5

Eliminating the Native and the Privileging of White Rights in *Adoptive Couple v. Baby Girl*

In early 1970, even before Cheryl Spider DeCoteau's son, Robert Lee, was born, a welfare officer of Roberts County, South Dakota, asked if she would give her son up for adoption, suggesting that she was a bad mother and her child would be better off in a White adoptive home, but she said no. The welfare officer visited DeCoteau weekly with continued pressure for her to relinquish her son for adoption. Following Robert's birth, the social worker persisted again, but DeCoteau rejected his requests. On a visit to DeCoteau's home, the social worker demanded that she come to the office to talk. When DeCoteau and her son arrived, the social worker asked her to sign papers but did not explain what or why DeCoteau was being asked to sign them. While this happened, a different social worker took Robert to another room. DeCoteau was then informed that she had signed papers to relinquish her son for adoption, at which point Robert was immediately taken to a local non-Indian foster home. Within less than a year DeCoteau's other son, John Spider, was also taken from her without notice while he was at a babysitter's house.[1]

DeCoteau's experience was just one of the thousands of instances where Native American children were removed from their families and homes to be placed in boarding schools, foster homes, or up for adoption. By the 1970s an estimated 25–35 percent of Native children had been separated from their families. As historian Margaret Jacobs has noted, the breakup of Indian families is a "defining feature of modern Indian life."[2] DeCoteau's story, along with many others, moved Native activists, leaders, and organizations to resist child removal and family separation. They pushed Congress to pass of the Indian Child Welfare Act (ICWA) of 1978, which created "minimum Federal standards" to "protect the best interests

of Indian children and to promote the stability and security of Indian tribes and families" by giving Tribes authority over child welfare cases.[3] ICWA was seen as a turning point to nearly a century of violent settler colonial policies. The rights of Indigenous children and Tribes were significantly affirmed later in the 1989 Supreme Court case *Mississippi Band of Choctaw Indians v. Holyfield* and in the 2007 creation of the UN Declaration on the Rights of Indigenous Peoples.[4] Together, these three legal "victories" pushed back against the notion that Indigenous child removal was a priori a better future. Despite ICWA being considered the "gold standard" in child welfare, however, the optimism generated by these advances was and continues to be suppressed by repeated stories of indigenous child removal that affect Indian families and communities today.[5] Nearly 40 years after DeCoteau's experience, another Indian child became the center of a legal custody battle that reached national news and the U.S. Supreme Court in *Adoptive Couple v. Baby Girl* (2013).[6]

The more than half-a-century practice of White families adopting Indian children has been categorized as transracial adoption, but what happens when we consider them transnational too? This chapter begins with the premise that Native American Tribes are separate and self-determined political entities.[7] Rather than questioning the existence of Native rights, I ask, How is Whiteness interpreted and White group rights formulated in *Adoptive Couple v. Baby Girl*? Discursive, ideological, and legal mechanisms, historically and in the present, have enabled the forcible removal of Indigenous children from their families, homes, and Tribes into not just non-Indian but specifically White homes. I examine the ICWA statute's text, court proceedings and decisions, and media accounts of *Adoptive Couple v. Baby Girl*. Racial, gendered, and settler colonial logics have not only shaped dominant ideas of Indian parenting, Indian families, and sovereignty but also futurity and group rights through Whiteness. The confluence of race, gender, settler colonialism, and the logic of elimination, as well as shifting manifestations of liberalism, have worked in concert to privilege White adoptive parents over and against Indigenous parents and Tribes.

Together, these logics of settler colonial White supremacy and heteropatriarchy have posited the former an "opposite future"—a spatio-temporal belief—where White American adoptive parents and homes are imagined as loving, safe, and moral while Indigenous parents, Tribes, and the reservation are represented as backward, abusive, neglectful, and absent—not only in the past and present but also in the predetermined future. Indeed, the removal of Indigenous children and their placement into White adoptive (or foster) families has been a form of liberal inclusion that utilizes, among other strategies, assimilation, rescue, and color-evasive ideology to eliminate Native presence and claims to their children, families, land, and sovereignty while simultaneously bolstering Whiteness. At stake is the future of Indigenous children and families, and who gets to make decisions about

them. In a long postscript at the end of the chapter I analyze the recently decided *Haaland v. Brackeen* (2023) case.

ELIMINATION THROUGH ASSIMILATION

The formation and endurance of the United States have in part been founded on the settler colonial myth that America was a vast, empty land—one that, despite the myth, required violent colonization, dispossession of land, and genocide of and against its Native inhabitants. Physical (as opposed to cultural) genocide against Indigenous peoples was a primary means for what historian Patrick Wolfe has called the logic of elimination; although he also notes that assimilation can be even more effective because it does not blatantly affront the notions of modernity and the rule of law.[8] Wolfe's concept of the logic of elimination helps us understand settler colonialism as "a structure not an event," where "elimination is an organizing principle" that spans time.[9]

In the late 1800s the U.S. government faced constant resistance from Indigenous Tribes. It recognized that their presence posed a threat to White settlers' territorial and resource claims and thus enacted new laws and policies such as the General Allotment Act of 1887 and blood quantum requirements to promote elimination through assimilation.[10] Boarding schools were another prominent example of assimilation. Ojibwe scholar Brenda Child has described the institution of boarding schools as "symbolic of American colonialism at its most genocidal."[11] Liberal White reformers from the late nineteenth century believed that the "only way to save Indians was to destroy them (culturally), that the last great Indian war should be waged against children."[12] Boarding schools, and policies such as the Dawes Act and blood quantum, became a popular and cost-saving biopolitical technology of power as the U.S. government strategy shifted from elimination via war to cultural decimation and assimilation. With significant assistance from religious institutions, the U.S. government operated at least 408 boarding schools on and off the reservation for Native American, Alaskan, and Hawaiian children.[13]

Tens of thousands of children attended on- and off-reservation boarding schools as well as day schools, the latter which also numbered in the hundreds. By 1920 nearly 28,000 Indian children were enrolled in such institutions, which accounted for 70 percent of all Indian children.[14] Informed by settler colonial and heteropatriarchal logics, boarding schools required Indian children to learn English, take on Anglo names, convert to Christianity, and adopt White American culture—including gendered labor and styles of dress—that they would then pass on to their children.[15] Rules prohibited the use of Native languages and cultural practices. Physical and emotional abuse were rampant, especially as punishment for breaking the rules, as was sexual abuse. Many children suffered malnutrition and disease, leading to hundreds of deaths.[16] If and when children did return to reservations, they often lacked traditional cultural knowledge to assist their families, resulting in shame and self-hatred.[17]

By the mid-1950s and 1960s boarding schools significantly declined as they became economic burdens; thus government officials used adoption into non-Native homes as the new strategy of assimilation and privileged solution to Indian poverty and their "non-normative" kinship structures.[18] According to Jacobs, post–World War II liberalism was different from earlier liberal interventions based on the "uncivilized savage." Instead, it was dependent on racial and gendered stock figures of the "forgotten Indian child, the unmarried Indian mother, the deadbeat Indian father, and the deviant Indian family."[19] News media representations of Indian children reconstructed them as "adoptable" and shifted to notions of sentimentality, intimacy, and family-making that were previously afforded only to White children.[20]

In 1958 the U.S. Bureau of Indian Affairs, the U.S. Children's Bureau, and the Child Welfare League of America joined forces to launch the Indian Adoption Project (IAP). The ten-year project placed 395 Native American children in White adoptive homes as a means of assimilating and civilizing them while simultaneously terminating Tribes.[21] Thousands more Indian children experienced unwarranted, coercive, and disproportionate removals and were placed into non-Native families with its successor, the Adoption Resource Exchange of North America, as well as through private agency adoptions and other local initiatives.[22] There were never systematized efforts to track these adoptions, but an IAP progress report indicated that in a two-year period between 1962 and 1963 there were 1,281 adoptive placements.[23] In addition, between 1959 and 1976 at least 12,881 Native American children were adopted by non-Native families.[24] Underscoring the devastation of these programs, a study by the Association on American Indian Affairs found that between 25 percent and 35 percent of Indian children were removed from their families and placed in foster homes, adoptive homes, or institutions.[25] Such adoptions by heteronormative White families were framed as liberal acts of reconciliation, humanitarian rescue, and love.[26] White care through both boarding schools and adoptions was one of the primary social, political, and intimate solutions to the "Indian problem."[27] They highlight the violence of love in adoption, where adoption is informed by "loving" discourse and acts by individuals, agencies, and state officials but that different forms of structural, symbolic, and traumatic violence are simultaneously attached to the practice. In addition, they underscored the overlapping and divergent ways in which the structure of settler colonialism, the logic of elimination, and heteropatriarchy through assimilation were mobilized.

CASE BACKGROUND AND THE COURT RULING

The Indian Child Welfare Act was the legal response by Native American activists and Tribes to Indian child removal. The controversy surrounding the law reached a high point in *Adoptive Couple v. Baby Girl* (2013). The case involved an Indian father, his then fiancé, their child, the father's Cherokee Tribe, and an adoptive couple. In 2009, Dusten Brown was a soldier in the U.S. Army and stationed in his

home state of Oklahoma when Christina Maldonado, his fiancé at the time, became pregnant. Brown wanted to change their wedding date to before his deployment so they could receive military benefits, including health care. Maldonado ended the relationship and, in June 2009, gave him the option via text message to pay child support or terminate his parental rights. Brown chose the latter because of his imminent deployment and worries that he might not return from Iraq.[28] He had hoped the threat not to pay would encourage her to reconsider marrying him. Brown also thought that he could remain in the child's life even if Maldonado had full custody, as he was unaware of her plans to place the baby for adoption, insisting that if he had known, he would not have relinquished his parental rights.

Struggling financially, Maldonado connected that month with Nightlight Christian Adoption agency, which paired her with Matt and Melanie Capobianco of South Carolina, who had unsuccessfully tried in vitro fertilization seven times. Melanie, who held a PhD in developmental psychology, and Matt, a Boeing automotive technician, provided Maldonado with significant financial support during the pregnancy and were there at the birth of Baby Veronica. Maldonado was aware of Brown's Indian heritage and knew that it could have some impact on the adoption. On August 21, 2009, before Veronica's birth, the adoption attorney wrote Cherokee Nation a letter to notify the Tribe, to inquire about Brown's probable status as an Indian father, and to ask if it objected to the adoption by non-Indian parents. The letter stated that "[Maldonado] believes the father has no objection" even though he was unaware of the adoption.[29] The letter, however, misspelled Brown's first name and gave an incorrect day and year for his date of birth. Hence, Cherokee Nation responded that it could not find records of Brown's enrollment. Veronica was born one month later, on September 15, where shortly after, the Capobiancos took her to South Carolina and filed for adoption.

Four months after Veronica's birth and days before Brown was to be deployed, he was served and signed papers in a parking lot for what he thought was the relinquishment of parental rights. After realizing that he had just consented to the adoption, Brown tried to "grab the paper" back but was told he would go to jail if he did.[30] He claimed that had he known this was Maldonado's plan, he would have never relinquished his parental rights. Upon realizing this and that Maldonado had misrepresented Veronica's Native heritage, Brown contested the adoption and hired a lawyer. They argued that the adoption violated the Indian Child Welfare Act because neither Brown nor the Tribe was properly notified of the adoption, a requirement of the law. The South Carolina family court stayed the adoption proceeding during Brown's deployment. Thus Baby Veronica remained with the Capobiancos until she was 27 months old. In November 2011, after Brown's return to the United States, the family court ruled that the adoption had violated various provisions of ICWA regarding involuntary termination of parental rights.[31] The court denied the adoption petition and ordered Baby Veronica to be returned to Brown with the transfer of custody happening in December, one month later.

After losing custody of Veronica in the family court, the Capobiancos appealed by claiming Brown had no right to invoke ICWA because he never had custody of her. Therefore, there was no Indian family to protect. In June 2012, however, the South Carolina Supreme Court affirmed the lower court's decision. It too found that "Cherokee Nation is an 'Indian Tribe,' Baby Girl is an 'Indian Child,' and Father is a 'parent' as prescribed in the ICWA."[32] Both courts added that in addition to the father not consenting to the adoption, two sections of ICWA were not satisfied. The first requires providing remedial services to "prevent the break up of the Indian family," and the second states that termination of parental rights necessitates evidence beyond a reasonable (in the form of testimony by expert witnesses) that the continued custody of the child would likely "result in serious emotional or physical damage to the child."[33] Lastly, the South Carolina Supreme Court argued that even if Brown's parental rights had been terminated, that should have triggered another subsection, 1915(a), which establishes a hierarchy of preferences for adoption placements.

The Capobiancos appealed again, and in June 2013, when Veronica was nearly four years old, the U.S. Supreme Court overruled the lower courts in favor of the adoptive parents and remanded the case back to the South Carolina Supreme Court, which approved the finalization of the adoption.[34] Associate justice Samuel Alito, writing for a five-member majority, argued that the ICWA is not applicable when "the parent abandoned the Indian child before birth and never had custody [legal or physical] of the child" during the time of the adoption proceedings. It also stated that the placement preferences in subsection 1915(a) "do not bar a non-Indian family like Adoptive Couple from adopting an Indian child when no other eligible candidates have sought to adopt the child."[35] The case garnered national and social media attention, most of which supported the Capobiancos and criticized Brown as a delinquent parent and ICWA as an antiquated, even racist, law.[36] The case is important because it raises significant concerns about tribal sovereignty and the meaning of being "Indian." Close examination reveals that underlying the wrangling over legal definitions of an Indian child, Indian parent, custody, and the intent of ICWA exist the racial and gendered notions of Indianness, the unmarked notion of Whiteness, as well as the structure of settler colonialism and the logic of elimination. Together, these elements dictated who was considered the better family and future for Veronica and whose rights mattered the most.

(RE)DEFINING INDIAN FAMILY, BETTER PARENTS, AND OPPOSITE FUTURES

Brown was without a doubt the father of Veronica; his status as a noncustodial parent was a primary matter of contention. By ICWA and Cherokee definitions, he was unquestionably an enrolled tribal member *and* Indian parent, and Veronica was an Indian child.[37] Lisa S. Blatt, an attorney supporting the Capobiancos, argued otherwise. She based her argument on the claim that Brown did not have

"continued custody" of the child, a phrase in one of the questioned provisions of ICWA. For Blatt, Brown was merely a sperm donor: "The only relationship the dad had is one of biology. . . . He has a biological link that under *State law* was equivalent to a sperm donor. . . . [Therefore] there is no Indian family. . . . [T]he only stranger in this case was the birth father, who expressly repudiated all parental rights and had no custodial rights."[38]

According to Blatt, Brown did not have parental rights or custody under state law, only a biological tie. Multiple justices reminded Blatt that this was a federal statute and that Brown was an Indian parent by ICWA's standard. Still, the Supreme Court agreed with Blatt that parenthood was attached to custody. Since Brown did not have custody, he was not a true parent with rights. ICWA was enacted to prevent the breakup of Indian families, not help create them. Consequently, there was no "ongoing" Indian family to break up.[39] This settler colonial interpretation of kinship disregards the Indigenous characteristics of kinship. For example, Cherokee scholar Daniel Heath Justice has argued that "kinship is best thought of as a verb rather than a noun, because kinship, in most indigenous contexts, is something that is *done* more than something that simply *is*."[40] Indeed, Brown was doing what he could to regain his parental rights. Yet Blatt's argument was similar to the "existing Indian family exception" (EIFE), which was a made up and now dying legal doctrine—in that there was no such language in ICWA—first established by the Kansas Supreme Court in 1982 to justify the disregard of ICWA in cases where there was no "Indian family" to break up or protect. The EIFE "doctrine" evolved to include many requirements for ICWA to "properly" apply, such as custodial relationship, heterosexual marriage, domiciled on the reservation, and cultural litmus test.[41]

Yet custody should not have mattered in this case as Congress enacted ICWA precisely to protect Indian children, parents, and Tribes regardless of custodial status. History has proven that state social workers too often misinterpreted situations in which Indian parents who relied on assistance from "noncustodial" extended kinship care as neglectful. Furthermore, as Jacobs has explained, local, state, and federal officials contributed to the fabrication of the "unwed Indian mother problem" that became concretized despite no statistical evidence. After creating a problem that did not exist, adoption was presented as the solution to stubborn dependence on the federal government. Officials targeted unmarried mothers on and off the reservation with little care for preserving and reuniting Indian families. They disregarded customary (non-state-sanctioned) marriages and disparaged traditional Indian family structure that included extended family (rather than placing sole value on the nuclear family) as harmful to the future of Indian children.[42] In essence, the separation of Indian families was a biopolitical project informed by settler colonial and heteronormative pretexts that made Indian children "adoptable" (and thus "thrive") while letting Indian families be destroyed.[43]

The inability of state and social workers to make ethical evaluations in these contexts is precisely why ICWA offers a federal definition of "parent" that is uniform

and broad as to protect *any* "parent" of an "Indian child" without reference to (or requirement of) custodial status or state law.[44] Indeed, ICWA affords Tribes "exclusive jurisdiction" over "child custody proceedings." Since Veronica is an Indian child, Brown is an Indian parent, and termination of parental rights falls under child custody proceeding, Brown's custodial status should not have mattered to ICWA. As associate justice Sonia Sotomayor noted in her dissent, "continued custody," only mentioned twice in the entire law, is "pluck[ed]" from the middle of the statute, in the last clause of the questioned subsections.[45] Sotomayor contends that ICWA applies to all child custody proceedings involving foster care placements, termination of parental rights, pre-adoptive placements, and adoptive placements. Termination of parental rights in particular means "any action resulting in the termination of the parent-child relationship."[46] Thus, according to Sotomayor, since Brown is a parent, his parent-child relationship should be protected. For her, the majority's selective and backward reading determines that a noncustodial family bond is not worth preserving, undercutting the explicit definition of parent under the law such that (Indian) parents are only guaranteed *procedural* protections while *substantial* protections are reserved for the subset of parents with custody.[47]

For those with the majority decision, this is how the law should be interpreted even though earlier subsections of ICWA give birth parents explicit rights to be notified of an adoption, represented by an attorney, have access to records, have court-witnessed consent, and, most important, the ability to revoke consent at any time for any reason prior the finalization of an adoption. Contrary to the majority's opinion, all these rights show that Congress intended parents to have "meaningful participation" during the involuntary termination of parental rights and the power to maintain family ties.[48] Thus the triumvirate of "continued custody," "ongoing" Indian family, and their close relative "existing Indian family" is part of a smoke screen to undermine Indian families and Tribes. Blatt's reduction of Brown to merely "biological" connections detaches him from the concept of the parent, leaving only one suitable alternative: the (prospective) adoptive parents. Imposing a custodial prerequisite when none is required demonstrates White heteronormative and neoliberal logics at play for the adoptive parents, adoption and appellate attorneys, and the Supreme Court of the United States (SCOTUS) that worked to negate the collective political rights of Tribes to self-determination.[49]

In addition to twisting the definition of parent and family, this case reveals other intersecting racial, gender, and settler colonial logics at work. The SCOTUS decision prompted a remanded South Carolina Supreme Court ruling, which decided in favor of the Capobiancos. However, Brown *kept* Veronica in hopes that there would be other legal options in the Oklahoma court system. Melanie Capobianco, in a statement to the media, employed one of the most problematic depictions of Brown that indirectly drew from the classic American West captivity narrative genre:

> Why have you been so slow to recover a child who is being illegally held against the wishes of her parents and the courts? What are you waiting for? With every passing hour, we fear more and more for her safety and well-being. If anything should happen to our daughter while she is being left in the hands of those who hold her captive from us, the responsibility will be shared by many. . . . Our daughter has been kidnapped and I expect the situation to be treated as such. If this doesn't happen, I will be boarding a flight to Oklahoma today and I am coming to get my daughter. I expect her bag to be packed and that she will be ready and waiting to come home. I expect Oklahoma law enforcement to escort me to the premises where my daughter is said to be held currently and if necessary, arrest anyone who attempts to hold her captive.[50]

Jessica Munday, the spokesperson for the Capobiancos, added that the lack of an Amber alert was "a slap in the face to every adoptive parent in America."[51] These messages were on top of the already existing Save Veronica website and petition that garnered more than 30,000 signatures. Taking her cue from the Capobianco public relations machine, Maldonado deployed similar language, describing the situation as kidnapping in her *Washington Post* opinion piece.[52] The captivity narrative is a well-rehearsed storyline within American West literature that relies on extreme racial, heteronormative, and settler colonial imagery, where a savage Native American man or entire Tribe captures a hapless White woman or cruelly tears apart a family by taking a child, who must then be saved by the White male protagonist(s).[53]

While unadulterated violence against the captive is a primary anxiety in such narratives, there is also the fear of illicit interracial intimacy for White women or the future adaptation by the White child.[54] The settler colonial captivity narrative, however, only resonates to a certain extent because in this case, the captive is a brown Indian girl, not a White woman. This case represents both specific (settler) and wider colonial contexts. As postcolonial scholar Gayatri Spivak has noted, the liberal colonial impulse centers on "white men . . . saving brown women from brown men."[55] Combining colonial desire with the captivity narrative yields an updated spin on Spivak's observation, where we have White (adoptive) families and nations saving brown babies from brown men, families, and nations. The utilization of these tropes by multiple actors garners favor from the public by asserting White innocence and Native criminality. As Figure 6 shows, the media and public were typically quick to side with the Capobiancos, portraying them as the victims. It ignores the ways in which the adoption was a form of captivity by the Capobiancos. When captivity occurs in reverse—Native peoples being captured by settlers—it has historically been celebrated as a form of assimilation, as in the case of Pocahontas by the Virginia Company.[56] For the Maldonado and the Capobiancos, the pre-adoption process began with numerous instances of nondisclosure, deceit, and misinformation that tried to circumvent ICWA—enacted precisely to undo the immeasurable harm caused by settler colonialism—and general guidelines of best practices in adoption.

FIGURE 6. Matt and Melanie Capobianco hold a framed picture of Baby Veronica; from a news article titled "Supreme Court agrees to hear 'Baby Veronica' case." Photo credit: *Charleston City Paper*.

In a multifaceted way Maldonado thoroughly concealed all adoption plans from Brown. In the letter to Cherokee Nation, her adoption attorney conveniently misspelled Brown's name and gave an incorrect birth date, ultimately enabling Maldonado to mark Hispanic for Veronica's heritage. This allowed the adoption to be "unencumbered" by ICWA and the Capobiancos to remove Baby Veronica from Oklahoma to South Carolina. After the Capobiancos took Veronica, Brown was only notified of the adoption in a parking lot, where he mistakenly signed his rights away one week before his deployment. Every subsection of ICWA that enumerates explicit rights to be, for example, notified of an adoption, represented by an attorney, have access to records, have court-witnessed consent, and have the ability to revoke consent at any time for any reason was ignored. Together, all these actions and inactions inhibited Brown and the Tribe from intervening.

An amicus brief submitted by 18 national child welfare organizations, including the Child Welfare League of America, argued that the "heartbreak" caused in this case was the direct "consequence of petitioners' adoption agency's circumvention of [ICWA]. . . . and failure to adhere to best practices."[57] Still, the deception and misconduct by the appellants were never points of concern for SCOTUS's majority decision. Unethical practices such as these are far from uncommon in adoption, especially for transracial and transnational placements. In fact, the legal system (under the International Adoption Convention or the Immigration and Naturalization Act Regulations, for example) allows for transnationally adopted children to remain in the receiving country even when minor procedural or legal improprieties are discovered.[58] While the Capobiancos and their spokesperson, Jessica Munday, fiercely portrayed Brown as a kidnapper who would only in time harm the "Capobiancos' child," one could easily question how this term might be more accurately applied to the Capobiancos.

For the Capobiancos the captivity narrative language depicts them as loving, unconditional, determined, and better parents. Countless news stories and the case syllabus highlighted the fact that the Capobiancos were present for Veronica's birth and that Matt Capobianco even cut the umbilical cord. For many supporters of the Capobiancos, including Justice Alito in his majority opinion, they "were the only parents [Veronica] had ever known."[59] As the Save Veronica website stated, being with the Capobiancos meant that Veronica would be "loved, nurtured and provided a happy, healthy home full of opportunity" that would "ensure the best life possible."[60] This formulation of not just good or better but as the *only* family for Veronica worked to erase her Native identity even though Veronica had already lived with her father for more than a year. I situate this captivity statement as a statement of "love," but in unpacking the racial, gendered, and settler colonial logics attached to it, we see how "love" is deployed to enact representational violence of who were the better parents and future.

Beyond the captivity narrative imbued upon this case, the teleological presumptions surrounding adoption reveal the additional intersection of class, capitalism, and gender—particularly, notions of proper motherhood. *Adoptive Couple v. Baby*

Girl may at first glance appear to align with feminist ideals based on the fact that Maldonado ultimately had the right to choose what she thought was best for her and her child. Adoption's relationship to gender and social equality, though, is much more tenuous. Adoption policy and practices have in general facilitated the reduction of support for single women and birth families while propping up the heteronormative ideal of marriage as well as the adoption industry (see chapter 3). Examples include welfare reform, the Adoption Tax Credit, federal adoption laws that promoted faster adoptive placements and shorter time to reunify families, and pregnancy crisis counseling that pushes mothers toward adoption rather than supporting them as possible parents.[61] The Adoption and Safe Families Act in particular was created without meaningful input and consideration of how it would align with the Indian Child Welfare Act and the ways it would affect Native families.[62] Policies and practices such as these support *a very specific choice* for single mothers—that of adoption. Choosing otherwise results in shame, being labeled a bad mother, and not receiving needed financial support. All the while, adoption regulations such as ICWA, as well as birth fathers in this case, are seen as foils to loving adoptive couples (and stepparents), who would be able to transform an illegitimate child into a proper one through adoption.

The adoption of Indian children follows what feminist scholar Mimi Nguyen has called the "gift of freedom." Nguyen examines how this concept specifically applies to "grateful" Vietnamese refugees after the Vietnam War. She argues that the gift of freedom is the gift of modernity. I would add that freedom is freedom from violence in all its forms (war, poverty, patriarchy, institutions such as orphanages, and culture), and it includes the gift of an opposite and better future. The "gift of freedom" is embraced because it pledges love, hope, life, and happiness.[63] While Maldonado gives the Capobiancos the gift of a child and Baby Veronica the gift of a "better life," the Capobiancos, in adoption discourse, are considered the true bestowers of freedom because they purportedly guarantee unconditional and everlasting love, family, and home for their new child. The last gift-giver is America, the condition of the possibility for freedom. The decontextualized loving, intimate act of adoption (taking in the guise of giving) erases the structure and logic of settler colonialism and instead presents the symbolic gift of freedom. The racial and colonial logic is "give us your children and we will give them civilization and freedom"—a presupposed opposite and better future.

BLOOD QUANTUM: ELIMINATION, THE POCAHONTAS EXCEPTION, AND WHITE RIGHTS

This case must be situated in the larger context of Indigenous *political* (not racial or minority) rights in relation to White racial group rights. Although the case was seemingly about Brown's parent and custody status, his and Veronica's "Indianness" was also very much in question. Justice Alito's majority and Justice Clarence Thomas's concurring opinions made three references to Baby Veronica's "remote"

fractional blood quantum, which in their eyes was a paltry 3 over 256.[64] Yet Veronica was clearly an Indian child under ICWA and Cherokee standards. ICWA defines an Indian child as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership and is the biological child of an Indian tribe member."[65] Furthermore, Article 4 of the Cherokee Nation Constitution omits a blood quantum requirement, and instead states, all citizens "must be original enrollees or descendants of original enrollees listed on the Dawes Commission Rolls" must "have at least one direct ancestor listed on the Dawes Final Rolls."[66] Both Baby Veronica and Brown's blood quantum were also referenced during the Supreme Court's oral arguments. The obsession with Brown and Veronica's blood quantum reveals two underlying aspects of the logic and structure of settler colonialism: (1) the belief that Natives are disappeared or (should be) disappearing; and (2) privileges associated with Indian political identity can be (problematically) reduced to "discriminatory racial preferences" that are perceived to not only harm the best interest of Indian children but also to diminish privileges and "rights" sought by White people.

The concern for Chief Justice John Roberts, Justice Alito, and Justice Stephen Breyer was that Brown and Veronica could barely be considered Indian. All three speculated the ramifications of persons who could claim to be Indian with even less amount than Brown and Veronica.[67] Roberts asked: "What if you had a tribe with a zero percent blood requirement; they're open for, you know, people who want to apply, who think culturally they're a Cherokee." Moments later, he revealed his apprehension: "I'm just wondering is 3/256ths close—close to zero? I mean, that's—that's the question in terms to me, that if you have a definition, is it one drop of blood that triggers all of these extraordinary rights."[68] Alito had essentially the same question: "But what if a tribe makes eligibility available for anyone who, as a result of a DNA test, can establish any Indian ancestry, no matter how slight?"[69] Hitting this point home, Breyer stated: "But that is a problem. Because look, I mean, as it appears in this case is [Brown] had three Cherokee ancestors at the time of George Washington's father. . . . I don't see how to decide that case without thinking about this issue."[70] What these comments show is how ancestry, race, and political citizenship are conflated. Indianness is not a racial category (to be protected by the U.S. Constitution) but a political one, and for Cherokee Nation it is *in part* based on ancestry—but not on an imagined blood quantum threshold.[71]

On the surface these comments about Brown's Native heritage as being "close to zero," "no matter how slight," and "at the time of Washington" articulated a belief that more should be required to be considered "Indian." But along with this is the subtler notion that persons with such low fractional amounts should be considered "assimilated" Indians who are in essence "eliminated," thus matching the vanished Indian narrative.[72] The justices' obsession with Brown and Veronica's Indianness reiterates Plains Cree scholar Robert Innes's argument that settler colonial classifications of what counts as Indian "has had profound impacts on the ways that

non-Aboriginal people view Aboriginal people."[73] This myth of the vanishing or eliminated Indian enables the settler colonial nation-state to exist unchallenged. Thus in some ways the issue is about identity and being, but in another way it is also temporal. These arguments about blood quantum are about the instituting of what Mark Rifkin, a settler and queer scholar, calls settler time, which "imposes a particular account of how time works—a normative language or framework of temporality that serves as the basis for forms of temporal inclusion and recognition."[74] Rifkin helps us understand the fixation of blood quantum is again about how settler time should have erased Brown's Native identity. Here, the main worry was that someone who is only "technically" but not substantively (in their Western opinions) Indian would or could be afforded "extraordinary rights." This dilemma—the possibility of increasing the number of Indians having rights—was exactly the reason Native blood quantum was established in the first place more than a century ago.

During the Allotment Era the language of blood—long used by state—was adopted by federal officials and used in treaties and court cases to define (not just describe) Indians and determine entitlement to benefits, racial (and political) category—that is, Indian without citizenship or White citizen—and/or tribal membership.[75] Blood quantum was used as both a necropolitical (make die) and biopolitical (make live and let die) legal technology of settler colonialism with the enactment of federal laws and policies such as the General Allotment Act of 1887 (and subsequent allotment acts), the Indian Reorganization Act of 1934, and the Termination Era.[76] These laws and policies attempted in different ways to assimilate Tribes into U.S. society. The Allotment Act dissolved Tribes' collective status and ownership of land, promoted individual land ownership (and compulsory citizenship for allottees), and made millions of acres open to White settlers who were eager to access land and resources.[77] While the Dawes Act did not define Indian by blood quantum, the law laid the foundation for blood quantum to be incorporated into allotment and other federal Indian policies.[78] By 1908, Congress passed a law stipulating that blood quantum—in this case individuals with less than one-half Indian blood—be used as a measurement to determine "competency" of who could sell allotments without restrictions.[79]

Allotment and blood quantum policies worked in concert to assimilate Native peoples and diminish their rights to land and government resources. In one of the debates concerning the many attempts to define "Indian" in 1895, Senator Anthony Higgins (R-Del.) clarified this logic:

> This nation is generous, and means to be generous, to the Indians, but by that, I know, the people understand and mean the Indian aborigines, not the half-bloods, not the quarter-bloods, not the eighth-bloods, not those in whom you can not [*sic*] observe the physical admixture. . . . This is growing to be a vast abuse. . . . It seems to me one of the ways of getting rid of the Indian question is just this of intermarriage, and the gradual fading out of the Indian blood; the whole quality and character of the aborigine disappears, they lose all of the traditions of the race; there is no longer

> any occasion to maintain the tribal relations, and there is then every reason why they shall go and take their place as white people do everywhere.[80]

Even during debates of the Indian Reorganization Act—generally viewed as a liberal law that tried to correct previous harm by the U.S. government—there were many senators who wanted to include strict blood quantum requirements.[81] For example, Senator Burton K. Wheeler (D-Mont.), chairman of the Senate Committee on Indian Affairs, argued that the one-quarter standard was too generous:

> I do not think the government of the United States should go out there and take a lot of Indians in that are quarter bloods and take them in under this act. If they are Indians in the half blood then the government should perhaps take them in, but not unless they are. If you pass it to where they are quarter blood Indians you are going to have all kinds of people coming in and claiming they are quarter blood Indians and want to be put on the government rolls, and in my judgment it should not be done. What we are trying to do is get rid of the Indian problem rather than to add to it.[82]

Thus blood quantum became a legal and necropolitical mechanism to enact "statistical elimination."[83] Cherokee Nation attorney general Todd Hembree reiterates this point: "Blood quantum is genocide in slow motion. The whole idea of the federal government imposing the blood quantum requirements of a half or a quarter was to eventually breed out the Indian tribes and assimilate them into the dominant society."[84] In this way the deployment of settler blood quantum logic works to accomplish two things at once. It not only facilitates the logic of elimination by attempting to negate the existence of rights-bearing Indians but also calls into question the notion of self-determination—because Indian logic of who can be Indian supposedly goes against reason.

Hidden on the other side of the blood quantum argument is U.S. mythology that has emboldened White Americans to liberally claim small fractions of Native ancestry. This practice can be traced back to at least Virginia's Racial Integrity Act of 1924, which contained a "Pocahontas exception" in the antimiscegenation law.[85] Before its passage, state legislators, as a part of the White elite ruling class, amended the law to protect themselves and anyone else with remote traces of Native blood, ensuring that they would not forfeit their White racial and social status.[86] Legal exceptions for interracial marriage and the desire for Indian blood, however, did not preclude the complementary goal of extinguishing Native culture and presence. Seven states explicitly prohibited interracial marriage between Indians and Whites, and even the Racial Integrity Act only allowed for a maximum of one-sixteenth Indian blood.[87]

Blood quantum, then, was not just about Native disappearance but also about what legal scholar Cheryl Harris has called "whiteness as property." Harris's argument applies to *Adoptive Couple v. Baby Girl* because it underscores her claim that Whiteness can be used to *access* or *deny* group identity and rights.[88] In this

case, like most, Whiteness is an unmarked asset that is required to be considered a "proper" parent.[89] Historically, being a White adoptive parent has afforded "property rights" of unfettered access to adoptions. We could also think about the right to adopt, the actual act of adoption (of Veronica), and the acts to define Indianness as a form of what Native Hawaiian feminist scholar Maile Arvin has called "possession through whiteness," which enables settler colonial people and settler knowledge to possess Indigenous peoples (and place). Furthermore, when Brown claimed Indian status, he reemerged in representation as a bad Native parent. As an Indian, Brown no longer possessed Whiteness in the way that the Capobiancos did. His rejection of Whiteness in favor of Indianness almost became a point of incredulity. It undermined the trope of the vanishing Indian and spoke to Blatt and Roberts's fear that anyone could be named Indian. To be sure, the Pocahontas exception was meant to maintain Whiteness and its claims to America and the land, not bolster indigeneity. *Adoptive Couple v. Baby Girl* illustrates the historical ways in which the logic of elimination and the erasure of Native people through blood quantum requirements worked in concert with the Pocahontas exception to enhance claims for settler colonial rights.

So dangerous is the threat of Indians with rights or the idea of tribal regrowth that the specter of zero percent Indians conjured multiple worst-case scenarios. For Alito, it was the potential for a reckless and conniving biological father whose identity and character would harm the child, birth mother, and adoptive parents. He warned against the South Carolina Supreme Court's ruling, stating it "would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian. A biological Indian father could abandon his child *in utero* and refuse any support for the birth mother . . . and then could play his ICWA trump card at the eleventh hour to override the mother's decision [to place the child for adoption] and the child's best interest."[90] This would diminish the birth mother's rights; possibly endanger the child immediately or in its future; and could frighten prospective adoptive parents. Hence, while the biological father would be unfairly awarded special rights via his "ICWA trump card," the child and birth mother would be irreparably harmed by this "remote" designation. True to settler colonial logics, Alito presumes that this outcome is predetermined to be damaging for the child.

In his protest over Brown's blood quantum, Breyer added his reasoning: "But I don't see how to decide that case without thinking about this issue [of blood quantum], because . . . a woman who is a rape victim who has never seen the father could, would, in fact, be at risk under this statute that the child would be taken and given to the father who has never seen it and probably just got out of prison, all right?"[91] Where Alito imagined a reckless and spiteful Indian father, Breyer pictured a criminal Indian rapist. Like Munday and the Capobiancos' inversion of the captivity narrative, Breyer's upends historical and contemporary realities of sexual violence between Indians and non-Indians, where lack of federal funding and

jurisdictional loopholes have allowed non-Native men to commit acts of sexual violence against Native women with impunity on reservations.[92] Appellate lawyer Blatt painted an even bleaker picture during her oral argument:

> And I want you to keep in mind about this case, is your decision is going to apply to the next case and to an apartment in New York City where a tribal member impregnates someone who's African-American or Jewish or Asian Indian, and in that view, even though the father is a completely absentee father, you are rendering these women second-class citizens with inferior rights to direct their reproductive rights [of] who raises the child. You are relegating adopted parents to go to the back of the bus and wait in line if they can adopt. And you're basically relegating the child, the child to a piece of property with a sign that says, "Indian, keep off. Do not disturb."[93]

Blatt, Breyer, and Alito were compelled to extend Brown's highly specific situation to a racialized and gendered future possibility (or "probability") of sexual and criminal deviant and irresponsible Native American men who live off the reservation, impregnate (or rape) future victims, and wreak havoc onto other people's lives. Blatt's doomsday narrative presumes that the traits of casual sex, delinquency, and absenteeism are inherent to Native American men such that it will not only "apply to the next case" but also be continual harm against birth mothers and adoptive parents.[94]

Here, again, the father is "absent" just as he had similarly abandoned his child in Alito's imagined example. And again, the birth mother and adoptive parents have lesser rights relative to the "undeserving" biological father. Blatt's hypothetical scenario went further by grossly (mis)appropriating liberal civil rights and feminist discourse. References to "African-American," "Jewish," and "Asian-Indian," as well as "back of the bus" and "reproductive rights," framed the issue as one of racial and gender discrimination rather than being about political sovereignty for Tribes to decide what is in the best interest of Indian children. Despite Blatt's gesture to universalize (or "diversify") the "victimization" created from alleged Indian tribal overreach, the truth is non-White families, both historically and recently, have not tried to adopt Indian children in the surreptitious, systematic, and (il)legal ways in which White families have. Nevertheless, for Blatt the group clearly aggrieved is White adoptive parents. Her racialized and gendered imagery glossed over that in this case Brown was misled about the adoption, which directly led to the events that unfolded. Blatt's story also ignored that ICWA's very purpose was to make it more difficult for adoptive parents to adopt Indian children, whether parental rights are terminated voluntarily or involuntarily. Indeed, if no metaphorical sign had said "Indian, keep off," Native children would have continued to be removed and separated from their families. To be sure, Tribes do not own Indian children.[95] They do, however, possess jurisdiction and the power to determine their best interest, just as any other foreign political entity has jurisdiction over their children, which is the case in all other forms of transnational adoptions.

Although race is only mentioned once during the oral argument and once in Thomas's concurring opinion, the case posited racial minority group rights as detrimental to the "universal" individual rights of the birth parent and adoptive parents, especially to the best interest of the child. Contestation against "affirmative" group rights has existed since their emergence in the 1960s. Critics have argued that protected group rights are actually a form of "reverse" discrimination. With regards to adoption, this argument has endured for not only the transnational/transracial adoption of Native American children but also for the transracial adoptions of Black children by White parents. For decades now, the "liberal" individual color-evasive approach continues to be the legal and practiced standard.[96] It posits that concerns over "group rights" are detrimental to children whose placements are delayed because they are considered "property of" or "belonging to" only one group. To address this concern, Congress passed the Multiethnic Placement Act of 1994 (MEPA) and an accompanying provision in 1996 (Removal of Barriers to Interethnic Adoption Provisions, IEP), which eliminated race from being a considered factor for foster and adoptive placements. Adoption supporters have argued that both children and prospective adoptive parents should be treated equally, in a "race-neutral" way. Moreover, transnational/transracial adoption is about "individual choice" and "making a family," which should not be concerned with race or "group rights."[97] In essence, protected "group/racial minority" rights of the Tribe infringe upon the rights of the (White) adoptive parents, the birth mother, and the best interests of the child.[98]

Jessica Munday, the spokesperson for the Capobiancos, iterated this point in a statement to the public: "At the root of all of this is the issue of fundamental fairness and recognition of basic human rights of all people. Children are not chattels nor are they the personal property of an Indian tribe, their birth parents or their adoptive parents. They are individuals who have unique, fundamental rights and needs. Above all, they have the right to permanency and a loving, nurturing family environment providing them stability and security. They should have all these rights irrespective of their race as do all other American children." By deploying the imagery of children being chattel and personal property, Munday invoked the racial violence of slavery and indirectly accused Cherokee Nation and Brown of replicating one of America's deeply sordid foundations—that a human could be owned. In this formulation she is the abolitionist, pitching an argument grounded on color-evasive individualism and equal protection under the Fourteenth Amendment. Her argument suggested that in all situations, a loving, nurturing family and future was not only more important but also legally required "irrespective" of any racial factors. Despite Blatt's seeming aversion to racial distinctions and ownership, she is the Capobiancos' attorney and argues that they would be best suited to provide Veronica with "permanency and a loving, nurturing family environment" that is "stable and secure." She implies that love, nurture, stability, safety, and permanency are features not available in Native peoples and Tribes but

are readily available "properties" of her White clients. In other words, love and positive futurity operates as properties of Whiteness.

What Blatt, Munday, and other critics of ICWA have articulated is a type of liberal color-evasive intimacy and love. Anthropologist Elizabeth Povinelli has deconstructed formulations of love as solely individual events or relationships, calling love a political event.[99] She elucidates how normative conceptions of intimate, individual, and liberal love oppose love based on "*tribalism, race, kinship, or religion*," which are not true forms of love.[100] This notion of "true love" is hegemonic and is seen as the "normative horizon" (i.e., the perceptible means and limit of what can and should be done) for children in need of permanent homes—for freedom, equality, and "just" outcomes.[101] Thus transnational/transracial adoption discourse follows this liberal logic that we should be formulating families based on individual, familial love not "tribalism, race, kinship, or religion." Hidden in society's pervasive formulation of love (beyond modernity) is Whiteness. For critics of ICWA, Native love is marked as tribal and racial while liberal individual color-evasive love is ascribed as universal even as it exists in relation to and is propagated by Whiteness as a form of symbolic violence.

These notions of liberal color-evasive individualism and love too often reduce and confuse "Tribes" to equal race rather than semisovereign nations. While the notion of Indian indeed emerged as a socio- and global-historic racial project based on scientific and political racism that was rooted in White supremacist logic, it is a political category tied to tribal sovereignty.[102] Even framers of the Fourteenth Amendment, such as Representative John Bingham (R-Ohio), understood and articulated this point. During a House debate in 1862 about the emancipation of enslaved men, women, and children in Washington, D.C., while arguing that natural-born citizenship should apply to everyone except Indians, Bingham said: "Gentlemen can find no exception to this statement touching natural-born citizens except what is said in the Constitution in relation to Indians. The reason why that exception was made in the Constitution is apparent to everybody. The several Indian tribes were recognized at the organization of this Government as independent sovereignties. They were treated as such; and they have been dealt with by the Government ever since as separate sovereignties."[103]

In addition, during a debate about the Fourteenth Amendment, Senator Jacob Howard (R-Mich.) explained: "Indians born within the limits of the United States, and who maintain their tribal relations, are not, in the sense of this amendment, born subject to the jurisdiction of the United States. They are regarded, and always have been in our legislation and jurisprudence, as being quasi foreign nations."[104] Howard added that this was clearly established in the Commerce Clause of the Constitution. *Elk v. Wilkins* (1884) reiterated this distinction—Indians were not counted in determining congressional representatives; they were "alien nations" and "distinct political communities" that habitually made dealings by treaties with the president and Senate or through acts of Congress; they "owed immediate

allegiance to their several tribes" and thus "were not part of the people of the United States."[105] Ignoring this distinction results in improper conflation that adds fuel to adoption supporters who assert that Tribes are more concerned about the Tribe and care less about the best interest of the child. Since Indian membership is often based on "blood quantum" or descent—which are (mistakenly) viewed as biological race—Tribes are then perceived as a racial minority group that possesses "special minority rights" rather than politically semiautonomous nations that have legal jurisdiction over their children.[106]

Thus the Indian child emerges as a racial Other who must be saved through adoption from her Indian father. Furthermore, the space in which the child does or could occupy if not adopted—the reservation—emerges, similarly, in opposition to a White adoptive home.[107] From this perspective Native children such as Veronica cannot live or become fully modern subjects in the space of the reservation, which portends physical, psychological, emotional, and economic harm. As legal analyst Amanda Tucker has argued, "To subject children, who come from neglected and abused homes to the perils of many reservations is only perpetuating a cycle of poverty and self-destruction."[108] Such discourse, representation, and legal outcomes suggest only through adoption, the liberal and loving act within the "positively" racialized space of the American White home—one of postraciality and predestined opportunity—can a child have a loving family and full future and life.[109] This settler colonial move deploys individual color-blind language to decontextualize the child, constructing the child's interest as separate from her familial, cultural, and tribal context.[110]

In addition, the SCOTUS's decision solidified that the individual rights of adoptive parents are privileged over and against the political (not racial) rights of tribal nations. This in turn hides the fact that the continued desire to adopt Indigenous children by White parents is more broadly about White majority group rights. Analyzing such adoption representations and legal outcomes demonstrates how transracial/transnational adoptions are attached to overlapping forms of structural-historical, symbolic, and traumatic violence that happen before, after, and outside of transracial/transnational adoption. Thus the larger question of *Adoptive Couple v. Baby Girl* should not have devolved into special minority rights that lead to racial ownership of children but rather attended to the point of tribal sovereignty and jurisdiction over child welfare issues.

CONCLUSION

The key legal concern for the case was that Brown did not have (continued) "custody" of the child. Still, at any point in the process, the Capobiancos could have disrupted or dissolved their adoption, allowing Brown to petition for custody.[111] However, they wanted a baby so badly that they defied all best practice standards by spending years to prevent Brown from gaining custody. If they had acknowledged

Brown as a willing and capable father, custody would have been a moot point. Yet the Capobiancos firmly held two beliefs: (1) that they had a right to be parents to this particular child, and (2) that they would be the better parents, family, and future for Veronica. The Supreme Court acknowledged that Brown wanted to be married and served in Iraq, yet he was characterized as an unfit father and sperm donor who abandoned his child in relation to the Capobiancos, who were a loving, White, well-off, heteronormative adoptive couple. And despite attempts to file for adoption by Brown and his wife (as well as a separate attempt by Brown's parents) that would have triggered adoptive placement preferences, Baby Veronica was returned to the Capobiancos.[112]

Yet it was not just the Capobiancos but also their attorney, the adoption agency, the media, and the Supreme Court that had what American studies scholar George Lipsitz has named a "possessive investment in whiteness."[113] Hence, heteronormative Whiteness and racialized, gendered notions of Nativeness were the invisible legal measurements that helped adjudicate this case. They buttressed the structure of settler colonialism, the logic of elimination, and liberal color-evasive individualism. Important to highlight is that this was not an individual case but illustrative of the law's relationship with Indian people, families, and Tribes relative to non-Indian people and entities. The "best interest" test (and American jurisprudence in general) presupposes an objective measurement, but in reality this test and the legal decisions that manifest from it are deeply rooted in Western colonial, racial, and heteronormative ideals.[114] ICWA was the legal concession that Western institutional and state interpretations of the "best interest" were detrimental to Indian children, families, and Tribes.[115] Thus, before the ethical question of what is in the best interest for Veronica, the Supreme Court should have remembered the legal question, Who should get to make this decision? Historically, Western governments and social service workers of White settler colonial nation-states have made decisions that have resulted in monumentally horrific outcomes.[116] As Margaret Jacobs has stated, child removal is not just a painful legacy of settler colonialism but also its "latest manifestation."[117]

The ruling highlights two other important points: First, it underscores the violence of love in transnational/transracial adoptions. There is no doubt that the Capobiancos and Maldonado loved Veronica. But structural-historical and symbolic violence were attached to the adoption even before it began, only to enact further violence as the case wore on. Second, while the majority of justices argued that the adjudication was narrow as to leave ICWA intact, the truth of the matter is that the decision not only ignored the law—the subsections that should have nullified Brown's supposed consent—but also substantially weakened it by gutting the placement preference requirement. Conservative organizations such as the National Council for Adoption and the Goldwater Institute are further attempting to exploit this moment.[118] Despite the precedent of *Mancari*, which explains that the authors of the Fourteenth Amendment of the Constitution considered and

then rejected the inclusion of Indians, they claim that ICWA, among other things, violates the Equal Protection Clause of the Fourteenth Amendment.[119] Such claims go back to the belief that Indians only care about the Tribe and not the rights and freedoms of children and parents.[120] The suits hope to reestablish minimum blood quantum requirements for tribal citizenship (an idea that the majority justices wondered why it was not already in place), which would endanger the continued existence of tribal nations—precisely the reason why ICWA was enacted.[121] Attacks by anti-ICWA individuals, agencies, and other entities focus on the local-present context (instead of the global-historical), dismissing Indigenous epistemology that considers seven generations in the past and seven generations in the future. They disregard the ways individuals are tied to land and the community around them, seeing them as "modern liberal individuals" who must be detached and adopted by White families in order to become modern. Such discourse has narrated an incredible, alluring, and captivating (in some cases literal) story of rebirth, new chances, and a new life.

Adoptive Couple v. Baby Girl demonstrates the limits of liberalism, ICWA, and the law in general as answers to ongoing settler colonial violence. For Lenape scholar Joanne Barker, the ruling is in fact a necessary "U.S. imperial formation" to maintain the "unlimited access [that] non-Indigenous people have enjoyed to Indigenous lands, resources, and bodies."[122] Indeed, the judgment disregards Indigenous parents, families, communities, and Tribes in favor of a Western philosophy of "best interest" that has been yet another form of elimination through assimilation. As constitutional law professor Milner S. Ball has put it: "Injustice [for Native Americans] is not peripheral or aberrational. It is built into the [U.S.] legal system."[123] *Adoptive Couple v. Baby Girl* illustrates what Dene scholar Glen Coulthard has called the colonial politics of recognition, where legal and state recognition of Indigenous self-government are always already circumscribed by the state and its institutional allies such that the recognition does not change the colonial relations.[124] Thus, while earlier legal victories in the form of *Morton* (1974), ICWA, and *Mississippi Band of Choctaw Indians* (1989) appeared to present American Indians as self-determined and sovereign subjects, *Adoptive Couple v. Baby Girl* represents how American jurisprudence is not separate from settler colonial and heteronormative logics even as it might try to atone for its past.

Although this might foretell a bleak future, Native feminist scholars Maile Arvin, Eve Tuck, and Angie Morrill, in their essay "Decolonizing Feminism," remind us that decolonization is a future-oriented project: "One of the most radical and necessary moves toward decolonization requires imagining and enacting a future for Indigenous peoples—a future based on terms of their own making."[125] Written in the text of ICWA is that the law ensures a "minimum federal standard" to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families" by giving Tribes authority over child welfare cases. This low bar elucidates in clear terms the colonial politics of recognition. More

important, though, it indicates the need for what Coulthard calls "resurgent politics of recognition" and Native feminist theories—as Arvin, Tuck, and Morrill suggest—in how we think about Indian children, families, Tribes, and yet-to-be-imagined futures vis-à-vis the settler colonial and heteronormative backdrop that prefers White adoptive homes, families, and supposedly predetermined futures.[126]

A LONG POSTSCRIPT

As I finished revisions for this book, the Supreme Court published its ruling on *Haaland v. Brackeen* (2023). Four parties were involved in the case. There were two White adoptive couples, Chad and Jennifer Brackeen of Texas as well as Nick and Heather Libretti of Nevada. The Librettis were joined by the birth mother, Altagracia Hernandez, of their adopted daughter. The other two parties were White foster parents, Jason and Danielle Clifford of Minnesota, and the State of Texas. Collectively, they argued that ICWA was unconstitutional because it exceeded federal authority, infringed upon state sovereignty, and discriminated on the basis of race.[127] ICWA has been challenged nearly as many times as the Affordable Care Act.[128] Here, White adoptive families, adoption and anti-Native interest groups, and the State of Texas used similar settler logics as *Adoptive Couple* such as racial discrimination, opposite futures, and best interest of the child to elevate White adoptive families and weaken Native self-determination. Although ICWA was surprisingly upheld, the ruling left the door open to further attacks, and it also reaffirmed settler colonial logics of plenary power that illustrate its limits.

Supporters of ICWA have feared that the *Brackeen* ruling could overturn the law in part or in its entirety, imperiling Native sovereignty more broadly. During the oral arguments, Native activists, like those in Figure 7, protested outside of the Supreme Court for it to protect ICWA. Lauren van Schilfgaarde, Cochiti Pueblo and UCLA law professor, articulated *Brackeen* as a "bundle" of "different threats," while Rebecca Nagle, Cherokee writer and podcast host, stated the case is feared to be "the first domino in a row of dominoes" that could affect such areas as tribal courts, housing, sacred land and water rights, environmental protections, employment, gaming, education, and health care.[129] For example, one of the law firms that represented the plaintiffs pro bono, Gibson Dunn, was involved in a recently dismissed Washington State court case that was challenging the Indian Gaming Regulatory Act as a race-based law that violates equal protection under the Constitution.[130] It was also fighting tribal challenges to the Dakota Access Pipeline. Mary Kathryn Nagle, an attorney and citizen of Cherokee Nation, stated it was no accident that the "fancy law firm that invests lots of time and resources into making money from oil and gas companies, all of a sudden really cared about Indian children, and wanted to all of a sudden get involved in custody disputes."[131]

In a shockingly decisive 7–2 decision, Justice Amy Coney Barrett authored the majority opinion with Justice Neil Gorsuch filing a concurring opinion that was

FIGURE 7. Native activists protest outside the Supreme Court on November 9, 2022, during the oral arguments of *Haaland v. Brackeen.* Photo credit: Darren Thompson.

joined in part by Justice Sonia Sotomayor and Justice Ketanji Brown Jackson. There was palpable anxiety that through this case the Court would dismantle ICWA. In the end its ruling seemed almost simplistically clear: the court rejected, based on merits, the petitioners' claims that ICWA exceeded congressional authority, infringed upon state sovereignty regarding family law, and burdened (or commandeered) states' resources and rejected, based on lack of standing, claims that ICWA's placement preferences violated equal protection.[132] Rather, the Constitution affords Congress the "power to legislate with respect to Indians" in ways that are "broad" but not "unbounded" and this includes the ability to institute ICWA as established.[133] Barrett cited nine cases to iterate that Congress possesses plenary (but not absolute) power that "supersed[es] tribal and State authority" and noted the trust relationship that has existed between the United States and Tribes.[134] Gorsuch in his concurring opinion similarly outlined Congress's power as broad and plenary only in that "it leaves no room for State involvement."[135] He remarked: "States could no more prescribe rules for Tribes than they could legislate for one another or a foreign sovereign."[136]

Gorsuch recounted the history of how U.S. policies tried to destroy tribal identity and assimilate Native Americans into American society. Citing discourse from the late nineteenth century that justified these brutal policies, he offered Richard Henry Pratt as an example. Pratt, with regards to the role of Indian boarding schools, contended that "all the Indian there is in the race should be dead. Kill the

Indian in him, and save the man."[137] In narrating this history, Gorsuch covered the assimilationist tactics of stripping Native identity through prohibiting traditional names, hair, clothes, and Native language usage; the physical, sexual, emotional, and institutional abuse (e.g., malnourishment, overcrowding, and lack of health care) that children experienced; as well as forced labor.[138] He also described the transition to adoption, which was described by one official as a way to "solve the Indian problem . . . in one generation."[139]

Practices of removal and family separation had little to do with physical abuse and instead were grounded in claims of "neglect" associated with poverty. Sometimes parents were forced, threatened, or tricked into surrendering their children, where they would oftentimes experience actual abuse in their foster and adoptive homes.[140] While he did not characterize such language and policies as White supremacist or settler colonial, Gorsuch's inclusion of this sordid history buttressed his claim that ICWA "did not emerge from a vacuum," duly contextualizing the need and Congress's justification for the law.[141] After laying out Congress's broad authority relative to tribal self-determination, Gorsuch contended that "at its core, ICWA restricts how non-Indians (States and private individuals) may engage with Indians. . . . And at the risk of stating the obvious, Indian commerce is hard to maintain if there are no Indian communities left to do commerce with."[142] ICWA is considered the gold standard for child welfare because in order to terminate parental rights or remove an Indian child from its family, the law requires that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family" (as opposed to "reasonable efforts"); there must be "clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child"; and that these findings must be "beyond a reasonable doubt."[143]

Diving deeper into the separate cases of *Brackeen* reveals that, similar to arguments made in *Adoptive Couple*, the adoptive and foster parents made claims about racial discrimination, opposite futures, and best interest of the child. According to the Brackeens, who are evangelical Christians, they "felt a very profound calling from God, leading [them] to become foster parents."[144] In June 2016 they received a call about a child, A.L.M., who had a Navajo mother and a Cherokee father. A.L.M. was ten months old when he was placed with the Brackeens. While they were told that it would be a two-month arrangement, he lived with the Brackeens for a year, during which his parents' rights were terminated and no extended family were available for adoption. The Brackeens were told that they could not adopt, but they "pursued adoption anyway because [they] felt like that was the right thing to do," which the child's biological family supported.[145] Nevertheless, Navajo Nation had found a prospective Navajo adoptive family in New Mexico, and the judge denied the Brackeens' adoption petition because of ICWA.[146] The Brackeens successfully

petitioned for an emergency stay of the order, and Navajo Nation relented to the Brackeens, whose adoption of A.L.M. was ultimately finalized by January 2019.

Despite this outcome, the Brackeens sued because they believed ICWA is "antiquated" and harmful.[147] They also wanted to adopt A.L.M.'s half-sister, Y.R.J., even though their great aunt, Ms. James, who is Navajo from Arizona, was available to adopt her.[148] Ms. James and other close family members to Y.R.J. traveled from Arizona to Texas for a court trial. In his testimony Chad explained his worry about the girl living with her great aunt, especially when she would be an adolescent: "I don't know what that looks like—if she needs space, if she needs privacy. I'm a little bit concerned with the limited financial resources possibly to care for this child, should an emergency come up."[149] Chad's testimony repeated the same settler and White supremacist logic that social workers had used in justifying the removal of Native children and placement into White homes—the ones that led to the creation of ICWA in the first place. Ironically, part of the Brackeens's reasoning for wanting to adopt her was because A.L.M. would need "a sibling who looks more like him than we do, who knows what he's gone through and who shares his story more than anyone else."[150] The judge sided with the recent federal court ruling that declared ICWA unconstitutional and applied Texas family law, declaring shared custody but awarding primary custody of the girl to the Brackeens.

The Librettis, a Nevada couple, successfully adopted Baby O after her mother, Altagracia Hernandez, who is not Native, relinquished her at a hospital upon birth under Nevada's Safe Haven Law. The birth father, E.R.G., whose mother was an enrolled member of Ysleta del Sur Pueblo Tribe in Texas, challenged the adoption but was houseless and struggled with substance abuse. Washoe County Human Services Agency determined that he needed to be sober to reunify with his daughter. Even though Baby O became an enrolled member, and the Tribe was trying to implement ICWA, the Librettis contacted Baby O's other family members to dissuade them from seeking adoption. They even asked her grandmother to renounce her tribal membership to remove ICWA from the equation. Washoe County assisted the Librettis by obstructing ICWA when the caseworker, who was given a list of 39 relatives by the Pueblo Tribe, did not reach out to any family members until court-ordered to do so. Eventually, the grandmother changed her mind about adopting Baby O. An uncle who was interested in caring for Baby O said he was contacted by the Librettis, and he too withdrew. A great aunt was interested and tried to contact the county, but months went by without a response. She tried again, but the social worker told her it would be a lengthy, difficult, and probably unsuccessful custody fight. Ultimately, the Librettis were able to adopt Baby O. Even though the Librettis prevailed, they joined the Brackeens in their suit against ICWA. Since filing the lawsuit, Nick and Heather have separated.[151]

Danielle and Jason Clifford were unable to have kids of their own and decided to foster-to-adopt. Similar to the Brackeens, God played an important role: "[Adoption was] the way that God had ordained for us to have a family," Danielle testified.

"We had a lot of prayer over that."[152] The six-year-old girl, Child P., whom they cared for had lived with them for a year after her parents lost their parental rights due to arrests from drugs and neglect. As a result of missing information, White Earth Ojibwe Nation did not believe Child P. was eligible to be a member, but it later realized that she was and intervened on behalf of the biological grandmother, Robyn Bradshaw, who was a member of the Tribe. In fact, Bradshaw had helped her daughter raise Child P. for the first three years of her life, yet she was denied custody of Child P., who was placed in state care. Bradshaw had a 15-year-old felony conviction for receiving stolen property, and she also was involved with Child Protective Services when her own daughter, Suzanne (Child P.'s mother), was a teen. Yet the county could have worked with Bradshaw to set aside her disqualifiers as the county does in many cases.[153] There is another detail about Bradshaw's history, though—when she was 10, she was relocated from Minnesota to another state and forced to attend an Indian boarding school.[154] Her family had already been a part of a deeply racist practice that had led to collective and intergenerational trauma for Native families and Tribes. Once Bradshaw knew that she could not become Child P.'s immediate foster parent, she found other family to be foster parents, but Hennepin County workers either did not investigate or denied her suggestions. In addition, Child P.'s guardian ad litem, Barbara Reis, a White retired schoolteacher, doubted Bradshaw's ability to care for her grandchild, citing her periods of houselessness and criminal record.

When Suzanne's parental rights were terminated in 2016, Bradshaw's visitation rights also disappeared. Child P. was then placed with the Cliffords. Reis repeatedly discouraged the Cliffords from allowing Bradshaw to visit Child P. In other words, she was "actively kept away from her granddaughter."[155] The Cliffords showed that they loved Child P., who participated in Girl Scouts, dance classes, and church activities. They attended a Mother's Day powwow, read her books about Native folklore, and tried to educate themselves about Native culture and history.[156] Similar to other cases, such as *Adoptive Couple*, the Cliffords believed that Child P. was their child despite family wanting to care for her: "We feel she's our daughter and we are going to fight to keep her because in our minds we've adopted her already." Moreover, they rehearsed familiar opposite future ideology, claiming: "Our biggest concern is that they win and what are her chances for the future if that happens."[157] The implication was that Child P. would have an undoubtedly worse future if she was not raised by the better family, the Cliffords. Eventually, Bradshaw became a licensed foster parent, and her granddaughter was able to live with her. In a five-day evidentiary hearing, twenty witnesses testified about Child P., Bradshaw, and the Cliffords.[158]

In a January 17, 2019, ruling Judge Angela Willms criticized multiple parties, including the county, the Tribe, and Reis for causing trauma to Child P. and Bradshaw. She recognized that both parties loved Child P., but the judge found that living with Bradshaw was in the best interest of Child P. In addition to caring for

Child P. for four of seven years, Bradshaw was "uniquely able to provide religious and cultural needs . . . through connection to the White Earth Band"; able to maintain connections with other family; and "consistently puts [Child P.'s] needs first." Willms found that Reis showed "palpable" "bias in favor of the Cliffords" with a "fundamental" misunderstanding of the cultural complexities of Child P.'s placement.[159] Despite the Cliffords suing for adoption and joining the *Brackeen* case, Bradshaw has facilitated overnight stays every other weekend for Child P. at the Cliffords because Child P. expressed that desire, once again showing her prioritization of Child P.'s best interest.[160]

A.L.M., Y.R.J., and Baby O's cases were exactly the type of cases that ICWA was meant to cover. As Rebecca Nagle has summarized: "The narrative that ICWA disadvantaged the Brackeens, Cliffords, and Librettis is an upside-down version of the truth. . . . All the Native children had an extended family member who wanted to raise them. Every Native relative got pushback—from a social worker, foster parent, family court judge, or all three. Compared with the white foster parents, the Native family members faced more hurdles in these custody battles. In the end, only one grandma was able to adopt her granddaughter—Child P—after fighting for six years."[161] To say that these cases have similarities to *Adoptive Couple* would be an understatement. All of the families in the *Brackeen* case, and many of the parties working with them, went to great lengths to maintain custody and prevent placement with the child's family. They believed that they were the better future for Native children.

General reactions to the ruling from ICWA supporters were jubilation and relief. The Protect ICWA Campaign, which is composed of the National Indian Child Welfare Association, the National Congress of American Indians, the Native American Rights Fund, and the Association on American Indian Affairs, stated: "We are overcome with joy that the Supreme Court has upheld the Indian Child Welfare Act. . . . The positive impact of today's decision will be felt for generations."[162] Robin Little Wing Sigo, member of the Suquamish Tribe and board member of the National Indian Child Welfare Association, added: "There's definitely a collective sigh of relief . . . across Indian Country today."[163] Despite the clear win for ICWA, Native Tribes, and Native children, there are still concerns. First, the Court declined to rule on the plaintiff's equal protection claim based on the Fourteenth Amendment—that ICWA's "racial preferences" harmed both non-Indian families and Indian children—because they lacked standing. Two of three couples, the Brackeens and Librettis, had not been harmed because their adoptions were completed, and the fourth was living with biological family. The Court had nothing to remedy. In addition, plaintiffs did not sue state parties that implement ICWA but instead sued federal parties that cannot redress the proclaimed injury.[164]

Even though this portion of the suit was dismissed on standing, there are legitimate concerns that future conservative, pro-adoption, and anti-Native groups will continue attempts to dismantle the placement preferences in sections 1915(a) and

(b) by targeting them as unconstitutional racial classifications while erasing their political denotation. As Nagle wrote just prior to the oral arguments for *Brackeen*: "If ICWA is unconstitutional because it is based on race, then what of the clinic where I get my health care that serves only tribal citizens? . . . What 'racial group' in the United States has their own police forces, courts, elections, governments, and lands, as tribes do? The possible shift is radical."[165] While Gorsuch seemed steadfast in his belief in tribal sovereignty, Barrett and Brett Kavanaugh in their opinions almost invited interested parties to submit a case. Kavanaugh, in a brief concurring opinion, wrote that the equal protection issue had not been addressed and that for him it was "serious."[166] In the oral arguments Kavanaugh stated: "I don't think we would ever allow . . . Congress to say that white parents should get a preference for white children in adoption or that Latino parents should get a preference for Latino children in adoption proceedings."[167]

Just as in the *Adoptive Couple* oral arguments, there was a focus on blood. Matthew McGill, lawyer for the Brackeens, contended that the Court must distinguish between "regulating tribes as a polity and regulating persons who happen to have tribal blood as persons."[168] *Brackeen* did not disrupt any legal precedents concerning "Indian" and "Native" as political identities, but that will not stop future entities from trying. The *Wall Street Journal* published an editorial lamenting the ruling but remained hopeful that the ruling indicated future challenges to the "racial criteria" that "elevate tribal prerogatives" "above the welfare of vulnerable Native American children."[169] Mark Fiddler, one of the attorneys for the plaintiffs, guaranteed as much, stating, "rest assured, more challenges to ICWA under equal protection grounds are guaranteed."[170] In the oral arguments, justices and attorneys for the plaintiffs continually questioned the placement preferences in section 1915(a), especially the third one, which states "other Indian families."[171] This is to say that people will continually question or willfully ignore the political (not racial) rights of Tribes. Chief Justice Roberts, who has already argued that equal protection requires eliminating "all" racial discrimination in *Students for Fair Admission v. Harvard* (2023), could be the deciding vote in a future ICWA challenge that could have widespread implications for Native self-determination and sovereignty.

The ruling was also based on the idea of plenary power. In a quick but important line of the *Brackeen* majority opinion, Barrett stated that the petitioners did not consider how their arguments fit within case law (Supreme Court precedents): "[Petitioners] neither ask us to overrule the precedent they criticize nor try to reconcile their approach with it. They are also silent about the potential consequences of their position. Would it undermine established cases and statutes? If so, which ones? . . . If there are arguments that ICWA exceeds Congress's authority as our precedent stands today, petitioners do not make them."[172] Throughout the oral arguments, multiple justices referenced Congress's plenary power. Justice Sonia Sotomayor in particular referenced the "legion of cases" regarding plenary power that has spanned "two centuries."[173] These two aspects of the case and the

oral arguments themselves demonstrate how the "win for ICWA" is buttressed by the limits of sovereignty and self-determination for Tribes. Those limits are based on the uneven relationship derived from Congress's possession of plenary power and the trust relationship that treats Tribes as "domestic dependents."[174] Indeed, according to Edwin S. Kneedler, the attorney defending the federal government, the Constitution and the plenary power that legally emerges from it "renders the tribes dependent and therefore, in need of protection."[175] While the Supreme Court upheld ICWA and the many aspects of Native identity, tribal status, sovereignty, and self-determination, it left open the possibility that the same players who will inevitably attack ICWA on the Native identity, racial discrimination, and equal protection front may also seek to dismantle Congress's plenary power to enable states to infringe on Native rights and sovereignty.

WHO GETS TO DECIDE?

This question must be asked once again because it is always disregarded. In his dissent Alito lamented: "The challenged ICWA provisions effectively 'nullify' a State's authority to conduct state child custody proceedings in accordance with its own preferred family relations policies, a prerogative that States have exercised for centuries."[176] Of course, Alito seems to forget the very purpose of ICWA was to eliminate the violence produced by the near century and a half of those very child welfare enactments that Gorsuch explicated. Although ICWA has largely been very successful, there are still 12 states where Native children are placed in foster care at disproportionate rates between 2 and 14 times their state population, with the average for all states being 2.6 times higher than their population. More important, disproportionality increases during the last stage—that of placement—which is four times higher.[177] After the *Haaland* ruling, Chuck Hoskin Jr., principal chief of Cherokee Nation, released a statement noting that 30 percent of the 1,141 Cherokee children in foster care placements are in non-Native homes.[178] Many Tribes have remedies that run counter to U.S. child welfare policies such as continuing reunification efforts for many years instead of ending after 15 to 22 months, as required by the ASFA; not (or rarely) terminating parental rights; and employing culturally practiced open adoptions instead of closed adoptions.[179] Importantly, ICWA has helped Tribes implement these practices.

The challenges to ICWA assume that White parents are completely excluded from the placements. In reality, there are many instances in which Tribes decide that it is in the best interest of the child to be placed or remain with a White family, as was the case for Manilan Houle. Houle is a member of the Fond du Lac Band of Superior Chippewa Tribe in Minnesota and had been placed with three different Native families. But for his next placement, his Tribe believed that the next available Native family was too far away from his support system, so it placed him with a White family that was already friends with his older sister. Houle was kept in

that family, even when another Native family nearby became available.[180] Houle's case and others show that Tribes sometimes decide to place children with non-Native families when it is in their best interest. Many policymakers, social workers, judges, and prospective adoptive parents continue to make arguments against ICWA based on claims of the "best interest of the child." Rebecca Nagle notes how these arguments about Native kids are also about Native Tribes: "Native kids have been the tip of the spear in attacks on tribal sovereignty for generations." She adds that even those who have good—I would add "loving"—intentions have produced harm: "The amount of harm that well-intentioned people who thought that they knew better than Native people ourselves what Native people needed—the amount of harm that those people have done is incalculable."[181] Indeed, the vital aspect surrounding the "best interest of the (Native) child" is that Tribes should get to make this decision.

Outside of ICWA, foster care has historically been seen as a temporary form of care. The ASFA shifted this idea, prioritizing adoption and creating more "foster-to-adopt" programs. But views have started to shift toward striving for kinship placements (for all children), both guardianships and adoptions, which research shows leads to increased stability, preservation of cultural identity, improved behavioral outcomes, and maintenance of sibling ties.[182] States are beginning to recognize ICWA as the "gold standard" that should be followed for all placements rather than a law that discriminates. In this way we can once again learn from Indigenous ways of relationality and care when thinking about the most vulnerable.