INTRODUCTION

The Indian Child Welfare Act (ICWA) is under fire; challengers argue that it interferes with adoptions and violates the Constitution by doing so. The current crop of lawsuits is an outgrowth of a 2012 case in which the Supreme Court heard its second-ever challenge to the law. While the Court sidestepped the most far-reaching anti-ICWA arguments, the majority opinion evidenced a deep skepticism about the law. This skepticism led the Court to narrow the law’s application so that it didn’t cover the family involved, and the decision seemed to invite further challenges to the law.

In the case, an unmarried father sought to stop his ex-fiancée from terminating his parental rights and allowing their daughter to be adopted by an educated, middle class, white couple. The father argued that the law applied to his situation because he is an enrolled member of the Cherokee Nation.¹ A cursory reading of the law’s text

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suggests that he is correct. If applied, it would have required adherence to stricter procedural requirements than state law would have imposed before the adoption could be finalized.

Under the ICWA, a parent’s rights cannot be involuntarily terminated in the absence of notice to the parents and the tribe, appointed counsel, a showing that active efforts were made to prevent the breakup of an Indian family, and a finding that continued custody by the parent will harm the child. The father in this case wanted custody of his daughter, and there was no suggestion made at any time that he caused her harm. Application of the ICWA would not have prohibited the adoption outright, but the presence of a stable and loving birth parent who wanted to keep his child would have prevented her adoption under the law. This outcome makes sense. In the absence of harm, prospective adoptive parents are not typically permitted to keep a child, even one they love and have cared for, over the objections of one of her birth parents. And yet, if the father were not an Indian, state law would have allowed his daughter to be given to another family despite his

2. The law defines “Indian child” as any person under the age of 18 who is a member of an Indian tribe or a biological child of a tribal member who is herself eligible for membership. 25 U.S.C. § 1903(4) (2012). The father is a Cherokee citizen, and his daughter is also eligible for citizenship under Cherokee law. See Bethany R. Berger, In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl, 67 Fl A. L. REV. 295, 329 (2015). The law defines a parent as “any biological parent or parents of an Indian child,” but does not include an unwed father “where paternity has not been acknowledged or established.” 25 U.S.C. § 1903(9). No argument was made in this case that the father did not acknowledge paternity. See Berger, supra note 2, at 312. When he found out about the pregnancy, he asked his fiancée to move up the wedding date. Id. at 301. After the breakup, he tried to contact her throughout the pregnancy, and he and his family tried to send her gifts and money. Id. at 302. He was named in adoption paperwork, and he was asked to sign a form indicating his consent to the adoption before it proceeded. See id. at 306.

3. In this Article, we use the term “Indian” when referring to a legally-defined class of people, such as those children and families covered by the ICWA. When referring more broadly to the history of displacement of Native children, we use the terms “Native” and “indigenous” interchangeably.

4. 25 U.S.C. § 1912. Even in cases of voluntary termination, consent is not valid under the ICWA unless it is executed in writing before a judge and the judge certifies that the terms and consequences were fully explained to the parent. Id. § 1913.

5. See Adoptive Couple, 133 S. Ct. at 2558-59.
presence and over his objections.\textsuperscript{6} Because the Court determined that the ICWA didn’t apply, this is precisely what happened in the case.\textsuperscript{7}

Why didn’t the Court apply the ICWA?\textsuperscript{8} One answer is that the Court did not seem to believe or value the fact that the father and daughter are Cherokee Indians. Resisting the idea that their Cherokee status should matter in an adoption decision, it found a way not to apply the law that made it matter. In her article “In the Name of the Child: Race, Gender, and Economics in \textit{Adoptive Couple v. Baby Girl},” Bethany R. Berger deftly deconstructs the arguments,\textsuperscript{9} the majority opinion,\textsuperscript{10} and the back stories of the attorneys\textsuperscript{11} and the Justices\textsuperscript{12} to reveal the way that anxieties about race and adherence to the modern version of colorblindness led the Court to “do violence” to the law’s text.\textsuperscript{13} These racial anxieties ran deep. The very first sentence of Justice Alito’s opinion describes the baby as “1.2% (3/256) Cherokee.”\textsuperscript{14} By framing the baby’s connection to the Cherokee Nation only in terms of fractional ancestry, Justice Alito revealed the Court’s fundamental investment in the idea that race (defined by the Court as equivalent to ancestry) is insignificant to identity. As Justice Roberts asked during oral argument, is it “one drop of blood that triggers all these extraordinary rights?”\textsuperscript{15}

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  \item \textsuperscript{6} See \textit{id.} at 2559.
  \item \textsuperscript{7} See \textit{id.} at 2560.
  \item \textsuperscript{8} The South Carolina Supreme Court held that the ICWA did apply and that no sufficient showing of harm justified involuntary termination of parental rights. \textit{See id.} at 2559.
  \item \textsuperscript{9} Berger, \textit{supra} note 2, at 325-27.
  \item \textsuperscript{10} \textit{Id.} at 327.
  \item \textsuperscript{11} \textit{Id.} at 310-11; see also Andrew Cohen, \textit{Indian Affairs, Adoption, and Race: The Baby Veronica Case Comes to Washington}, \textsl{Atlantic} (Apr. 12, 2013), https://www.theatlantic.com/national/archive/2013/04/indian-affairs-adoption-and-race-the-baby-veronica-case-comes-to-washington/274758/ [https://perma.cc/CZZ7-M4XW] (describing Paul Clement, the attorney for the guardian ad litem, as seeking to “undermine Congressional authority over the ICWA and all federal Indian law” and linking his arguments in the \textit{Adoptive Couple} case to his representation of a non-Indian gaming client engaged in a legal challenge to Indian gaming rights in Massachusetts).
  \item \textsuperscript{12} Berger, \textit{supra} note 2, at 330.
  \item \textsuperscript{13} \textit{Id.} at 318.
  \item \textsuperscript{14} \textit{Adoptive Couple v. Baby Girl}, 133 S. Ct. 2552, 2556 (2013).
  \item \textsuperscript{15} Berger, \textit{supra} note 2, at 327. The Court’s skepticism regarding the ICWA is also apparent in the opinion’s suggestion that application of the law would disadvantage Indian children by making [non-Indian] people reluctant to adopt them, \textit{Adoptive Couple}, 133 S. Ct. at 2564-65; Berger, \textit{supra} note 2, at 319 (explaining that this assertion is “implausible”), and its reference to the father’s argument as an “ICWA trump card [played] at the eleventh hour,” \textit{Adoptive Couple},
\end{itemize}
The best (and most often given) response to this is that Indianness is not race. That is, it’s not reducible to a biological classification. Professor Berger makes this point eloquently, pointing out that that the ICWA should have applied because of the child’s eligibility for citizenship (and the father’s citizenship) in the Cherokee Nation. Her “quantum of Cherokee blood was irrelevant to her citizenship,” and so, contrary to the Court’s repeated insistence, her fractional ancestry “was not the reason her father had rights to object to her adoption.” Indian tribes have a different relationship

133 S. Ct. at 2565. Its view regarding the insignificance of the father’s Cherokee status is made clear by the opinion’s wholesale dismissal of any aspect of the father’s Cherokee identity outside of ancestry, see Berger, supra note 2, at 332-33 (detailing the father’s family’s political, cultural, and geographic integration into the Cherokee Nation, all ignored by the Court), and in the way the majority opinion fails to engage Mississippi Band of Choctaw v. Holyfield, 490 U.S. 30 (1989), the Court’s only ICWA precedent and a case that strongly underscored the importance of the connection between Indian tribes and their children. The Court’s dismissive treatment of the family’s Cherokee status was no doubt fueled by the attitudes of others involved in the case. See, e.g., Brief for Respondent Birth Father at 13, Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013) (No. 12-399), (quoting guardian ad litem’s finding that the advantages of “having Native American heritage ‘include[ed] free lunches and free medical care and that they did have their little get togethers and their little dances’”).

16. Berger, supra note 2, at 335. In legal terms, Indianness is a political classification that hinges here on citizenship (or eligibility for citizenship) in a federally recognized tribe, not a racial classification. Id. In our view, it makes no sense to claim, as some do, that Indianness has nothing at all to do with race and racism. It is equally a mistake, however, to suggest that the specter of race renders it less of a political status in the sense that the term is used to denote a particular legal history in which the federal government has treated Indian tribes as separate nations and has assumed unique powers to legislate with respect to tribes and indigenous people. See Addie C. Rolnick, The Promise of Mancari: Indian Political Rights as Racial Remedy, 86 N.Y.U. L. REV. 958, 1026 (2011).

17. Berger, supra note 2, at 329.

18. Id. Unlike many other tribes, the Cherokee Nation does not require members to have any specific fraction of ancestry; members must instead demonstrate descent from a person on the historical tribal rolls. CONST. OF THE CHEROKEE NATION, art. IV. The fact that the Nation does not rely on “blood quantum,” a concept that has been criticized for injecting racial requirements into tribal citizenship, see, e.g., Kimberly TallBear, DNA, Blood, and Racializing the Tribe, 18 WICAZO SA REV. 81, 88-93 (2003) (summarizing critiques), provided little comfort to the Court. Instead, the Court seemed to view the Nation’s citizenship law as problematic because it extends citizenship to people whom the Court viewed as having an insignificant fraction of Cherokee ancestry. See Adoptive Couple, 133 S. Ct. at 2565; see also Transcript of Oral Argument, Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (No. 12-399) (quoting Alito, J.) (inquiring whether Indian status under the Act might be open to anyone who could establish a “slight” degree of Indian ancestry). For a discussion of the paradox faced by American Indian tribal
with the federal government than any other group, a relationship based largely on treaties and recognition of nationhood. They are recognized as governments and their courts generally exercise jurisdiction over family and child welfare matters involving their children. That is why the baby’s Cherokee-ness mattered in a way that her Hispanic-ness (on her mother’s side) did not.¹⁹

While correct, this response has not placated critics. After the decision, the Department of the Interior issued new guidelines in 2015²⁰ intended to strengthen the force of the ICWA in state courts. Two new lawsuits were immediately filed challenging the constitutionality of the ICWA and the guidelines.²¹ A third was filed

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¹⁹. See Palmore v. Sidoti, 466 U.S. 429, 433-34 (1984) (prohibiting express consideration of a step-parent’s non-white race as a dispositive factor in a custody dispute between divorced parents). Even though disputes about custody are very different from adoption proceedings, courts’ attitudes about race filter through all decisions that involve questions about the best interests of children, including custody, placement, termination, and adoption.


²¹. See generally Class Action Complaint, A.D. v. Washburn, No. 2:15-cv-01259-DKD (D. Ariz. July 6, 2015). The complaint in A.D. v. Washburn was dismissed without prejudice for lack of standing. Order at 19, No. 2:15-cv-01259-PHX-NVW (D. Ariz. Mar. 16, 2017) (“Any true injury to any child or interested adult can be addressed in the state court proceeding itself, based on actual facts before the court, not on hypothetical concerns. If any Plaintiffs encounter future real harm in their own proceedings, the judge in their own case can discern the rules of decision. They do not have standing to have this Court pre-adjudicate for state court judges how to rule on facts that may arise and that may be governed by statutes or guidelines that this Court may think invalid.”). The plaintiffs have appealed that decision. Plaintiff’s Notice of Appeal, A.D., No. 2:15-cv-01259-PHX-NVW; Appellant’s Opening Brief, A.D. v. Washburn, No. 17-15839 (9th Cir. Sept. 1, 2017). The plaintiffs in National Council for Adoption v. Jewell challenged the 2015 guidelines on administrative and constitutional grounds. 156 F. Supp. 3d 727, 730, 732 (E.D. Va. 2015). The district court denied plaintiff’s motion for summary judgment on the administrative claims and dismissed the constitutional challenges, Memorandum Opinion and Order at 10-14, 156 F. Supp. 3d 727, finding that the plaintiffs had not identified any authority to support their equal protection claim. The plaintiffs appealed, and the Fourth Circuit later vacated the district court’s judgment because the Bureau withdrew the 2015 guidelines and replaced them with
on the eve of this Article’s completion. Where the opinion in *Adoptive Couple* raised questions about Indianness, race, and adoption but decided the case on statutory grounds, these lawsuits directly attack the ICWA as an unconstitutional race-based law.

We agree that the Court improperly inserted a discussion of race into its consideration of an Indian statute, but the subsequent suits illustrate the folly in dismissing the Court’s racial anxieties too quickly. In this Article, we seek to engage the Court’s fears directly. For, although Indians are not identically situated to other racial minority groups, the harm that the ICWA was designed to counteract was a racial harm in the sense that the work of severing Native children from tribal communities was part of an effort to eradicate those communities (defined by law and social practice as racially inferior) by absorbing them via interracial marriage and cultural reprogramming. As Professor Berger explains, the practice of removing Indian children from their communities was directly linked to both the racialization of Indians and colonial efforts to acquire indigenous land and dominate indigenous peoples. The ICWA is a

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See Bureau of Indian Aff., supra note 20, at 6.


23. See, e.g., Class Action Complaint, supra note 21, ¶ 25. In *A.D. v. Washburn*, the complaint frames the ICWA as unconstitutional because it allegedly distinguishes among groups of children because of race:

Children with Indian ancestry, however, are still living in the era of *Plessy v. Ferguson*. Alone among American children, their adoption and foster care placements are determined not in accord with their best interests but by their ethnicity, as a result of a well-intentioned but profoundly flawed and unconstitutional federal law, the Indian Child Welfare Act.

Id. ¶ 3. The National Council for Adoption complaint states, “ICWA violates the due process and equal protection rights of ‘Indian children’ as well.” Complaint ¶ 7, *National Council for Adoption*, 156 F. Supp. 3d 727 (No. 1:15-cv-00675-GBL-MSN). See also Amended Complaint, supra note 22, ¶ 307 (alleging that the ICWA’s placement provision “impose[s] a naked preference for ‘Indian families’ over families of any other race” and that the law’s “classification of Indians and non-Indians, and its discrimination against non-Indians, is based on race and ancestry and violates the constitutional guarantee of equal protection”).


25. See Berger, supra note 2, at 330-32.
legal intervention intended to counteract this process. While it is not a race-based statute, it seems that the Court’s skepticism of such an intervention was race-based, and the new lawsuits seek to mine this skepticism. It is this fear that we hope to interrogate: What is so terrifying about a law that strongly protects minority families, works to ensure that minority children remain in their communities, and recognizes the rights of communities to control decisions regarding the placement of their children?

I. DISPLACED CHILDREN

The Indian Child Welfare Act was a response to a particularly chilling history in which generations of Native children were removed from their homes and communities. Sometimes removal occurred with the express intent of annihilating tribal culture and literally handing Native children over to white institutions to be remade.26 Such was the goal of federally run boarding schools in the late 1800s and early 1900s.27 Native people have stories of children being kidnapped from their families and taken far away to a boarding school, where they were physically and mentally abused.28 But

26. Id. at 350-51 (citing COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 (Nell Jessup Newton et al. eds., 2012)).

27. See generally MARGARET CONNELL SZASZ, EDUCATION AND THE AMERICAN INDIAN 106 (1999) (discussing educational programs as a vehicle for assimilation of Indians); K. TSIANINA LOMAWAIMA, THEY CALLED IT PRAIRIE LIGHT: THE STORY OF CHILOCCO INDIAN SCHOOL 3, 5 (1994) (relating Indian experience of assimilation through boarding school program); see also R.H. Pratt, The Advantages of Mingling Indians with Whites, in PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION 45, 46 (Isabel C. Barrows ed., 1892) (explaining the goal of the boarding schools to “[k]ill the Indian . . . and save the man”).

people also tell stories of parents voluntarily sending their children to
school, and of positive educational experiences at some of the
schools.29 Like anything else, it is a complicated history that is not
easily cabined in a voluntary versus forced dichotomy.

This express assimilation campaign was eventually rejected,
but Native children continued to be removed from tribal
communities via state child welfare workers, foster care, and
adoption.30 Removal was no longer animated by a malicious intent to
annihilate indigenous cultures and undermine group social and
political cohesion. However, it was still premised on the assumption
that Native families and, more pointedly, Native communities were
dysfunctional. By this logic of dysfunction, leaving children in the
custody of their parents or even their extended families and
communities would work a harm so severe that child welfare
intervention was needed. The bar for showing that removal was
necessary was quite low.31 Children were removed based on vague

litigants’ claims of physical abuse and neglect in lawsuit against government-
sponsored, church-run boarding schools).

29.  See generally, e.g., POLINGAYS QOYAWAYMA & VADA F. CARLSON, NO
TURNING BACK: A TRUE ACCOUNT OF A HOPI INDIAN GIRL’S STRUGGLE TO BRIDGE
THE GAP BETWEEN THE WORLD OF HER PEOPLE AND THE WORLD OF THE WHITE MAN
(1964); LOUISE UDALL, ME AND MINE: THE LIFE STORY OF HELEN SEKAQUAPTEWA
(1969); see also LOMAWAIMA, supra note 27, at 25-26 (recounting stories of positive
experiences despite repressive institutional practices at Chilocco in the 1920s and
1930s); Native Americans File Lawsuit Against Boarding School Abuses, supra note
28 (quoting one attendee from the 1940s who “value[d] the religious training I got
there as well as the academics”).

30. Berger, supra note 2, at 350 (citing LAURA BRIGGS, SOMEBODY’S
CHILDREN: THE POLITICS OF TRANSRACIAL AND TRANSNATIONAL ADOPTION 7-8
(2012)) (“American Indian children, like African American children, became targets
for child welfare removals after they began receiving state-financed welfare
assistance in large numbers.”).

(“Congress was especially critical of the general standards employed by the child
welfare system in determining the necessity of intervention. One survey cited found
that ninety-nine percent of the cases involving the removal of Indian children from
their families were predicated ‘on such vague grounds as “neglect” or “social
deprivation” and on allegations of the emotional damage the children were subjected
to by living with their parents.’ Congress was altogether dismayed at the lack of
understanding non-Indian child welfare workers had of Indian family society.”).
Systematic removal of Indian children is not only a relic of the past; South Dakota
child welfare officials were recently found to have adopted procedures facilitating
easy removal of Indian children from their homes, violating the ICWA and denying
Indian parents their rights to due process prior to removal. See Oglala Sioux Tribe v.
Van Hunnik, 100 F. Supp. 3d 749, 754, 773 (D.S.D. 2015) (granting partial
allegations of neglect or deprivation with very little evidence to back them up except for misunderstandings of tribal cultures, devaluation of extended family structures, and racist assumptions about Native people.32

Native children are not the only children who have been involuntarily removed from their parents and communities at disproportionately high rates, nor the only population subjected to wholesale transfer out of their communities and into “good” white homes. Although various minority groups have experienced the removal and/or placement of their children in ways unique to each group and historical moment, there are strong thematic ties in the discourse surrounding childhood displacement that bear exploring. African American and some Latinx children, especially poor children, are removed from their homes and placed in foster care at higher rates than other children.33 Analyzing the statistics in


32. Gallagher, supra note 31, at 85 n.27 (quoting H.R. REP. NO. 95-1386, 10 (1978)) (“Indian communities are often shocked to learn that parents they regard as excellent caregivers have been judged unfit by non-Indian social workers . . . . For example, the dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights. Because in some communities the social workers have, in a sense, become a part of the extended family, parents will sometimes turn to the welfare department for temporary care of their children, failing to realize that their action is perceived quite differently by non-Indians.”); see also Margaret Howard, Transracial Adoption: Analysis of the Best Interests Standard, 59 Notre Dame L. Rev. 503, 520 (1984) (describing the role of biases and misunderstandings in facilitating removal of Indian children).

conjunction with evidence of case-by-case mishandling and mistreatment by child welfare agencies, Dorothy Roberts argues, would lead a person to “conclude that [child welfare] is an institution designed to monitor, regulate, and punish poor families of color.”^{34}

A generation of adoptees from Korea and China are coming of age in their adoptive homes,^{35} most of them with white families and most living in the United States. A younger set of children, those who lived through the 2012 Haiti earthquake, may have a similar experience in twenty years.^{36} Like some of the children sent to Indian

Kin (1974) (arguing that social welfare policies are based on stereotypes of black families as dysfunctional and self destructive and challenging those stereotypes by documenting kinship and child-rearing networks in a poor black community).

34. Roberts, Race and Class, supra note 33.


[T]hose ends [placing them in middle class U.S. homes] do not justify the means. Rushing children out of familiar environments in a crisis can worsen their trauma . . . . Expediting adoptions in countries like Haiti – where it is not uncommon for people to turn children over to orphanages for money – violates children’s rights and leaves them at risk of trafficking.

Id. In contrast, adoption advocates expressed concern about temporarily housing children in-country, arguing that “attempts to locate the children’s biological relatives [would] deny tens of thousands of needy Haitian orphans the opportunity to
boarding schools, some of these children were “voluntarily” placed—some the children of single mothers with few options, and others the children of families facing such a lack of resources that they believed their children would be better off raised by strangers in another country.

Unlike Korean and Chinese adoptees, and perhaps even more than American Indian children, African American children are not transferred into white families so much as they languish in the purgatory of foster care because they are viewed as the least desirable in the racial hierarchy of adoption. As Roberts explains,

Most white children who enter the system are permitted to stay with their families, avoiding the emotional damage and physical risks of foster care.


be placed in loving homes.” Id. See also KATHRYN JOYCE, THE CHILD CATCHERS: RESCUE, TRAFFICKING, AND THE NEW GOSPEL OF ADOPTION 3-5 (2013) (detailling the media framing of Haiti as “a sort of animal kingdom from which children must be rescued, lest . . . ‘they won’t even grow up to be human’”). Joyce’s account of the post-disaster Haitian adoptions reveals that the efforts to remove children by foreign adoption agencies and Haitian orphanages, citing the children’s best interests, were occurring at the same time U.S. government officials made it clear that adult Haitian refugees were unwelcome in the United States. See id.

37. Berger, supra note 2, at 332 (“[A]doption of Indian children into non-Indian homes has a particularly honored and accepted place in American culture . . . [and] the notion of easy and beneficial assimilation of Indian children into white culture helps fuel the desirability of Indian children as adoptees.”). While Professor Berger asserts that Indian children are treated just like white children in terms of racial desirability in adoptions, id. at 322, the reality is likely more complicated. Foster care data suggests Native American children are over-represented in foster care. See infra note 38.

38. Mariagiovanna Baccara et al., Gender and Racial Biases: Evidence from Child Adoption 2, 23-24 (CESifo, Working Paper No. 2921, 2010) (showing that the group which was least preferred by prospective adoptive parents was African American boys). See also U.S. DEP’T OF HEALTH & HUMAN SERVS., RECENT DEMOGRAPHIC TRENDS IN FOSTER CARE, DATA BRIEF 2013-1 (2013) (showing that despite a marked decline of 47% of African American children in foster care since 2002, they still represent more than one-quarter of all children in foster care; after 2009, Native American children have the highest rates of representation in foster care). According to the same report, between 2002 and 2012, all groups experienced a decrease in the number of children placed in foster care, but children who identified as two or more races experienced an increase. Id. We note that, although the report shows a net decrease in the number of foster children overall, this pattern also likely reflects a change in demographic categories used to count children in the system. Adoptive parents’ racial preferences drive the adoption market domestically and internationally. See Kim H. Pearson, Displaced Mothers, Absent & Unnatural Fathers: LGBT Transracial Adoption, 19 Mich. J. Gender & L. 149, 159, 165-67 (2012) (describing the shift away from domestic foster care adoptions towards international adoption because of shortages of white adoptive children, making children believed to be capable of passing as white preferable).
placement, while most black children are taken away from theirs. And once removed from their homes, black children remain in foster care longer, are moved more often, receive fewer services, and are less likely to be either returned home or adopted than any other children.39

II. RACE IN FAMILY LAW

Race is uniquely devalued in family law proceedings, especially adoptions.40 While many other aspects of a child’s identity development may be important factors in whether the law is willing to intervene in parenting decisions, custody, or placement, race is a third rail. As a comparison, courts attend to a child’s religious identity, usually by considering the parents’ religious beliefs and traditions, even if such attentiveness may violate one of the parent’s constitutional rights. Another point of comparison is sexual orientation; in some states parents are prohibited from forcing their

42. See, e.g., Johns v. Johns, 918 S.W.2d 728, 729-30 (Ark. Ct. App. 1996). Father required to take children to religious services during his visitation time. Id. at 729. Order to take children to mother’s choice of religious services was not a violation of father’s free exercise of religion because he had no other plan in place. Id. See also Jennifer Ann Drobac, For the Sake of the Children: Court Consideration of Religion in Child Custody Cases, 50 Stan. L. Rev. 1609, 1611 (1998) (a survey of over fifty cases showed that courts “consider the religious beliefs and practices of parents in determining custody of children”); Ann Laquer Estin, Embracing Tradition: Pluralism in American Family Law, 63 Md. L. Rev. 540, 541 (2004) (calling for the development of a pluralist approach to family law in response to increasing diversity in religious beliefs).
gay children to attend conversion therapy. Courts and legislatures make the connection between LGBT children’s poor health outcomes, including high depression, substance abuse, and suicide rates and attempts to change their sexual identity development. The law is willing to regulate parenting—normally considered a private sphere—to protect the child from the harm that will come from seeking to change that child’s sexual identity. In contrast, the law does not similarly attend to children’s racial identity development, assuming that a child’s racial identity is malleable, fungible, and of less significance to a child’s innate sense of self than sexual orientation. This is the case despite having data that suggest some transracially adopted children have negative outcomes linked to poor racial identity development and severed connections to their communities.

What would it look like for the law to value and protect a child’s racial identity? The National Association of Black Social Workers (NABSW) proposed legislation in the late 1980s and early 1990s modeled on the ICWA that would have required states to give “due consideration” to a child’s race and established a placement preference first for a blood relative and, if that were not available, for

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a same-race family. The proposed law would not have prohibited transracial adoption; it would have required state agencies to consider race and, like the ICWA, would have required them to follow the established placement preferences absent “good cause to the contrary.” By establishing a legal preference for placement of minority children in same-race adoptive homes, the law would have forced the child welfare system to acknowledge and attend to the importance of racial identity development in children, and it would have attached legal value to African American and other minority families and communities, the historical devaluation of which has led to the breakup of many families. The law never passed at the federal level, although at least one state adopted similar legislation.

We do not intend here to advocate for passage of the NABSW bill. The proposed legislation had many flaws, and we do not


48. See id. The placement preferences approximated those in the ICWA. Compare id. (giving preference first to a blood relative and then second to “the same racial or ethnic heritage of the child”), with 25 U.S.C. § 1915(a) (2012) (giving preference to a member of the child’s family first, to members of the same Indian tribe second, and to other Indian families third). The proposed bill would have authorize[d] child-placing agencies to give preference, “in the absence of good cause to the contrary” to placing a child with a person or persons related by blood to the child, or, if that would be detrimental to the child or a relative is not available, a family with the same racial or ethnic heritage of the child.


50. On its face, the proposal had drafting and coverage problems. It employed the vague term “minority ethnic heritage” to describe the children it would apply to, it failed to set forth guidelines for dealing with mixed-race children,
necessarily believe that a bill modeled on the ICWA is workable or desirable where the child’s community does not coincide with a government entity. We want to focus instead on the response: Congress passed two separate laws specifically prohibiting states from weighing race heavily in placement and adoption decisions. The Multi-Ethnic Placement Act prohibits states from denying a person the right to become a foster or adoptive parent “solely on the basis of the race” of the child involved and from “delaying or denying placement” of any child “solely on the basis of . . . race.” Although it permits states to “consider [a child’s] cultural, ethnic, or racial background,” race is singled out as a factor that cannot be important enough to sustain a placement decision. The Interethnic it enshrined a particular version of the interplay between racial and religious identity preservation, and it failed to address the issues presented by “consensual” international adoptions. Nat’l Ass’n Black Soc. Workers, supra note 47, at 6. The proposal’s more fundamental flaw, however, is that it was built around two main tools: procedural barriers to removal and placement preferences. Although these were the two provisions at issue in Adoptive Couple, they are arguably the least important provisions of the ICWA, which also provides for tribal court jurisdiction over child welfare matters involving Indian children. 25 U.S.C. § 1911. It is the jurisdictional provisions that have had the greatest impact, giving tribal communities control over what happens to thousands of Indian children, including children for whom removal from home was necessary because of actual or potential harm. For a more thoughtful proposal that would raise the standards for removal of African American children along with other interventions targeted to the specific circumstances of African American children and families, see Jessica Dixon, The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases, 10 Berkeley J. Afr.-Am. L. & Pol’y 109, 125-30 (2008).

51. Inter-country adoptions, such as the adoption of Haitian children by U.S. families, might present a better parallel to American Indian children because the Haitian government has a role in decisions regarding removal and placement of Haitian children. Similarly, the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention) is a system of central government authorities complying with agreed-upon guidelines in the protection of children who are removed from home countries and placed in Convention-participating countries. The Convention, like the ICWA, does not ban adoption; instead, it creates child-centric guidelines as procedural protections to value the child’s interests in her connection to her community.


53. Id. § 5115a(a)(1)(B).

54. Id. § 5115a(a)(2).

55. The Department of Health and Human Services has reported that state agencies sometimes avoid all consideration of a child’s race out of fear of violating
Placement Amendments strengthened the MEPA’s prohibitions by imposing penalties for violating it.56

By prohibiting placement decisions based on race, the MEPA stops state child welfare agencies from assigning legal value to race. To the extent that race can be considered, it is viewed as only an individualized aspect of personality development, an idea that has been conceived thinly, even stereotypically, by courts that do address it.57 Like the case law governing the use of race in higher education admission standards, the MEPA ensures that race can only be considered as a personal quality and, even then, as one of many factors.58 At the same time, it prohibits state actors from establishing a legal regime that makes it more difficult to break up minority families and, if families are disrupted, redirects minority children back into their families and communities wherever possible. In other words, the MEPA prevents states from making a structural intervention to correct for the historical devaluation of minority families and communities that led directly to the transfer of so many children out of them.59 It also forecloses consideration of the way


57. See Roberts, Race and Class, supra note 33.


59. This is also consistent with the cases holding that the goal of undoing generalized past racism is not a sufficiently compelling interest to permit use of racial classifications in the present. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); id. at 239 (Scalia, J., concurring); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989) (plurality opinion); id. at 505-06 (majority opinion); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90, 307-10 (1978). See Cheryl I. Harris, Whiteness as Property, 106 HARV. L. REV. 1707, 1767 (1993) (explaining that the Court’s rejection of race-conscious remedial measures in affirmative action cases “is based on [its] chronic refusal to dismantle the institutional protection of benefits for whites”).
that *white* race has operated as a clear plus factor in determining which families were considered the most ideal adoptive placements and how proximity to whiteness has defined a child’s desirability in the marketplace of adoption. The problem is not special consideration of race; it is that race is the only thing that can’t be accorded primary importance, despite its central role in the history of child welfare and adoption.

The ICWA is an exception to this rule in that it is a legislative regime that changes the procedures governing the breakup of Indian families and the removal of Indian children from Indian communities. It forces state courts to acknowledge a child’s Indianness, putting the responsibility on the child welfare system to determine whether someone is an “Indian child” and to contact the child’s tribe. It establishes a preference for tribal control over the proceedings by requiring states to transfer jurisdiction to the tribal court unless the tribe does not or cannot accept it. When the case remains in state court, it forces the actors (from caseworkers to judges) to carefully justify removal and placement outside the child’s community by adding heightened requirements for removal and termination and establishing a hierarchy of placement preferences.

60. The ICWA can be justified even under the Court’s narrow approach to racial remedies under several theories. The primary approach is that Indian classifications are political ones that depend on a person’s relationship to a recognized tribe, so Indian classifications are not governed by the law on racial classifications. Even acknowledging that Indian legal status often overlaps with Indian racial status, tribes have clear membership rules, recognized leadership, and federally acknowledged legal institutions that make them uniquely able to exercise authority over removal and adoption proceedings. Furthermore, even if the Court were to apply strict scrutiny to Indian classifications, the harm that the ICWA was meant to counteract was so direct, specific, and well documented that a racial classification could permissibly be employed to remedy it. See Carole Goldberg, *What’s Race Got to Do With It?: The Story of Morton v. Mancari*, in *Race Law Stories* 237, 238, 257 (Rachel F. Moran & Devon Wayne Carbado eds., 2008); Carole Goldberg, *American Indians and “Preferential” Treatment*, 49 U.C.L.A. L. Rev. 943, 955-58 (2002); Rolnick, *supra* note 16, at 995-96 (explaining different legal theories for upholding Indian legislation); see also Matthew L.M. Fletcher, *ICWA and the Commerce Clause*, in *Facing the Future: The Indian Child Welfare Act* 28-29 (Matthew L.M. Fletcher, Wenona T. Singel & Kathryn E. Fort eds., 2009) (arguing that the Indian Commerce Clause provides a constitutional basis for the ICWA).


62. *Id.* § 1911(b).

63. *Id.* §§ 1912, 1913.

64. *Id.* § 1915 (preference for placement with members of the child’s family, members of the child’s tribe, and other Indian families, in that order).
Most importantly, the ICWA recognizes that the relationship between tribe and child is not simply one of personal identity or self-esteem, but is in fact the key to the continued existence of the tribe, which is in turn a fundamental aspect of the child’s “best interests.”

It bears reiterating that the ICWA’s intervention is structural, not substantive. It doesn’t require a particular outcome, and none of its barriers are absolute. A child can still be removed, and a parent’s rights terminated, if there is a showing that the child faces serious harm. A court can depart from the placement preference for good cause. Instead, it tilts the process in favor of keeping the child in the tribal community to counteract the strong historical devaluation of those communities and the corresponding advantage accorded to white parents, which resulted in Indian parents (and tribes) losing so many children. Indeed, many mainstream child welfare organizations

65. Id. § 1902. The Court’s only prior ICWA decision, Holyfield, underscored this aspect of the law by holding that the tribe’s interest (and the child’s future interest in its connection to the tribe) could outweigh an Indian parent’s fully informed attempt to circumvent its provisions. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 49 (1989). The Adoptive Couple opinion ignores this aspect of the law, characterizing it as nothing more than a law protecting the individual interests of Indian parents. Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2561 (2013).

66. Laura Briggs, Why Feminists Should Care About the Baby Veronica Case, INDIAN COUNTRY TODAY (Aug. 16, 2013), https://indiancountrymedianetwork.com/news/native-news/why-feminists-should-care-about-the-baby-veronica-case/ [https://perma.cc/CM4L-S53Y] (“ICWA does not determine who gets a child. It determines jurisdiction – who gets to decide who gets a child . . . ICWA does not provide special ‘racial entitlements’; it treats (some) American Indians as having a distinct political status conferred by treaty rights . . . [A]ll ICWA does is give birth parents rights that many think they should have regardless . . . .”); Rolnick, supra note 16, at 1042-43 (describing the ICWA as a structural intervention that “explicitly acknowledges the link between the individualized effects of Indian racialization and the political rights of tribal governments”).

67. In Holyfield, the Court affirmed exclusive tribal court jurisdiction over a voluntary adoption of children domiciled on the reservation in compliance with the Act, ordering that the case be transferred to tribal court despite the children’s three-year placement with the prospective adoptive parents. Holyfield, 490 U.S. at 53. After review of available options, the tribal court placed the children back in the same non-Indian adoptive home that had been chosen by the birth parents, who had originally tried to avoid the tribe’s jurisdiction, ordering the adoptive mother to maintain contact with the children’s extended family and tribe. Maldonado, supra note 41, at 17.

68. 25 U.S.C. § 1912(e)-(f).

69. Id. § 1915(a)-(b). A child’s tribe can also establish a different order or preference. Id. § 1915(c).
have touted the ICWA as the “gold standard” for child welfare. It prevents a court from doing precisely what courts did for decades: removing a child from her family and community, placing her with a white family in another state just because that new family seems better, and offering only a cursory justification for the decision.

III. WHITENESS AND IDEAL PARENTHOOD

Within a year of the Court’s decision in *Adoptive Couple*, an entirely different kind of case involving parents and children thrust questions about race and family into the public eye. Jennifer Cramblett, one half of a white lesbian couple living in a small town in Ohio, sued Midwest Sperm Bank for mistakenly delivering sperm from an African American donor resulting in a biracial child. The case was a breach of contract and wrongful birth action, and it made out a claim for damages based not upon the fact that Cramblett and her partner do not love their daughter (they do), but upon the loss suffered by a family who expects to be all white and then loses that status. In her complaint, Cramblett alleged that she “must relocate to a racially diverse community with good schools.” Her complaint implied that there is a legal harm that should be remedied for her inability to remain near her “all-white community [and] all-white,


73. Complaint for Wrongful Birth, *supra* note 71, ¶ 27.
and often unconsciously insensitive family” because of her daughter’s “irrepressible” differences. In other words, the complaint explained that being part of her white community has legal value and that having to move to a more “diverse” area would entail a quantifiable cost. Some of this cost is material: Cramblett and her partner moved to the all-white town because its schools are better, and they must now send their daughter to potentially worse schools because they understand that being the only African American child at this “good” school will harm her even more. White communities—their schools, their associations, their distance from non-white communities—are valuable in this equation. The unspoken implication that follows is that non-white communities are not.

These cases may seem to have little in common on the surface: One is an adoption case originating with a separated, never-married heterosexual couple and an Indian child, while the other is a case arising out of an intact lesbian couple’s efforts to start a family using artificial reproductive technologies, and a case that does not involve Indian children at all. Both cases, however, involve white couples seeking to parent through non-traditional methods, and both involve non-white children. In each case, a white, upper-middle class, educated couple appears to have done everything right in their quest to start a family, including making a substantial investment of time and money. In our view, access to this particular vision of voluntary, resource-intensive family formation provides significant advantages to parents.

In each case, the child’s race is problematized. The difference lies in the proposed solution: for the Capobiancos, the adoptive family in Adoptive Couple, the preferred solution is to ignore differences that they view as only skin-deep, absorb her fully into their home, and erase any aspect of her difference. Her birth father’s invocation of the ICWA and the legal salience of the baby’s Cherokee identity made this difficult. In Cramblett, on the other hand, the parents’ preferred solution was to avoid the difficult identity and community issues faced by inter-racially adopted and racially mixed children by choosing a white donor, a solution foreclosed by the bank’s mistake.

74. Id. ¶ 25.
75. Id. ¶¶ 26-27.
76. Id.
Racial Anxieties in Adoption

The Cramblett complaint seeks to quantify the value of voluntary, upper-middle class, white family formation, but one need not even use such a far-flung set of facts to see how such families are valued. It is readily apparent in the rich history of removing Korean, Chinese, American Indian, Haitian, Latino and African American children from their homes and placing them in (or leaving them in search of) good white homes.77 It is also apparent in the way the potential adoptive parents were described in Adoptive Couple v. Baby Girl; media accounts describe them as “ideal” parents, emphasizing their educational pedigree and economic status.78 The

77. See supra notes 31-36 and accompanying text.
Court’s opinion emphasizes how they supported mother and baby “emotionally and financially” during the pregnancy and how the adoptive father “even cut the umbilical cord.” The tenor of both the opinion and most of the media coverage was one of sympathy for a family who had done everything right and yet was facing the loss of a child they loved. This narrative ignores the preceding loss faced by the father, the tribe, and the baby at the moment she was placed for adoption. It ignores the fact that children have attachments to their families and communities and in this sense are not free for the taking, no matter how deserving the adoptive family.

In the contest over who could provide a better home for the baby, the adoptive couple had a built-in advantage because they were white, educated, upper class, and Christian. Historically, this advantage has been strong enough to overcome even the presumption in favor of biological parents’ rights to raise their children. Instead of counteracting this imbalance, South Carolina state law shored up the elements of the case, sadly, harken back to the bad old days of dark stereotypes about Indians. The adoptive couple, who’ve relentlessly argued their case in the court of public opinion by appearing on television with the likes of Anderson Cooper and Dr. Phil, have been widely portrayed as the innocent victims of the story. Meanwhile, Baby Veronica’s father has been largely portrayed as little more than a shifty, good-for-nothing drifter.


80. The failure of imagination in modern family law when it comes to valuing a birth parent’s rights and a child’s community is stunning, particularly when compared to historic family law decisions such as Spence-Chapin Adoption Service v. Polk, 274 N.E.2d 431, 431 (N.Y. Ct. App. 1971), which articulated the primacy of a birth parent’s rights as compared to would-be adoptive parents: “A baby born out-of-wedlock, even of a troubled mother, is not no-one’s child. In the inimitable vernacular, it is not ‘up for grabs.’ It is not a waif claimable by the first finder, however highly qualified.” Id. Accord Adoptive Couple, 133 S. Ct. at 2572 (Scalia, J., dissenting) (“It has been the constant practice of the common law to respect the entitlement of those who bring a child into the world to raise that child. We do not inquire whether leaving a child with his parents is ‘in the best interest of the child.’ It sometimes is not; he would be better off raised by someone else. But parents have their rights, no less than children do.”).

81. Kevin Maillard, A Father’s Struggle to Stop His Daughter’s Adoption, ATLANTIC (July 7, 2015), http://www.theatlantic.com/politics/archive/2015/07/paternity-registry/396044/ [https://perma.cc/697C-EK2W] (detailing the challenges that unmarried men have in establishing rights to their biological children when the biological mother wishes to terminate parental rights and place a child for adoption).

82. As Professor Maillard points out, South Carolina already had a reputation for laws favoring adoptive parents.

In the 1980s and 1990s, South Carolina gained a reputation as an “adoption mecca” for wealthy out-of-state couples seeking children.

The lack of protective laws drew prospective parents who sought quick,
the adoptive parents’ advantage (as state child welfare laws have historically done) by according the biological father the same status as another prospective adoptive parent, erasing the existence of a birth parent whose rights could possibly trump even the most ideal adoptive home. ICWA’s enhanced procedural protections would have tipped the scales back toward balance, but the Court—hiding behind its fear of making race significant—neutralized its force by holding that it did not apply to the father’s situation.83

In a case with many disturbing angles, this easy erasure of a stable, loving birth parent may be the most frightening. The record is rife with facts showing at best ineptitude and at worst deliberate efforts to circumvent the law.84 As a result, by the time the case reached the courts, the baby was two years old and had lived her whole life with her adoptive parents.85 Her initial placement with the adoptive parents was characterized as completely voluntary (on the part of the mother), and the father’s claim to his own child appeared as an “eleventh hour” disruption.86 In holding that the ICWA’s protections against involuntary termination did not apply to a father who had never had custody, the Court drew a line between the involuntary removal of Indian children from their families, which the law was designed to stem, and an adoption “voluntarily and lawfully easy, and uncontested adoptions. An infamous March 1984 Time magazine article featured a “loving, financially secure college-educated couple” that placed a personals ad in a local paper for a “white newborn,” promising vacations and expenses paid for an expectant mother who wanted to “LIVE LIKE A QUEEN.” The same month that the Time article was published, The New York Times found that doctors and lawyers privately arranged many adoptions, with little oversight from state agencies. Judges often approved adoptions with few questions under the assumption that children fared better in adoptive homes. At the time, no state law prohibited the open sale of children. Id.

83. Adoptive Couple, 133 S. Ct. at 2555-56.
84. Adoption agency notes show that the mother at first refused to name the father because she thought his Cherokee enrollment would complicate the adoption. Berger, supra note 2, at 302-03. When the agency finally provided notice to the tribe, his name and identifying information were misstated in the letter, leading the Nation to respond that they could find no enrollment records. Id. at 303. The mother refused contact with the father and his family during the pregnancy and maintained strict secrecy during the birth itself. Id. at 304. The father was not notified of the planned adoption until several months after the baby had been placed with the adoptive family and the adoption petition had been filed. Id.
85. Adoptive Couple, 133 S. Ct. at 2554-55.
86. Id. at 2565.
initiated by a non-Indian parent with sole custodial rights.”87 This dichotomy between voluntary and involuntary child welfare proceedings is, of course, too simplistic.88 It misses the way that racial hierarchies continue to structure ideas about who deserves children, influencing even decisions that are nominally voluntary, such as private adoptions.89

Policies shaped by values such as stability and permanency in a loving home are important, but they should not overshadow the value a child derives from knowing that her birth relatives want her and that she is a member of a community. Over-emphasizing idealized homes and stability, especially in cases where children have already been placed with foster or adoptive parents, provides cover for moving children of color to richer, better-educated white families. When the desires of these idealized prospective parents are overvalued, adoption can involve a problematic leveraging of resources and cultural capital to attain other people’s children.

CONCLUSION

In spite of the unique legal status of tribal communities and the presence of a law mandating recognition of that status in child welfare and adoption context, some members of the Court in Adoptive Couple seemed ready to dismantle, or at least significantly limit the reach of, the ICWA because of a concern that it places too much emphasis on a child’s ancestry.90 As Professor Berger’s analysis of the case demonstrates, dismissing or failing to talk about the role of race in adoption is not enough to assuage the Court’s fears, and it leaves the field open to opponents of tribal sovereignty.

In this sense, the recent lawsuits challenging the ICWA are natural heirs to Adoptive Couple. The first is an action on behalf of

87. Id. at 2561.
88. Professor Berger describes the “shift toward easy adoption and away from rights of biological parents,” including both mothers and fathers, that has characterized state child welfare law. Berger, supra note 2, at 343-50.
89. The Court characterized the ICWA as being concerned only with the involuntary breakup of intact Indian families via child welfare intervention, Adoptive Couple, 133 S. Ct. at 2561, but many pre-ICWA adoptions were also voluntary. See Brief for Adult Pre-ICWA Indian Adoptees, supra note 46, at 5-8, 14-18.
90. See Adoptive Couple, 133 S. Ct. at 2584 (Sotomayor, J., dissenting) (“The majority’s repeated, analytically unnecessary references to the fact that Baby Girl is 3/256 Cherokee by ancestry do nothing to elucidate its intimation that the statute may violate the Equal Protection Clause as applied here.”).
two adoption organizations, one child in foster care, and the birth parents of another child. One of the attorneys listed on the complaint is Lori Alvino McGill, who represented Maldonado in the *Baby Girl* case. The second suit is a class action organized by the

91. The National Council for Adoption is an adoption advocacy organization. *Mission*, NAT’L COUNCIL FOR ADOPTION (2014), https://adoptioncouncil.org/who-we-are/mission [https://perma.cc/2QDD-DFXY]. Among the “value statements” listed on the NCFA’s website are the belief that “[e]thnic and cultural identity, while extremely important considerations, should not prevent a child from finding a permanent, nurturing family through adoption” and the belief that “[c]ultural and racial identity and birth history are important to adopted individuals, and every effort should be made to respect and preserve this information so the adopted individual may retain his or her history and heritage.” *See id.* NCFA supported passage of the Multi-Ethnic Placement Act of 1994 and legislation designed to facilitate inter-country adoption by granting automatic citizenship to babies adopted from outside the United States. *Federal Adoption Policy*, NAT’L COUNCIL FOR ADOPTION (2014), https://adoptioncouncil.org/who-we-are/mission/Federal-Adoption-Policy [https://perma.cc/A8XX-FAHL]. Building Arizona Families is a private, non-profit adoption assistance organization in Arizona that is a member of NCFA. *International Adoptions*, BUILDING ARIZ. FAMILIES, http://www.bafinternational.com/ [https://perma.cc/6EBL-BQ92] (last visited Feb. 22, 2018). The company’s website highlights its work facilitating international adoptions from China and Haiti. *See id.* For a more comprehensive look at the international adoption industry, particularly adoptions of those “children whose parents are poor and live in countries where the social services infrastructure for child welfare is limited to orphanages that families may turn to in a season of need,” see JOYCE, *supra* note 36, at xiii.


McGill also represented the foster parents in a California case in which the court ordered a Choctaw foster child removed from her non-Indian foster placement, where she had been temporarily placed with the consent of the tribe to facilitate reunification efforts, and placed with non-Indian relatives in compliance
Goldwater Institute on behalf of two named Indian children in foster care in Arizona,94 their prospective non-Indian adoptive parents, and “all off-reservation children with Indian ancestry in the State of Arizona.”95 The third is an action by non-Indian foster parents


94. The named children are both younger than five years old. Although seeking certification on behalf of all Indian children in the Arizona child welfare system, the complaint specifically alleges that the named children are each “more than 50%” non-Indian blood. Class Action Complaint, supra note 21, ¶¶ 9-10.

95. Id. ¶ 11. See supra note 21. The Goldwater Institute has developed a website to support its ICWA litigation, which refers to the law as “a well-intentioned but a profoundly flawed and unconstitutional federal law” and includes several policy reports supporting its campaign against the law. See Clint Bolick, A.D. v. Washburn, GOLDWATER INST. (July 6, 2015), http://goldwaterinstitute.org/en/work/topics/constitutional-rights/equal-protection/equal-protection-for-indian-children/ [https://perma.cc/4NHH-D5D3]. The Institute has also filed a petition for certiorari asking the Supreme Court to limit application of the ICWA in cases involving children whose “only relationship to [a] tribe is genetic,” citing the “equal protection concerns” mentioned in Adoptive Couple, Petition for Writ of Certiorari at 22-23, Renteria v. Superior Court of Tulare Count, No. 17-789 (U.S. 2017), cert. denied, (Feb. 20, 2018), and has filed amicus briefs in several other cases challenging the application of the ICWA and other laws affecting tribal courts as part its “Equal Protection for Indian Children project . . . devoted to reforming the federal and state legal treatment of Native American children subject to the Indian Child Welfare Act.” See, e.g., Brief for the Goldwater Institute as Amicus Curiae Supporting Petitioner at I, Tavares v. Whitehouse, No 17-429 (U.S. Sept. 22, 2017). See also Petition for Writ of Certiorari, S.S. v. Colorado River Indian Tribes, No. 17-95 (U.S. July 17, 2017), cert. denied, (Oct. 30, 2017).
seeking to adopt an Indian foster child who was placed with them. Other lawsuits challenge the constitutionality of various state laws that parallel the ICWA: two suits by biological parents of Indian children who want to place their children with non-Indian parents through private adoption agencies and a third suit by non-Indian foster parents seeking to adopt Indian foster children. Courts have repeatedly and correctly rejected arguments that the ICWA violates the constitution, but the challenges continue.

The new lawsuits lay bare the parallels between efforts to pass the MEPA and the IEP and efforts to overturn the ICWA. The

96. See generally Amended Complaint, supra note 22. According to the complaint, the child’s birth parents and grandmother support the adoption. Id. ¶ 1.


99. See supra notes 21 (describing two federal cases), 93 (describing the Alexandria P. case), and 95 (citing to the Colorado River Indian Tribes denial of certiorari).

100. It is worth noting that none of the children named in the first two ICWA lawsuits were removed from their homes because of allegations of physical or sexual abuse by their parents. The A.D. and National Council for Adoption complaints describe voluntary adoptive placements, maternal exposure to controlled substances, felony conviction of a child’s mother, incarceration of a child’s father, and accidental injury of a child who was left in the care of a relative while his mother was at work, with the mother unable to provide 24-hour nursing care required as a result of the injury. See Class Action Complaint, supra note 21, ¶¶ 17, 21; see also Complaint, supra note 23, ¶¶ 20, 21-22, 32, National Council for Adoption v. Jewell, No. 1:15-cv-6756BL-MSN (E.D. Va. May 27, 2015). The complaint in Brackeen does not describe the child’s history or the reason for removal. See generally Amended Complaint, supra note 22. The children in Donn were in foster care because of allegations of substance abuse, mental illness, and neglect by their biological mother. See Complaint, supra note 98, ¶¶ 23, 27-28. Their father had a history of domestic violence and possible sexual abuse, but the complaint suggests they were in the custody of their mother, and that her victimization may have contributed to her inability to care for them. Id. ¶¶ 23, 35. Without commenting on the specifics of any case, these are all circumstances where additional resources provided to the child’s family or community could potentially have obviated the need for removal. For a related discussion in the context of international adoption, see JOYCE, supra note 36, at xiii (noting that “in an overwhelming number of cases children were relinquished because of poverty alone, when a fraction of the huge
lawsuits characterize ICWA and related state laws as impeding (white) parents’ access to Native children in the same way that informal race\textsuperscript{101} matching policies did before the MEPA and the IEP tilted the scales in favor of parental access and reintroduced a language of neutrality that prevented full consideration of children’s best interests. The ICWA’s opponents see it as another instance of race matching that must be defeated. At least one court has correctly dismissed this argument, pointing out that the ICWA applies based on a child’s citizenship status, not her biological ties, but the lawsuits are ongoing.\textsuperscript{102}

The law is clearly constitutional, but sound legal arguments have not dissuaded critics’ racial anxieties. In \textit{Adoptive Couple}, the Court left a crack of doubt, and scores of litigants have stepped in to pry the crack open.\textsuperscript{103} Laws that protect Native children are doctrinally distinguishable from proposed laws to protect other children of color. But, because both challenge the baseline assumptions about ideal parenthood and access to children that have shaped adoption policy, resistance to the ICWA is driven by the same investments that supported enactment of the MEPA and the IEP.

\textsuperscript{101}Fountaine v. Fountaine, 9 Ill. App. 2d. 482, 484 (Ill. App. Ct. 1956) (citing plaintiff’s response to petition for custody) (“[T]he two children have ‘the outstanding basic racial characteristics of the Negro race and that for racial and religious reasons these children will make a better adjustment to life if allowed to remain identified, reared and educated with the group and basic stock of the plaintiff, their father.’”).

\textsuperscript{102}Memorandum Opinion and Order, supra note 21, at 10-14 (district court dismissal of equal protection claims).

\textsuperscript{103}In order to monitor and coordinate responses to the onslaught of cases, several Native rights and child welfare organizations have formed a coalition called the ICWA Defense Project. See \textit{ICWA Appellate Project}, TURTLE TALK, https://turtletalk.wordpress.com/fort/icwa/ [https://perma.cc/AGY2-QVKM] (last visited Feb. 22, 2018).