the child's age increased."); *see* Kara L. Boucher & Ruthann M. Macolini, *The Parental Rights of Unwed Fathers: A Developmental Perspective*, 20 N.C. CENT. L.J. 45, 45 (1992) ("Courts treat unwed fathers inconsistently across jurisdictions, generally focusing on the existence and quality of the relationship between the unwed father and his child without consulting relevant social science literature.").

[85] Stanley v. Illinois, 405 U.S. 645, 658—59, 92 S. Ct. 1208 (1972). Stanley's claim in the state courts and here is that failure to afford him a hearing on his parental qualifications while extending it to other parents denied him equal protection of the laws […] Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. [D]enying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause. *Id.*

[86] *Id.* at 646.

[87] *Id.* at 651.

[88] *Id.* at 658–59.

[89] *Id.* at 664–65.

[90] *See* Caban, 441 U.S. at 380 (finding that a New York statute that permitted a child's unwed mother to withhold her consent and foreclose that child's adoption, but did not allow a child's unwed father to do the same was violative of the father's constitutional rights).

[91] *See* Quilloin v. Walcott, 434 U.S. 246, 246 (1978) (noting Supreme Court's holding that "[e]qual protection principles do not require that [natural father's] authority to veto an adoption be measured by the same standard as is applied to a divorced father").

[92] *See* Michael H. v. Gerald D., 491 U.S. 110, 159 (1989) (discussing that "fathers who have participated in raising their illegitimate children and have developed a relationship with them have constitutionally protected parental rights").

protection of unwed fathers' parental rights, but left unanswered the question of the parental rights of unwed fathers who did not raise their children. This absence of protection for this particular class of fathers is glaringly evident in the opinion presented by the *Adoptive Couple* Court, who freely interpreted "parent" in such a narrow way that unwed fathers without custody had no means of having their parental rights statutorily or constitutionally protected. If parameters were established to afford legislative protection for this class of fathers in a post-*Stanley* world, the holding for the *Adoptive Couple* Petitioner may have had a different outcome.

Speculation as to whether the case would have been held differently if Petitioner had been the biological mother rather than the father of Baby Girl may appear obsolete. Such theorizing, however, is important as the *Adoptive Couple* holding adds to the narrative of fathers' parental rights and the issue of their Equal Protection, particularly for the "sub-class" of parents that Justice Alito delineates in the Court's opinion. The *Adoptive Couple* Court fails to recognize the importance of the *biological* connection[93] between a father and his child as it affords him an opportunity to develop a relationship with that child, embrace some measure of responsibility for that child and subsequently "enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development."[94]

IV. CONCLUSION

The Court's opinion is constructed far too narrowly, grounding the majority of its analysis on the lone, imprecise phrase "continued custody."[95] Placing so much interpretive weight on this one phrase, coupled with the Court's distorted reading of the term "parent" within the meaning of the ICWA, is why the Court's opinion is fundamentally flawed.

Additionally, the Court's opinion also reflects a lack of understanding of the larger contextual issues rooted in the Petitioner's case regarding race relations and the rights of unwed fathers. The Court insists that its opinion aligns with the ICWA's fundamental purpose of conserving tribal and cultural ties between the American Indian community and its children.[96] Their persistence that their finding is harmonious with the statute's purpose further illustrates their ignorance of race relations and racial identity. This is exemplified primarily by qualifying Baby Girl's racial identification as extraneous, but also by its off-putting language alluding to Petitioner "race-baiting" as a way to challenge the holding, and finally by suggesting that the true test of equal protection for Petitioner as an unwed father is rooted in a legal relationship rather than a biological one.[97]

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[93] Lehr v. Robertson, 463 U.S. 248, 262 (1983).

[94] *Id.*

[95] *Adoptive Couple*, 133 S.Ct. at 2557 (2013).

[96] *Id.* at 2555, 2561.

[97] *See id.* at 2555 (illuminating the Court's contention that Petitioner did not qualify as a parent under the ICWA "because he had never had legal or physical custody of Baby Girl at the time of the adoption proceedings").