Indian Child Welfare Act — Termination of Parental Rights — Adoptive Couple v. Baby Girl

In the decades leading up to 1978, large numbers of Indian families were broken up through forced adoption or foster-care placement of Indian children, usually in non-Indian homes.[1] To stem this "wholesale removal of Indian children,"[2] Congress enacted the Indian Child Welfare Act of 1978[3] (ICWA), which sets rigorous standards to govern state court custody proceedings involving Indian children. Last Term, in *Adoptive Couple v. Baby Girl*,[4] the Supreme Court held that provisions of the ICWA heightening requirements for termination of an Indian's parental rights did not apply where the parent had never known or had custody of his child.[5] More than a mere inquiry into Indian exceptionalism, the case tests the contours of parental rights, asking whether natural parents or custodial families should most warrant judicial protection. In so doing, *Adoptive Couple* both sustains the Court's consistent if fragile protection of affective parenthood and suggests the interminability of the debate over biology versus care.

Baby Girl was born to an Indian Father and non-Indian Mother whose relationship ended shortly after they discovered the pregnancy.[6] When Mother asked Father if he preferred to pay child support or to relinquish his parental rights, Father chose relinquishment; Mother consequently decided to put the child up for adoption, selecting Adoptive Couple, a non-Indian couple from South Carolina.[7] Adoptive Couple aided Mother throughout the pregnancy, providing financial and emotional support and even attending the delivery.[8] Four months after Baby Girl's birth, Adoptive Couple served Father, who had not offered support or attempted to contact Mother or child, with notice of the pending adoption.[9] He signed papers stating that he accepted service and was "not contesting the adoption," but one day later contacted a lawyer to stay the proceedings and seek custody.[10]

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[1] *See, e.g.*, Toni Hahn Davis, *The Existing Indian Family Exception to the Indian Child Welfare Act*, 69 N.D. L. REV. 465, 467–68 (1993).

[2] Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2557 (2013) (quoting Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989)) (internal quotation mark omitted).

[3] 25 U.S.C. §§ 1901–63 (2006).

[4] 133 S. Ct. 2552.

[5] *Id.* at 2557.

[6] Adoptive Couple v. Baby Girl, 731 S.E.2d 550, 553 (S.C. 2012). To avoid choosing between the majority's and dissents' pointedly different appellations, this comment will refer to Baby Girl's natural parents simply as "Mother" and "Father."

[7] *Id.*

[8] *Id.* at 553–54. As both courts noted, "Adoptive Father even cut the umbilical cord." *Adoptive Couple*, 133 S. Ct. at 2558; *see Adoptive Couple*, 731 S.E.2d at 554.

[9] *Adoptive Couple*, 731 S.E.2d at 555.

[10] *Id.*

The South Carolina Family Court denied the adoption and awarded custody to Father.[11] Holding Adoptive Couple to the ICWA's heightened standards, the court found they had failed to show by clear and convincing evidence that granting Father custody of Baby Girl would cause her serious emotional or physical harm, as required by § 1912(f) of the ICWA.[12] Then twenty-seven months old, Baby Girl was placed in the custody of Father and removed to Oklahoma.[13]

The South Carolina Supreme Court affirmed.[14] Writing for the court, Chief Justice Toal[15] first confirmed that the ICWA applied both to Baby Girl as an Indian child and to Father as a "parent" under the ICWA.[16] Over the dissents of Justices Hearn and Kittredge, who would have found that Father's "complete[] shirking [of] his parental responsibilities"[17] "manifestly overc[a]me the statutory placement preference and compel[led] placement" with Adoptive Couple,[18] the court concluded that two ICWA provisions barred termination of Father's parental rights: § 1912(d), which required showing that "active efforts ha[d] been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family,"[19] and § 1912(f), which required showing that "serious emotional or physical damage" would result should Father retain custody.[20] Finding that Adoptive Couple had made neither showing,[21] the court "with a heavy heart . . . affirm[ed] the family court order."[22]

The Supreme Court reversed. Writing for the Court, Justice Alito[23] held that Father could not invoke either of the disputed ICWA provisions because he had never known or had custody of Baby Girl.[24] Assuming that Father was a "parent" under the terms of the statute, the Court considered both provisions purporting to bar termination of Father's rights and found each wanting. The Court first examined the text of § 1912(f), zeroing in on the provision's required showing that

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[11] *Id.* at 556.

[12] *Id.*

[13] *Adoptive Couple*, 133 S. Ct. at 2559.

[14] *Adoptive Couple*, 731 S.E.2d at 552.

[15] Chief Justice Toal was joined by Justices Pleicones and Beatty. *Id.* at 567.

[16] *Id.* at 558, 560.

[17] *Id.* at 591 (Hearn, J., dissenting).

[18] *Id.* at 568 (Kittredge, J., dissenting).

[19] *Id.* at 562 (majority opinion) (quoting 25 U.S.C. § 1912(d) (2006)).

[20] *Id.* at 563 (quoting 25 U.S.C. § 1912(f)).

[21] *Id.* at 567. The court also observed that, were it to terminate Father's rights, it would be bound by § 1915(a) to place Baby Girl in a "statutorily preferred home," *id.* at 566 — one featuring a member of the child's extended family, her tribe, or another Indian tribe. *Id.* at 566–67.

[22] *Id.* at 567.

[23] Justice Alito was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Breyer.

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

harm result from "continued custody of the child by the parent."[25] Insisting that the term "continued custody" necessarily implied a prior term of custody that could be sustained or resumed, the Court concluded that § 1912(f) did not apply where, as here, the parent had never had custody of the child.[26] To accept Father's reading, under which § 1912(f) would effectively give noncustodial parents the statutory benefit of the doubt, would be, the Court averred, "contrary," "nonsensical," and "absurd."[27] In particular, the Court rejected Father's reading as unresponsive to the ICWA's historical purpose: the ICWA, the Court explained, existed to counter the removal of Indian children from intact tribal families that had occurred in the 1970s due to cultural insensitivity.[28] This motivating concern for the protection of the Indian family could not be implicated where there existed no intact Indian family to protect.[29]

The Court then turned to § 1912(d)'s requirement that parental rights be terminated only after the Indian family has been offered remedial services to prevent its "breakup."[30] The Court observed that no "breakup" of a family could occur where a parent had never known his child, as there was then "no 'relationship' that would be 'discontinu[ed]' — and no 'effective entity' that would be 'end[ed]' — by the extinction of the Indian parent's rights."[31] This provision, like § 1912(f), made sense only where applied to governmental interference with a functioning family; to hold otherwise, the Court insisted, would be to force an adoptive couple to first stimulate a natural parent's parental feeling — a "bizarre undertaking" certain to "dissuade some"[32] and thereby leave "vulnerable Indian children at a unique disadvantage in finding a permanent and loving home."[33] Rather than allow Father to "abandon his child *in utero*[,] refuse any support," and then "play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests," the Court held that the ICWA's protections did not apply to an absentee Indian father.[34]

Justice Thomas concurred, writing separately to explain why constitutional avoidance compelled the Court's decision.[35] He questioned

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[25] *Id.* at 2560 (emphasis omitted) (quoting 25 U.S.C. § 1912(f)).

[26] *Id.*

[27] *Id.* at 2560, 2561.

[28] *Id.* at 2561.

[29] *Id.*

[30] *Id.* at 2562.

[31] *Id.* (alterations in original).

[32] *Id.* at 2563.

[33] *Id.* at 2564.

[34] *Id.* at 2565. The Court also clarified that § 1915(a)'s placement preference would not bar a non-Indian family from adopting an Indian child where, as here, neither the father nor members of the tribe had attempted to *adopt* the child. *Id.* at 2564.

[35] *Id.* at 2565 (Thomas, J., concurring).

whether the Indian Commerce Clause, the ICWA's grant of authority, afforded Congress the "power to override state custody law whenever an Indian is involved."[36] After tracing the history of the Indian Commerce Clause, he noted several constitutional problems created by the ICWA's application: namely, that its regulation of child custody proceedings implicated neither commerce nor "Indian tribes as tribes."[37] Because the Court's reading gave a plausible interpretation that avoided the constitutional quandary, he concurred in full.[38]

Justice Breyer penned a brief concurrence to add "three observations."[39] First, he noted the possibility that the Court's decision might "exclude too many" fathers, including those whom an evidentiary showing could prove to be suitable parents.[40] Second, he stressed the narrowness of the Court's holding, insisting that it made no decision regarding "a father with visitation rights," "a father who has paid 'all of his child support obligations,'" "a father who was deceived about the existence of the child[,] or a father who was prevented from supporting his child."[41] Finally, he questioned whether statutory provisions not at issue might permit an absentee Indian father to regain "special statutory . . . preference," but declined to investigate further.[42]

Justice Sotomayor dissented.[43] Reproaching the majority for transforming the ICWA into "an illogical piecemeal scheme," Justice Sotomayor would have held that both provisions of the ICWA barred termination of Father's rights.[44] She first explained that the ICWA's protections were intended to augment the protections for parents — including unwed fathers — already "recognized in our cases, [which acknowledge] that the *biological* bond between parent and child is meaningful."[45] In particular, she faulted the majority for accepting Father as a "parent" under the ICWA without accepting his subsequent entitlement to the ICWA's intentionally "greater protection for the familial bonds between Indian parents and their children than state law may afford" the bonds between non-Indian parents and children.[46] To ensure Indian parents these protections, she would have read the ICWA as safeguarding not the Indian family but rather the "'parent-child relationship' that exists between a[n Indian] birth father and his

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[36] *Id.* at 2566.
[37] *Id.* at 2570.
[38] *Id.* at 2571.
[39] *Id.* at 2571 (Breyer, J., concurring).
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] Justice Sotomayor was joined by Justices Ginsburg and Kagan and in part by Justice Scalia.
[44] *Adoptive Couple*, 133 S. Ct. at 2572–73 (Sotomayor, J., dissenting).
[45] *Id.* at 2574 (emphasis added).
[46] *Id.* at 2575.

child,"[47] "on which a stable and caring [family] may be built."[48] This inchoate parent-child relationship, she insisted, was the relationship at stake in both § 1912(d) and § 1912(f), as it was both "fully capable of being preserved via remedial services"[49] and implicated by the statute's definition of "child custody proceeding[s]," which included any "termination of *parental rights*."[50]

Justice Sotomayor further criticized the majority for ignoring "the full implications of its assumption that there are some ICWA 'parent[s]' to whom" the statute's protections did not apply.[51] Raising the specter of the sympathetic Indian father who unfailingly visits and supports his child, Justice Sotomayor lamented that, under the majority's rigid custodial requirement, his parental rights might nonetheless be terminated or subjected to the vagaries of "patchwork" state custody proceedings.[52] Finally, she countered the majority's conclusion that the ICWA created an "undeserved windfall" for unwed Indian fathers, explaining that the ICWA merely afforded Indian birth fathers protections similar to those already in place for non-Indian fathers in several states.[53] Though the majority might "consider this scheme [of securing Indian families] unwise," Justice Sotomayor chastised, or might wish for an ideal world populated by "'intact' families,"[54] "we do not live in such a world"; rather, she concluded, Father constituted a "parent" whose rights "should be honored" under the ICWA.[55]

Justice Scalia joined Justice Sotomayor's dissent "except as to one detail": rather than reject the Court's reading of "continued custody" because, as Justice Sotomayor suggested, "literalness may strangle meaning,"[56] Justice Scalia would have held the dissent's interpretation of "continued" — as ongoing rather than temporary — to be the interpretation intended by the statute.[57] Before closing, however, he criticized the majority for "demean[ing] the rights of parenthood," asserting that even where children "would be better off raised by someone else," "parents have their rights" and "no reason in law or policy [exists] to dilute that protection."[58]

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47 *Id.*

48 *Id.* at 2582.

49 *Id.* at 2575.

50 *Id.* at 2574 (emphasis added) (quoting 25 U.S.C. § 1903(1) (2006)) (internal quotation marks omitted).

51 *Id.* at 2578 (alteration in original).

52 *Id.* at 2579.

53 *Id.* at 2581.

54 *Id.* at 2583.

55 *Id.* at 2584.

56 *Id.* at 2571 (Scalia, J., dissenting).

57 *Id.* at 2572.

58 *Id.*

In a Term with the Court's attitudes toward race and equal protection on high display,[59] it is tempting to see *Adoptive Couple v. Baby Girl* as yet another debate about statutory protections on the basis of race, its holding merely another iteration of the Roberts Court's discomfort with government-endorsed exceptionalism.[60] More intriguing, however, is the case's expression of another, equally contentious debate: that of the rights of biological parents versus those of custodial parents. A close reading of its opinions reveals their countervailing preoccupations with affective families and natural parents, as both Justice Alito and Justice Sotomayor notably eschewed ICWA precedent[61] and fixated instead on the terms "parent," "family," and "custody," exploring and exploiting their associated connotations to arrive at the opinions' contrasting conclusions. Read as a dispute over biology versus care, the case then fits squarely in the parental rights jurisprudence preceding it, continuing the Court's trend toward provisional prioritization of family over biology. In so doing, *Adoptive Couple* augurs forthcoming challenges for nontraditional families and reveals a judicial unwillingness to lay to rest this fundamental tension.

The majority plainly broadcasts its anxiety over the case's implications for the functioning family. From its first words, the majority launches a visceral campaign on behalf of the (caring) family against the (absent) biological parent: "This case," it opines, "is about a little girl . . . taken, at the age of 27 months, from the only [family] she had ever known and handed over to her biological father, who had attempted to relinquish his parental rights."[62] Contrasting Adoptive Couple's financial aid, emotional support, and inclusion of Mother in Baby Girl's upbringing with Father's financial irresponsibility,[63] physical "abandon[ment],"[64] and callous decision to "cut off all communica-

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[59] *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675 (2013); Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013); Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013).

[60] Public commentary has generally focused on the case's racial implications. *See, e.g.*, Marcia Zug, Commentary, Adoptive Couple v. Baby Girl*: Two-and-a-Half Ways to Destroy Indian Law*, 111 MICH. L. REV. FIRST IMPRESSIONS 46 (2013); Andrew Cohen, *Indian Affairs, Adoption, and Race: The Baby Veronica Case Comes to Washington*, ATLANTIC (Apr. 12, 2013, 10:52 AM), http://www.theatlantic.com/national/archive/2013/04/indian-affairs-adoption-and-race-the-baby-veronica-case-comes-to-washington/274758.

[61] The opinions largely neglected *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), the Court's only prior ICWA case, and strikingly made no reference to the "existing Indian family" doctrine, which emerged in state courts to evade the ICWA's parental preferences. *See, e.g.*, *In re* Adoption of Baby Boy L., 643 P.2d 168, 174–76 (Kan. 1982); Davis, *supra* note 1, at 476. The doctrine precludes application of the ICWA when neither child nor parent has retained a significant relationship with the tribe — in essence, where there is no existing *Indian* family to be disrupted. The majority, by contrast, declines to apply the ICWA where no Indian *family* exists to be fractured, ignoring essentially the race-conscious analogue of its prevailing theory.

[62] *Adoptive Couple*, 133 S. Ct. at 2556.

[63] *Id.* at 2558.

[64] *Id.* at 2557.

tion" between Baby Girl and her prior parents,[65] the Court constructs a clear dichotomy not merely between Adoptive Couple and Father but between the affective family and the cold parent. Its references to Father as "Biological Father," distinguished from "Birth Mother," likewise saturate the text with subconscious reminders of the biological parent's inferior ties to his child.[66] The Court's very use of the terms "parent" and "family" manifests its devaluation of the parent: even when discussing § 1912(f), which addresses the "termination of parental rights" and "the parent['s]" custody,[67] the majority avoids speaking of the "parent" whenever possible, exchanging the term for "custodian"[68] or "custodial parent[]"[69] and inserting statutory text and history to ensure that the discussion alludes to "families" no fewer than eight times.[70] Above all, in its recurrent assertion that the ICWA was "intended [to keep] Indian children [in] *intact* Indian *families*,"[71] the Court makes clear that it is "families" — not "parents" or "Indians" — who merit the Act's protections.[72]

Justice Sotomayor's dissent likewise homes in on the nature of the "family" governed by the ICWA, rejecting the majority's conclusion for its failure to respect Father not as an Indian but as a parent. It spends pages wading through peripheral ICWA provisions purely to drive home that Father "has a federally recognized status as Baby Girl's '*parent*'";[73] only then does it locate the heart of its critique in the Court's seemingly unimplicated fathers' rights jurisprudence: namely, in the broad "principle, recognized in our cases, that the *biological bond between parent and child* is meaningful."[74] Indeed, the opinion remarkably justifies its reading of the statute by showing its protections to be commensurate with "laws protecting biological fathers[] . . . outside the context of ICWA,"[75] as if to transform the statute's focus from Indian rights to fathers' rights. The dissent also collapses the distinction between "families" and "parents" so central to the majority, insisting that the ICWA was "aimed at protecting the *familial* relationships between . . . *parents and their children*."[76] More tellingly, just as the majority's key semantic distinction depends on

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[65] *Id.* at 2559 n.3.

[66] *Id.* at 2558.

[67] *Id.* at 2560 (quoting 25 U.S.C. § 1912(f) (2006)).

[68] *Id.*

[69] *Id.* at 2561.

[70] *Id.* at 2561–62.

[71] *Id.* at 2561 (emphases added).

[72] *See, e.g.*, *id.* at 2557 (citing the ICWA's focus as "consequences to . . . *families*" (emphasis added)); *id.* at 2561 (citing the ICWA's focus as "dissolution of . . . *families*" (emphasis added)).

[73] *Id.* at 2574 (Sotomayor, J., dissenting) (emphasis added).

[74] *Id.* (emphasis added).

[75] *Id.* at 2582.

[76] *Id.* at 2579 (emphases added).

evocative images of family and parent, Justice Sotomayor's argument turns on its own haunting specter: the active and affective father who, indigent or ignorant, finds his constitutionally recognized relationship demeaned and his child wrested away.

By focusing so intently on the familial relationship at stake, both opinions identify *Adoptive Couple* as the newest heir to the Court's constitutional family law and parental rights jurisprudence. Justice Sotomayor's dissent is overt about its place in this canon, citing to the Court's parental rights cases more than to any on Indian law or rights,[77] and explicitly framing its claim as a call for Father to be accorded a form of the right the Court's cases promise all fathers: the right to create a family from biological opportunity.[78] Where Justice Sotomayor embraces the language of this canon, however, the majority embraces its content and course, continuing the Court's trend toward qualified prioritization of family over biology[79] and locating its decision firmly in the Court's line of parental rights cases.

The Court's foundational parental rights cases, while recognizing that biological parentage can serve as the basis for a constitutional right, qualified and cabined the reach of such a parental rights principle. From its first recognition that unwed fathers might have rights to parenthood in *Stanley v. Illinois*[80] to its refusal to afford unwed fathers an absolute right to notice and hearing before the child's adoption in *Lehr v. Robertson*,[81] the Court confronted a wide array of claims by fathers and grounded its holdings in the specific state laws at issue, repeatedly shying away from general pronouncements about fathers' rights. On one overarching principle, however, its cases concur: mere biology is insufficient to create bonds meriting constitutional protection; only if a parent actively "grasps [the opportunity to develop a relationship with his offspring] and accepts some measure of responsibility" may he "enjoy the blessings of the parent-child relationship."[82]

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[77] *See, e.g.*, *id.* at 2574–75 (citing Santosky v. Kramer, 455 U.S. 745, 758–59 (1982)); *id.* at 2575 (citing Lehr v. Robertson, 463 U.S. 248, 262 (1983)); *id.* at 2582 (citing Quilloin v. Walcott, 434 U.S. 246, 254–56 (1978)).

[78] *See id.* at 2574–75 (citing *Lehr*, 463 U.S. at 262; *Santosky*, 455 U.S. at 758–59).

[79] *See* Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809, 812–13 (2006) ("In a series of cases . . . biological fatherhood was subordinated to social fatherhood because the Supreme Court continued to embrace the . . . family."); *Developments in the Law — The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2058 (2003) (noting a "trend towards nonparental . . . rights — and the erosion of traditional parental rights").

[80] 405 U.S. 645 (1972); *see id.* at 649.

[81] 463 U.S. 248; *see id.* at 250.

[82] *Id.* at 262; *see also* Caban v. Mohammed, 441 U.S. 380, 392 (1979) (allowing father to veto infant's adoption, but approving the statute's permission to "proceed in the absence of consent when the parent whose consent otherwise would be required never has come forward or has abandoned the child"); *Quilloin*, 434 U.S. at 255; *Stanley*, 405 U.S. at 654–55.

The Court's more recent parental rights cases, *Michael H. v. Gerald D.*[83] and *Troxel v. Granville*,[84] have sustained and strengthened this skepticism toward parents' rights. *Michael H.* considered the relative rights of a biological father who had maintained ties with his child and of a cuckolded husband who had served as the child's de facto father.[85] Holding that a parent's rights do not include the right to override an existing family's presumption of legitimacy,[86] Justice Scalia's plurality opinion presented a striking glorification of the "unitary family"[87] that inspired two vehement dissents, each attempting with rhetoric to buttress the biological parent's rights against Justice Scalia's blistering opinion.[88] At the same time, the plurality's preoccupation with the salacious facts of the case at hand[89] — not to mention the decision's numerous, splintered opinions — left the future of Justice Scalia's elevation of the family less clear.[90] *Troxel* notably reversed the recurrent dichotomy of custodial family and noncustodial parent, asking whether a custodial parent possesses a right to deny visitation to her child's extended family.[91] Though the Court ultimately found for the parent, its failure to declare control of a child's visitation a parental right — instead merely faulting the lower court for affording the parent's preference insufficient weight in a best-interest balancing — left open the possibility that a court could require family visitation over *even a custodial parent's objection*, a radical expression of sympathy for familial bonds.[92] Amid convoluted and qualified holdings, these cases thus suggest a tentative commitment to maintenance of familial ties at the expense of parental control or access.

The majority opinion in *Adoptive Couple* then seems to offer, if anything, too fervent a defense of the affective family to fit neatly into this trend. However, Justice Breyer, necessary to the five-vote majority, introduces a key element of uncertainty in his concurrence that renders the decision as hesitant as its predecessors. By cataloging the numerous situations to which *Adoptive Couple*'s holding does not apply and suggesting that at least some suitable parents may prove for-

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[83] 491 U.S. 110 (1989).

[84] 530 U.S. 57 (2000).

[85] *See Michael H.*, 491 U.S. at 130 (plurality opinion).

[86] *Id.* at 123–24.

[87] *Id.* at 123.

[88] *See id.* at 137 (Brennan, J., dissenting); *id.* at 157 (White, J., dissenting).

[89] *See, e.g.*, *id.* at 130 (plurality opinion) (casting the case as a choice between "being []able to act as father of the child he has adulterously begotten, or . . . preserv[ing] the integrity of the traditional family unit").

[90] The fact that Justice Scalia joined Justice Sotomayor in *Adoptive Couple* in arguing for "the rights of parenthood" casts further doubt on the ongoing force of his opinion in *Michael H.*

[91] 530 U.S. 57, 67 (2000) (plurality opinion).

[92] *See id.* at 72; *see also Developments in the Law*, *supra* note 79, at 2057 ("*Troxel* [is] most significant for its implicit, albeit limited, endorsement of nonparental visitation.").

midable opponents to adoptive families, Justice Breyer emphasizes the narrow, provisional reach of the Court's prioritization of families and thereby puts *Adoptive Couple* back on the Court's listing path.

It is this very inability to escape uncertainty, qualification, and conflict that ultimately situates *Adoptive Couple* in the Court's parental rights canon and that suggests its ongoing significance. Like its predecessors, *Adoptive Couple* is another deeply divided and closely fought decision,[93] which refuses to wholly deny the power of biology even as it insists upon proactive parenting and affective relationships. The conditions and disclaimers embedded in the case's holding, taken together with the equal conviction and fervor of both opposing opinions, thus serve as proof of the interminability of such judicial debates about the family.[94] Further, the Court's very willingness to engage in a stark contest over biology versus family in a case that by no means required it — and to engage vigorously, even viciously[95] — seems a harbinger of things to come: in an age of momentous changes in the composition of the family, alluded to both in the decision[96] and in other decisions of the Term,[97] questions regarding which relationships and nontraditional ties warrant judicial protection promise to appear with ever more frequency and complexity.[98] As *Adoptive Couple* shows, however, the Court remains mired in the same disputes it first unleashed forty years earlier, still grappling with the fundamental tension between nature and nurture. Yet this irresolution and ongoing struggle may well be a cause for comfort rather than concern, a sign that the essential questions about the most essential ties and relationships remain open for investigation and reinvestigation.

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[93] *Cf. Troxel*, 530 U.S. at 59 (four-Justice plurality, two concurrences, three dissents); *Michael H.*, 491 U.S. at 112 (four-Justice plurality, two concurrences, two dissents); Lehr v. Robertson, 463 U.S. 248 (1983) (6–3); Santosky v. Kramer, 455 U.S. 745 (1982) (5–4); Caban v. Mohammed, 441 U.S. 380 (1979) (5–4).

[94] *See, e.g.*, Chris W. Altenbernd, *Quasi-Marital Children: The Common Law's Failure in* Privette *and* Daniel *Calls for Statutory Reform*, 26 FLA. ST. U. L. REV. 219, 234 (1999) (calling on "[c]ourts and legislatures [to] now directly confront the unresolved tension between biology and family in the field of paternal rights" active since "the early common law era").

[95] *See, e.g.*, *Adoptive Couple*, 133 S. Ct. at 2560 n.5 ("With a torrent of words, the dissent attempts to obscure the fact that its interpretation simply cannot be squared with the statutory text."); *id.* at 2572 (Sotomayor, J., dissenting) ("Unlike the majority, I cannot adopt a reading of ICWA that is contrary to both its text and its stated purpose.").

[96] *See, e.g.*, *id.* at 2579 n.8 (disputing the applicability of the dissent's interpretation to "sperm donor[s]" and "artificial insemination").

[97] *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2694 (2013).

[98] For example, the Court has yet to tackle reproductive technologies, despite their recurrence in state court cases and the promise of their increased prominence in an age of gay marriage.