THE "BABY VERONICA" CASE: CURRENT IMPLEMENTATION PROBLEMS OF THE INDIAN CHILD WELFARE ACT

JANE BURKE

I. INTRODUCTION

"Save Veronica" has become a common phrase in the American South over the past year.[1] It appears on the signs of local businesses,[2] is stamped on light purple bracelets,[3] and is the rallying cry for fundraisers,[4] candlelight vigils,[5] and cupcake sales on holidays.[6] It is the topic of many newspaper articles and television news broadcasts and was recently featured on an episode of the television show "Dr. Phil."[7] But who is Veronica and what exactly does she need saving from?

Veronica is an Indian baby girl who apparently needs to be saved from the Indian Child Welfare Act (ICWA).[8] She is currently in the middle of a highly-debated custody battle among her biological father, a Native American, his tribe, and her adoptive parents, whom she lived

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1. SAVE VERONICA, http://www.saveveronica.org/ (last visited Apr. 9, 2014).

2. *Local Repair Shop Joins Fight to 'Save Veronica'*, ABC NEWS 4 CHARLESTON (Jan. 6, 2012, 8:04 PM), http://www.abcnews4.com/story/16465999/emily-working-on-this.

3. *Buy a Bracelet to Help 'Save Veronica'*, ABC NEWS 4 CHARLESTON (Jan. 25, 2012, 7:26 PM), http://www.abcnews4.com/story/16602298/buy-a-bracelet-to-help. These bracelets were sold at local businesses and the proceeds went to help the Capobianco couple pay their mounting legal fees.

4. Jonathan Allen, *Local Hosts Save Veronica Fundraiser Saturday*, CHARLESTONPATCH (Jan. 27, 2012), http://westashley.patch.com/articles/local-hosts-save-veronica-fundraiser-saturday.

5. Haley Hernandez, *"Save Veronica" Effort Holds Candlelight Event in Charleston*, COUNT ON 2 NEWS WCBD-TV CHARLESTON (Jan. 28, 2012, 11:31 PM), http://www2.counton2.com/news/2012/jan/28/3/save-veronica-effort-hold-candlelight-event-charle-ar-3131169/. Twenty-nine candles were laid along a lake to represent how many days Veronica had been separated from her adoptive parents. *Id.*

6. *Flowers, Cupcakes for Valentine's Day Will Help 'Save Veronica'*, ABC NEWS 4 CHARLESTON (Feb. 8, 2012, 5:34 PM), http://www.abcnews4.com/story/16772573/flowers-cupcakes-for-valentines-day-will-help-save-veronica. On Valentine's Day, a flower studio and dessert store worked together to sell flowers and cupcakes. The proceeds were donated to the "Save Veronica" fund. *Id.*

7. *Adoption Controversy: Battle over Baby Veronica*, DR. PHIL (Oct. 18, 2012), http://www.drphil.com/shows/show/1895.

8. 25 U.S.C.A. §§ 1901-1963 (West 2013).

with for the first two years of her life.[9] Baby Veronica's story spiraled into a media-heavy controversy that brought to the public's attention the issues of the best interests of a child in a custody proceeding and federal American Indian law.[10]

This Note will discuss how the "Baby Veronica" case demonstrates the ongoing implementation problems for the ICWA in state courts. Part II will begin with the facts of the "Baby Veronica" case and then explain the unique history of the ICWA, as well as the pertinent sections of the Act that apply to this case. Part II will also include a thorough analysis of both the majority and dissenting opinions in *Adoptive Couple v. Baby Girl*, the "Baby Veronica" South Carolina Supreme Court decision. Part III will begin with the major implementation and compliance problems in this case and compare it to the only ICWA case previously heard by the United States Supreme Court, *Mississippi Band of Choctaw Indians v. Holyfield*.[11]

Finally, this Note will conclude that there are currently no repercussions for states that fail to follow the ICWA, and similar to this country's child support system, there should be a threat of losing federal funding if ICWA is not properly implemented by the states. A possible solution to this problem would be for states to adopt their own versions of the ICWA so that local lawyers and judges at the state level are more familiar with its provisions and are able to implement the Act correctly.

II. BACKGROUND

A. The Facts of the "Baby Veronica" Case

Baby Veronica was born on September 15, 2009 in Oklahoma.[12] Her biological parents, Christy Maldonado and Dusten Brown, the latter a Native American, were engaged in December 2008, but in April of 2009 Maldonado broke off the engagement (claiming Brown was pressuring her to get married too quickly).[13] Brown provided Veronica's mother with no financial support throughout her pregnancy.[14]

Maldonado then worked with an adoption agency that identified Matt and Melanie Capobianco as potential adoptive parents.[15] The

9. *See generally* Adoptive Couple v. Baby Girl, 731 S.E.2d 550 (S.C. 2012), *rev'd*, 133 S. Ct. 2252.

10. *Id.*

11. 490 U.S. 30 (1989).

12. *Adoptive Couple*, 731 S.E.2d at 552.

13. *Id.* at 552-53.

14. *Id.* at 553.

15. *Id.*

Capobiancos lived in Charleston, South Carolina and had no other children.[16] A close relationship quickly developed between Veronica's mother and the adoptive parents. The Capobiancos spoke to Maldonado weekly by phone, Melanie visited Maldonado in Oklahoma, and the Capobiancos provided Maldonado with financial support during her pregnancy and after Veronica's birth.[17] The Capobiancos were even present in the delivery room when Veronica was born and Matt Capobianco cut Baby Veronica's umbilical cord.[18] Maldonado consented to the adoption and the Capobiancos took Baby Veronica from Oklahoma to South Carolina about a week after her birth.[19]

The Capobiancos filed an adoption petition in South Carolina in September 2009, but did not notify Veronica's father of their intention to adopt Veronica until January 2010.[20] Although Brown previously agreed to relinquish his parental rights, he claimed he did not realize that Baby Veronica was being adopted by another family until he was served with the adoption petition.[21] Brown instead thought the child was to remain with her mother, Maldonado.[22] Brown then moved to stay the adoption proceedings and filed a complaint to establish his paternity in January 2010.[23] During the same month, the Cherokee Nation intervened in the lawsuit because Brown is a registered member of the tribe, thus making Baby Veronica an "Indian Child" under the ICWA.[24]

The first of many trials commenced in September 2011, resulting in the local South Carolina family court issuing a final order in November 2011, denying the Capobiancos' adoption petition and ordering that custody be transferred to Brown.[25] Brown and his family picked up then two-year-old Veronica on New Year's Eve, 2011, and brought her back to Oklahoma.[26] On July 26, 2012, the South Carolina Supreme Court

16. *Id.*

17. *Id.*

18. *Adoptive Couple*, 731 S.E.2d at 554.

19. *Id.* at 554-55.

20. *Id.* at 555. Dusten Brown was not notified about the adoption of Baby Veronica for four months after she was born and just a few days before Brown was deployed to Iraq. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Adoptive Couple*, 731 S.E.2d at 555.

25. *Id.* at 556. A Guardian *ad Litem* represented Baby Veronica at this trial and the opinion is unpublished. *Id.*

26. Haley Hernandez, *Couple Forced to Turn Over 2-Year-Old to Biological Father*, COUNT ON 2 NEWS WCBD-TV CHARLESTON (Dec. 31, 2011), http://www2.counton2.com/news/2011/dec/31/couple-forced-turn-over-2-year-old-biological-fath-ar-2962551/.

affirmed the family court's decision denying adoption by the Capobiancos and awarding custody to Brown.[27] The Capobiancos then requested a rehearing and the South Carolina Supreme Court denied the petition in an unpublished opinion.[28] As their last resort, the Capobiancos filed a petition for certiorari to the United States Supreme Court on October 1, 2012.[29] The Supreme Court granted certiorari on January 4, 2013, the case was heard in April 2013, and the Supreme Court issued a ruling on the "Baby Veronica" case on June 25, 2013.[30]

This Note will focus on the South Carolina Supreme Court decision, rather than the subsequently decided United States Supreme Court decision, as the South Carolina Supreme Court decision better demonstrates the ICWA implementation problems at the state and local levels.

B. The Indian Child Welfare Act: 25 U.S.C. §§ 1901-1963

This section will explain the background and context in which the ICWA was passed, and continue with the pertinent parts of the Act that have caused interpretation and implementation problems in the "Baby Veronica" case.

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27. *Adoptive Couple*, 731 S.E.2d at 552.

28. *See* Adoptive Couple v. Baby Girl, No. 27148, 2012 S.C. LEXIS 176 (S.C. Aug. 22, 2012); *see also* Tami Beyersdoerfer, *State Supreme Court Denies Request To Rehear Baby Veronica Custody Case*, NEWSON6 OKLAHOMA'S OWN (Aug. 23, 2012, 3:58 PM), http://www.newson6.com/story/19354292/state-supreme-court-denies-request-to-re-hear-baby-veronica-custody-case. This decision gave the Capobiancos 90 days to appeal to the U.S. Supreme Court. *Id.*

29. *See Adoptive Couple*, 731 S.E.2d 550, *petition for cert. filed*, 2012 WL 4502948 (U.S. Oct. 1, 2012) (No. 12-399); *see also Save Veronica Case Appealed to US Supreme Court*, ABC NEWS 4 CHARLESTON (Oct. 5, 2012, 9:57 PM), http://www.abcnews4.com/story/19744377/save-veronica-case-appealed-to-us-supreme-court.

30. *Adoptive Couple*, 731 S.E.2d 550, *cert. granted*, 133 S. Ct. 831. Now that this case has reached the Supreme Court, it has garnered national attention and debate on what the proper outcome should be. *See generally Adoptive Parents vs. Tribal Rights*, N.Y. TIMES (Jan. 24, 2013), http://www.nytimes.com/roomfordebate/2013/01/24/adoptive-parents-vs-tribal-rights/?ref=opinion. In the summer of 2013, the Supreme Court issued a decision. *See* Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013).

1. History and Policy of the ICWA

Congress passed the ICWA in 1978.[31] The ICWA was passed as a remedial measure to address the historic mistreatment of American Indian tribes and their children by the United States.[32] Such mistreatment began in the 1800s, when Indian children were taken from their homes and sent to all-white boarding schools.[33] These schools were run in a military fashion to assimilate Native American children into white society.[34] At these schools, Indian children were forced to abandon their Native American culture, cut their hair, speak English, and convert to Christianity.[35]

As a result of the boarding school era and its policy of assimilation, the 1900s saw a disproportionate rate of American Indian children placed into non-Indian foster homes or with white adoptive parents.[36] This occurred because state courts and social workers used "white, middle-class values . . . [to] assess[] the fitness of Indian parents."[37] State child welfare agencies did not understand the traditional Native American child-rearing practices, such as caregiving by the Indian child's extended family members.[38] Instead, these workers believed that the Indian children's biological parents neglected or abandoned their children when the children were cared for by relatives, and social services used this fact

31. Ann Murray Haag, *The Indian Boarding School Era and its Continuing Impact on Tribal Families and the Provision of Government Services*, 43 TULSA L. REV. 149, 165 (2007).

32. *Id.* Haag considers the passing of ICWA a "shift in U.S. government philosophy about its relationship with tribal nations." *Id.*

33. Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 601-02 (2002).

34. Haag, *supra* note 31, at 151-52 (citing Andrea A. Curcio, *Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses*, 4 HASTINGS RACE & POVERTY L.J. 45, 52 (2006)). The first Indian boarding school, the Carlisle Indian School, was founded in 1879 by Captain Richard Henry Pratt. *Id.* at 151. Pratt was an army officer who based the school off of his experience as a jailer for Indians at a prison in Florida. CAROLE E. GOLDBERG ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 29 (6th ed. 2010). The school and its founders believed that Native American traditions were the "enemy of progress," and the Native American children who attended were cruelly punished for practicing any tribal cultural tradition. *Id.* Some argue that this has led to modern problems in Native American families, including inappropriate child rearing, that can be traced back to the corporal punishments these Indian children were subjected to at boarding schools. *Id.*

35. Haag, *supra* note 31, at 154.

36. *Id.* at 161.

37. Atwood, *supra* note 33, at 599.

38. *Id.* at 603.

to better justify placing the Indian child outside the home.[39] Such a significant misunderstanding in cultural differences resulted in many Native American children being taken from their families and a further mistrust of the American government by Indians.[40]

It is clear from several provisions of the ICWA that Congress intended the Act to remedy its prior mistreatment of Native Americans and their children.[41] The Act begins with congressional findings that "there is no resource . . . more vital to the continued existence and integrity of Indian tribes than their children."[42] Furthermore, Congress found that the states in their jurisdiction over child custody proceedings misunderstood traditional tribal customs, which resulted in the unwarranted removal of Indian children from their homes and the breakup of Indian families.[43] Thus, the policy of the ICWA is to protect Indian families and their stability by enacting federal standards to follow when an American Indian child is to be removed from the home.[44]

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39. *Id.*; *see also* Haag, *supra* note 31, at 162.

40. Haag, *supra* note 31, at 162.

41. *See generally* 25 U.S.C.A. §§ 1901-1963 (West 2013).

42. 25 U.S.C.A. § 1901(3) (West 2013).

43. 25 U.S.C.A. § 1901(4)-(5) (West 2013).

44. 25 U.S.C.A. § 1902 (West 2013). This section reads in full:

> The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

Id.; *see also* 41 AM. JUR. 2D *Indians; Native Americans* § 116 (2012) (citing Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989)) ("The federal policy underlying that Act is that . . . an Indian child should remain in the Indian community . . . ."). Some argue that the ICWA impermissibly takes race into account as a factor in determining child custody. In *Jones v. Jones*, there was a custody dispute between a Native American father and a Caucasian mother. Jones v. Jones, 542 N.W.2d 119, 120 (S.D. 1996). The mother argued that the trial court wrongfully considered race when determining the best interests of the child and awarded custody to the father. *Id.* at 121. The court rejected this argument and held that it was acceptable to consider race in custody proceedings because "[t]o say . . . that a court should never consider whether a parent is willing and able to expose to and educate children on their heritage, is to say that society is not interested in whether children ever learn who they are." *Id.* at 123. Thus, this case demonstrates that especially in Indian children custody proceedings, it is acceptable for the court to consider Native American race and ethnicity when determining the custody of a Native American child.

2. Operative Problems of the ICWA

The ICWA tries to achieve this policy by giving the Native American tribal courts jurisdiction over Indian child custody proceedings[45] and by changing the placement preferences of Indian children.[46] The tribal court has exclusive jurisdiction as to the custody proceedings of any Indian child who is domiciled on the reservation and "in the absence of good cause to the contrary," jurisdiction will be transferred to the tribal court for the custody proceeding of any Indian child who is not domiciled on the reservation.[47] A tribe may also intervene in any state court proceeding regarding the custody of an Indian child.[48]

The ICWA also alters the traditional placement preferences for Indian children in custody proceedings.[49] For an Indian child, preference for placement is with "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."[50] These placement preferences protect the future of Indian families and acknowledge the cultural differences in child rearing, such as extended family caregiving commonly practiced in Indian tribes discussed above.[51]

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45. *See* 25 U.S.C.A. § 1911 (West 2013). The tribe has exclusive jurisdiction over that of the state regarding a child custody proceeding of an Indian child who is *domiciled* on the reservation. 25 U.S.C.A. § 1911(a) (West 2013) (emphasis added). If the Indian child at issue in the custody dispute is *not* domiciled on the reservation, and the Indian child could be placed in foster care or the parental rights to the Indian child could be terminated, then the state court must transfer the proceeding to the tribal court. 25 U.S.C.A. § 1911(b) (West 2013) (emphasis added). Either parent or an Indian custodian can petition to transfer jurisdiction to the tribe, and the tribe may decline to accept jurisdiction. *Id.* This section also provides that the Indian child's custodian or tribe has the right to intervene in any state court proceeding regarding the custody of the child. 25 U.S.C.A. § 1911(c) (West 2013). See also 25 U.S.C.A. § 1903(12) (West 2013), which defines a "tribal court" as:

> [A] court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

Id.

46. *See* 25 U.S.C.A. § 1915 (West 2013).

47. 25 U.S.C.A. § 1911(a)-(b) (West 2013).

48. 25 U.S.C.A. § 1911(c) (West 2013); *see also* 41 AM. JUR. 2D *Indians; Native Americans* § 117 (2012) (citing *Dwayne P. v. Superior Court*, 103 Cal. App. 4th 247, 126 Cal. Rptr. 2d 639 (4th Dist. 2002) (stating that the ICWA gives the tribe this right to intervene because it recognizes that tribes have an interest in their children that is distinct from, but on the same level as, the interest of the child's parents).

49. 25 U.S.C.A. § 1915(a) (West 2013).

50. *Id.*

51. Atwood, *supra* note 33, at 603.

The first section of the ICWA that is of major importance to the "Baby Veronica" case is § 1903, which provides the statutory definitions.[52] The parties in the "Baby Veronica" case dispute the application of the "Indian child"[53] definition to Veronica and the "parent"[54] definition to her biological father, Dusten Brown. Under § 1903, an "Indian child" is an unmarried person under eighteen who is a member of a tribe or eligible for membership and whose biological parent (or parents) is a member of a tribe.[55] This section is interpreted to mean that a child may be considered an "Indian child" whether or not that child is actually registered or enrolled with the tribe.[56]

Furthermore, a "parent" is defined as a biological parent (or parents) of an Indian child or an Indian person who adopted an Indian child.[57] The definition states that "parent" does *not* include unwed fathers who do not establish their paternity.[58] The Capobiancos' petition for writ of certiorari raised the issue of whether Dusten Brown met the "parent" definition because he is an unwed biological father whom the Capobiancos claim did not comply with state law to obtain legal status as a parent.[59]

The last sections of the ICWA paramount to *Adoptive Couple* pertain to the voluntary termination of parental rights by an Indian parent[60] and the return of custody to an Indian parent.[61] Under § 1913(c), the consent of the parent to termination of parental rights or to an adoptive placement may be withdrawn any time before a final decree of termination or adoption is entered and the child will be returned to the biological

52. *See* 25 U.S.C.A. § 1903 (West 2013).

53. 25 U.S.C.A. § 1903(4) (West 2013).

54. 25 U.S.C.A. § 1903(9) (West 2013).

55. 25 U.S.C.A. § 1903(4) (West 2013). This section states that an "Indian child" is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."

56. 41 AM. JUR. 2D *Indians; Native Americans* § 119 (2012) (citing *In re* Desiree F., 83 Cal. App. 4th 460, 99 Cal. Rptr. 2d 688 (5th D. 2000)).

57. 25 U.S.C.A. § 1903(9) (West 2013).

58. *Id.* A "parent" is defined as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established." *Id.*

59. Adoptive Couple v. Baby Girl, 731 S.E.2d 550 (S.C. 2012), *petition for cert. filed*, 133 S. Ct. 831. The United States Supreme Court ultimately declined to decide whether Dusten Brown was a "parent" under the ICWA definition because it found other ICWA provisions inapplicable and thus did not bar the termination of his parental rights. *See* Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2560 (2013) (determining that neither § 1912(f) nor § 1912(d) barred termination of Brown's parental rights).

60. 25 U.S.C.A. § 1913(c) (West 2013).

61. 25 U.S.C.A. § 1916(a) (West 2013).

parent.[62] Under § 1916(a), if a final adoption decree is vacated, the biological parent can petition for return of custody of the Indian child and the court will return custody unless the return would not be in the best interests of the child.[63]

As explained in the next section of this Note, these provisions of the ICWA are intertwined and debated in the tumultuous custody case of Baby Veronica as there still remains a difficulty in understanding and correctly applying the ICWA.

C. The South Carolina Supreme Court Decision

The majority and dissenting opinions of the South Carolina Supreme Court in *Adoptive Couple* are herein discussed in detail to analyze this case.

1. The Majority Opinion

The issues before the South Carolina Supreme Court were: (1) whether the Capobiancos transferred Veronica to South Carolina properly from Oklahoma; (2) whether the ICWA relies on state law to determine whether an unwed father meets the ICWA definition of "parent"; and (3) whether the Capobiancos could prove the grounds required by the ICWA to terminate Brown's parental rights.[64]

The court found the transfer of Baby Veronica to South Carolina fraught with problems. The Capobiancos hired an attorney to represent Veronica's birth mother, Maldonado, at the commencement of the adoption proceedings.[65] This attorney wrote a letter to the Cherokee Nation inquiring as to Baby Veronica's birth father's membership in the tribe, but spelled Brown's first name wrong ("Dustin" instead of "Dusten").[66] In response, the Cherokee Nation could not and did not verify Brown's membership.[67] When the Capobiancos sought permission from Oklahoma to take Baby Veronica from the state, according to the Oklahoma Interstate Compact on Placement of Children (ICPC), they indicated that her ethnicity was "Hispanic" rather than "Native American" on the appropriate form.[68]

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62. 25 U.S.C.A. § 1913(c) (West 2013).
63. 25 U.S.C.A. § 1916(a) (West 2013); *see also* 42 C.J.S. *Indians* § 176 (2012).
64. *Adoptive Couple*, 731 S.E.2d at 556.
65. *Id.* at 554.
66. *Id.*
67. *Id.*
68. *Id.* at 554-55.

The Cherokee tribe was not given proper notice as to Veronica's custody due to the Capobiancos' mistakes in determining Brown's tribal membership and in listing Baby Veronica's incorrect ethnicity on the ICPC form. The tribe did not have the chance to intervene, as is their right under the ICWA, before the Capobiancos moved Veronica to South Carolina.[69]

Next, the Capobiancos argued before the South Carolina Supreme Court that Brown did not meet the ICWA definition of "parent" under 25 U.S.C. § 1903(9).[70] They believed that since Brown was an unwed father, he had to demonstrate more than biology to be protected under the ICWA.[71] Because the ICWA does not explain how an unwed father establishes paternity, the Capobiancos argued that state law should govern, and in South Carolina, the father must either live with the mother for six months before the child's birth or support the mother's pregnancy expenses;[72] Brown did neither.[73]

However, the South Carolina Supreme Court agreed with the family court and held that Brown met the ICWA definition of "parent."[74] Brown met the statutory definition because he pursued legal action once he realized Veronica was up for adoption and thereafter established his biological paternity through a DNA test.[75] Furthermore, the South Carolina Supreme Court noted, in a footnote, that the application of the ICWA depends on the status of the child rather than the parent—whether the child meets the statutory definition of "Indian child" under 25 U.S.C. § 1903(4).[76] Therefore, the court noted that the ICWA applies regardless of whether the court found that Brown was a "parent" under the ICWA because Veronica is an "Indian child" under the ICWA.[77]

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69. *Id.* at 559.

70. *Adoptive Couple*, 731 S.E.2d at 559-60.

71. *Id.* at 560.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Adoptive Couple*, 731 S.E.2d at 560 n.18. The statutory definition for "Indian child," as explained above, is an unmarried person under eighteen who is a member of a tribe or eligible for membership, and whose biological parent(s) is a tribal member. 25 U.S.C.A. § 1903(4) (West 2013).

77. *Adoptive Couple*, 731 S.E.2d at 560 n.18. The United States Supreme Court declined to decide whether Brown met the ICWA definition of a "parent." *See* Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2560 (2013). The Court stated that it did not have to decide this issue because § 1912(f) of the ICWA did not apply to Brown (because Brown never had custody of Baby Veronica to begin with) and because § 1912(d) of the ICWA did not apply to Brown (efforts to provide remedial services to prevent the "breakup" of an Indian family only applies when the family is originally together, and not in Brown's case where he "abandoned her" before she was even born). *Id.* at 2560-62.

The last issue the South Carolina Supreme Court decided was whether to terminate Brown's parental rights.[78] The ICWA mandates that state courts consider its higher federal standards than those of an adoption proceeding of a non-Indian child when terminating the parental rights of an Indian parent.[79] Under 25 U.S.C. § 1913(a), the voluntary consent of an Indian parent must be in writing and a judge of proper jurisdiction must confirm that the terms of the consent were explained and understood by the Indian parent.[80] The state court held that the Capobiancos did not meet the heightened requirements for obtaining Brown's consent because all Brown did was sign an "Acceptance of Service" letter handed to him by the Capobiancos' attorney, who asked him to sign it to receive service of the complaint.[81]

Because Brown did not give voluntary consent to termination of his parental rights, the Capobiancos argued that Brown's rights should be terminated involuntarily.[82] Under 25 U.S.C. § 1912(d), the Capobiancos must prove to the court that they provided remedial services to try to keep the Indian family together and that those attempts failed.[83] The Capobiancos admitted that they did not make any of these efforts and the

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78. *Adoptive Couple*, 731 S.E.2d at 560.

79. *Id.*

80. 25 U.S.C.A. § 1913(a) (West 2013). This section reads:

> Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

25 U.S.C.A. § 1913(a) (West 2013).

81. *Adoptive Couple*, 731 S.E.2d at 561. Even if this consent by Brown had been valid, he still had the right to withdraw his consent under 25 U.S.C. § 1913(c), which reads:

> In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

25 U.S.C.A. § 1913(c) (West 2013).

82. *Adoptive Couple*, 731 S.E.2d at 561.

83. *Id.* at 561; *see also* 25 U.S.C.A. § 1912(d) (West 2013), which states that the party seeking to adopt must prove to the court that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." *Id.*

South Carolina Supreme Court found that they actually prevented Brown from getting custody of Veronica for most of her life.[84]

The Capobiancos also argued that giving Brown custody could result in emotional or physical harm to Veronica.[85] The court found that the Capobiancos failed to prove this beyond a reasonable doubt because they relied on bonding between Veronica and her adopted parents that occurred during the litigation and because Brown intervened at an early point in Veronica's life.[86] The Capobiancos argued that it was not in the child's best interests to give Brown custody.[87] However, the court relied on *Holyfield* in concluding that when an Indian child is at issue, the proper inquiry is the best interests of the Indian child.[88] According to *Holyfield*, the best interests of the Indian child include the relationship to its tribe and protection of its cultural heritage.[89]

Based on these findings, the South Carolina Supreme Court affirmed the decision of the local family court, denying the Capobiancos' adoption petition and granting Brown custody of Baby Veronica.[90]

2. The Dissent

Two justices of the South Carolina Supreme Court wrote dissenting opinions.[91] Justice Kittredge would have terminated Brown's parental rights and returned Baby Veronica to the Capobiancos.[92]

First, Kittredge believed the majority gave Brown more credit than credit was due because Brown "abandoned" the child.[93] Brown willfully failed to visit Veronica and did not establish a relationship, willfully signed to waive his parental rights, and never contributed financially to Maldonado's medical costs during her pregnancy.[94] Also, Justice Kittredge believed the majority applied the ICWA too rigidly, and would rather give more discretion to the judge in a child custody case to

84. *Adoptive Couple*, 731 S.E.2d at 561.
85. *Id.* at 562-63.
86. *Id.* at 563-64.
87. *Id.* at 565.
88. *Id.*
89. *Id.* (citing Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 50 n.24 (1989)).
90. *Adoptive Couple*, 731 S.E.2d at 567.
91. *Id.* (Kittredge, J., dissenting). Justice Kittredge wrote a dissenting opinion in which Justice Hearn concurred. Justice Hearn also wrote a dissenting opinion in which Justice Kittredge concurred. *Id.*
92. *Id.* at 567-68 (Kittredge, J., dissenting).
93. *Id.* at 568 (Kittredge, J., dissenting).
94. *Id.* at 578 (Kittredge, J., dissenting).

determine the best interests of the child.[95] He believed the family court erred in determining that the ICWA replaced the family court's duty to determine the child's best interest.[96]

Kittredge argued that a dual burden of proof must be met to terminate a parent's rights in an ICWA case.[97] This includes "beyond a reasonable doubt that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child, and . . . clear and convincing evidence supports termination under the applicable state statutory ground."[98]

In applying this dual standard, Justice Kittredge found that the Capobiancos proved through expert testimony that separation from Veronica would result in depression, anxiety, and other harm to Veronica.[99] Under the second prong, Kittredge explained how South Carolina requires an effort to reunify a family after the removal of a child.[100] But here, Kittredge believed that Brown's clear abandonment of Baby Veronica cannot be remedied by such services and it would be futile for the Capobiancos to try to rehabilitate a family in which the father never formed a relationship with the child.[101] Because Justice Kittredge believed the Capobiancos met both prongs of the dual standard, he would have terminated Brown's custody and returned Baby Veronica to the Capobiancos.[102]

In the second dissenting opinion, Justice Hearn agreed with Justice Kittredge's view and stated that Brown "turned his back on the joys and responsibilities of fatherhood at every turn" and that the majority overlooked his abandoning conduct to give Brown "a second chance at

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95. *Id.* at 573 (Kittredge, J., dissenting).

96. *Adoptive Couple*, 731 S.E.2d at 579 (Kittredge, J., dissenting).

97. *Id.* at 580 (Kittredge, J., dissenting).

98. *Id.* at 580-81 (Kittredge, J., dissenting). Justice Kittredge quoted a Michigan case that applied the dual burden of proof in the custody proceeding of an Indian child. *In re* Elliott, 554 N.W.2d 32 (Mich. Ct. App. 1996).

99. *Adoptive Couple*, 731 S.E.2d at 581 (Kittredge, J., dissenting). Justice Kittredge found the Capobiancos' expert witness, Dr. Saylor, fully credible and persuasive. The majority opinion did not. *Id.*

100. *Id.* at 586 (Kittredge, J., dissenting). *See generally* S.C. CODE ANN. § 63-7-1640 (2010) ("Family preservation").

101. *Adoptive Couple*, 731 S.E.2d at 568 (Kittredge, J., dissenting). This was the same reasoning given by the Supreme Court in determining that § 1912(d) of the ICWA did not apply to Brown. Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2562 (2013). The Court determined that this section only applies where the "breakup" of the Indian family would be "precipitated by the termination of the parent's rights." *Id.* at 2555. However, this was not the case for Dusten Brown since he had "abandoned" Baby Veronica before birth and never had custody, so the "breakup of the Indian family" had occurred a long time prior. *Id.*

102. *Adoptive Couple*, 731 S.E.2d at 567-68 (Kittredge, J., dissenting).

fatherhood, all at great emotional cost to Baby Girl and Adoptive Couple."[103] Moreover, Justice Hearn stated that the majority improperly placed the ICWA at "a position of total dominance over state law" in this proceeding.[104]

III. ANALYSIS

A. Noncompliance with the ICWA

The South Carolina Supreme Court decision in *Adoptive Couple* demonstrates noncompliance with the ICWA by the parties and implementation problems for all of the involved courts. The major problem within many of the Capobiancos' arguments was their lack of familiarity with the ICWA statute itself.[105]

The Capobiancos' argument that Brown did not meet the ICWA definition of "Indian parent" demonstrates a clear lack of understanding, because Brown did meet the statutory requirements under 25 U.S.C. § 1903(9).[106] This was a futile argument because the applicability of the ICWA depends on the status of the child as an "Indian child" under 25 U.S.C. § 1903(4); since Veronica met this definition, it did not matter whether Brown was found to be a "parent" under the Act.[107] Had the Capobiancos' attorney been more familiar with the accurate meanings of the definitions in the ICWA, this argument would never have been raised.[108]

Similarly, the failure to give Brown and the Cherokee tribe proper notice stems from unfamiliarity with the ICWA. The misspelling of Brown's first name when inquiring as to his tribal membership and the mistake on the ICPC form could have easily been avoided had the Capobiancos' attorney been more familiar with the consequences

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103. *Id.* at 591 (Hearn, J., dissenting).

104. *Id.* (Hearn, J., dissenting).

105. *Id.* at 560.

106. *Id*; *see also* 25 U.S.C.A. § 1903(9) (West 2013). The Capobiancos focused their argument on the part of the ICWA "parent" definition that says "[i]t does not include the unwed father where paternity has not been acknowledged or established." 25 U.S.C.A. § 1903(9) (West 2013). Although Brown was an unwed father, he did establish his paternity through a DNA test. *Adoptive Couple*, 731 S.E.2d at 560.

107. *Adoptive Couple*, 731 S.E.2d at 560 n.18.

108. *See generally* 25 U.S.C.A. § 1903 (West 2013) (defining "child custody proceeding," "extended family member," "Indian," "Indian child's tribe," "Indian custodian," "Indian organization," "Indian tribe," "parent," "reservation," "Secretary," and "tribal court").

resulting from such mistakes.[109] However, because of these major mistakes, the Cherokee tribe was not given proper notice at the beginning of the litigation.[110] Had they been given proper notice, the tribe could have intervened far earlier, pursuant to 25 U.S.C. § 1911(c), and perhaps prevented this case from coming this far.[111]

The dissenting opinions by Justice Kittredge and Justice Hearn also portray classic implementation problems by state courts.[112] Both opinions have a hostile tone toward the ICWA and demonstrate how state court judges are irritated by the fact that the ICWA takes precedence over state law when determining the custody of an Indian child. Justice Kittredge argued for more judicial discretion in the determination of these cases[113] and that the ICWA should not replace state law regarding child custody.[114] Justice Hearn also disagreed with how the majority "elevated" the ICWA to dominate over state law.[115] These judges were upset by the ICWA mandates interfering with their discretion to decide these cases. However, poor decisions made by such judges throughout history regarding the custody of Indian children are why the ICWA was enacted in the first place. Yet, these dissenting opinions demonstrate how state court judges are still reluctant to follow the ICWA's statutory procedures.

Overall, the major implementation problem falls to the family court decision for which there is no published opinion. Nowhere in the South Carolina Supreme Court decision is there any mention as to why the case was not transferred to the tribal court by the family court pursuant to 25 U.S.C. § 1911(b).[116] When an Indian child is not domiciled on a reservation, the court "shall" transfer jurisdiction to the tribal court, absent good cause to the contrary and absent any objections by a parent.[117] The tribal court can still decline to take jurisdiction of the

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109. *Adoptive Couple*, 731 S.E.2d at 559. The court also addresses the fact that these "mistakes" may actually have been efforts by the mother Maldonado to conceal Baby Veronica's Indian heritage, knowing that revealing such information would require Brown's involvement in the adoption process. *Id.* at 554. The court does not press further as to whether these were willful omissions or honest mistakes on the part of the biological mother. *Id.*

110. *Id.* at 559.

111. *See generally* 25 U.S.C.A. § 1911(b) (West 2013).

112. *Adoptive Couple*, 731 S.E.2d at 567-92 (Kittredge and Hearn, J.J., dissenting).

113. *Id.* at 572 (Kittredge, J., dissenting).

114. *Id.* at 575 (Kittredge, J., dissenting).

115. *Id.* at 591 (Hearn, J., dissenting).

116. 25 U.S.C.A. § 1911(b) (West 2013).

117. *Id.*

case.[118] Nevertheless, proper notice was not given to the tribe by the Capobiancos after litigation commenced, and there is no indication that the family court ever offered to transfer jurisdiction to the tribal court at the beginning stages of the case.

B. Comparison of "Baby Veronica" to Holyfield

The only other case the Supreme Court has heard regarding the ICWA is *Mississippi Band of Choctaw Indians v. Holyfield*.[119] In *Holyfield*, twin babies were born to two unmarried members of the Mississippi Band of Choctaw Indians—both of whom were domiciled on the reservation.[120] The mother purposely gave birth outside the reservation in an attempt to avoid the ICWA's exclusive jurisdiction mandate over child custody proceedings for Indian children domiciled on the reservation under 25 U.S.C. § 1911(a).[121] Months after the twins were adopted by the Holyfields, the tribe moved to vacate the adoption decree, arguing that the tribal court had exclusive jurisdiction to decide the custody of the twins.[122] The sole issue before the Supreme Court was whether these twin babies were "domiciled" on the reservation.[123]

The Supreme Court found that the twins were domiciled on the Choctaw Reservation in Mississippi because both of their parents were domiciled there and it did not matter that the twins had never physically been present on the reservation.[124] The Court noted that the mother's attempt to avoid the ICWA application by giving birth off the reservation goes against all that the ICWA meant to protect.[125]

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118. *Id.* The statute states "such transfer shall be subject to declination by the tribal court of such tribe." 25 U.S.C.A. § 1911(b) (West 2013). Under this statute, it is clear that jurisdiction of the Baby Veronica case should have been transferred to the tribal court by the family court, and then the tribe would have the option to accept or decline the case before it went any further in the state courts of South Carolina.

Furthermore, in her dissenting opinion, Justice Sotomayor states that had Brown "petitioned to remove this proceeding to the *tribal* court, for example, the state court would have been *obligated* to transfer it absent an objection from Birth Mother or good cause to the contrary." Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2574 (2013) (Sotomayor, J., dissenting) (emphasis added).

119. 490 U.S. 30 (1989).

120. *Id.* at 37.

121. *Id.*

122. *Id.* at 38.

123. *Id.* at 42.

124. *Id.* at 48-49.

125. *Holyfield*, 490 U.S. at 52. In fact, the Supreme Court also noted that *all* Choctaw women give birth outside the Choctaw Reservation because there are no appropriate obstetric services on the reservation. *Holyfield*, 490 U.S. at 52, n.27. Therefore, the

Most importantly for the purposes of this Note is the Supreme Court's recognition that the question they were to decide was not who should receive custody of the twins[126]—rather, it was who (or what court) should make that custody determination.[127] The Supreme Court held that the Choctaw Tribal Court had that authority under the ICWA and that jurisdiction must be transferred regarding the custody of the twins.[128]

It was hard to predict what the Supreme Court would do regarding the "Baby Veronica" case in light of *Holyfield*. The major difference between these cases was that the twins in *Holyfield* were domiciled on the reservation, and therefore fell under 25 U.S.C. § 1911(a).[129] This section of the ICWA mandates that the tribal court has exclusive jurisdiction over the custody proceedings of the twins in *Holyfield*, which is why the Supreme Court transferred jurisdiction to the Choctaw tribe.[130] Here, Baby Veronica was not domiciled on the Cherokee reservation, and thus falls under 25 U.S.C. § 1911(b), which states that the court "shall" transfer the child custody proceeding to the tribal court, absent good cause not to.[131]

C. Comparison of the ICWA to Child Support and a Recommendation

To avoid the problems introduced by the "Baby Veronica" case, there should be repercussions to states for noncompliance with the ICWA to ensure proper future implementation of the Act. Because family law has traditionally been relegated to state courts,[132] it is proper to analogize to another area of family law where the federal government has stepped into the sphere of state authority—the child support system.

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mother's attempts at avoiding ICWA applicability and tribal exclusive jurisdiction of Indian child custody proceedings was a weak attempt.

126. *Holyfield*, 490 U.S. at 53.

127. *Id.*

128. *Id.*

129. 25 U.S.C.A. § 1911(a) (West 2013); *see also supra* note 45 and accompanying text.

130. *Id.*

131. 25 U.S.C.A. § 1911(b) (West 2013).

132. Laura W. Morgan, *A Federal Hand in Child Support*, 23 SPG FAM. ADVOC. 10, 11 (2001). Morgan states that family law is traditionally the only area the federal government may not intrude via "legislation, regulation, or assertion of federal jurisdiction." *Id.* However, the author notes that over the last fifty years federal regulation on the child support system has greatly increased because Congress believes that any money collected to be paid as child support is less money the federal government has to spend on welfare programs. *Id.*

1. Child Support Guidelines and Federal Funding

With regard to child support, 42 U.S.C. § 667 requires that each state set child support guidelines.[133] Each state must set these guidelines to receive federal funding for public welfare programs.[134] Such funding includes block grants to the states, cash subsistence benefits, or Temporary Assistance to Needy Families (TANF) grants.[135] There is no requirement as to what child support guidelines the state must adopt and as such, no state has the same guidelines as any other state.[136] However, every state must review its guidelines at least once every four years to make sure that appropriate child support amounts are awarded.[137] Thus, the federal government actively oversees the payments of child support without directly participating in the state's process.[138]

Child support guidelines and the ICWA both include federal mandates stepping into the primarily state law area of family law.[139] As such, a recommendation for the noncompliance and implementation problems of the ICWA would be an added provision to the statute requiring states to adopt their own version of the statute with the consequence of losing federal funding in the event that it is not properly followed.[140] The states would risk losing the same funding for welfare

133. *See* 42 U.S.C.A. § 667 (West 2013). Section (a) states that each state must establish guidelines for child support awards that will be reviewed once every four years to ensure that appropriate awards have been given.

134. Jo Michelle Beld & Len Biernat, *Federal Intent for State Child Support Guidelines: Income Shares, Cost Shares, and the Realities of Shared Parenting*, 37 FAM. L.Q. 165, 165-66 (2003) (citing Pub. L. No. 98-378, § 18, 98 Stat. 1305 (1984)).

135. Morgan, *supra* note 132, at 13.

136. Beld & Biernat, *supra* note 134, at 166.

137. *Id.* at 168; *see also* 42 U.S.C.A. § 669(a) (West 2013). This statute sets out the collection and reporting requirements of child support data. It states:

> [T]he Secretary shall collect and maintain up-to-date statistics, by State, and on a fiscal year basis, on
>
> (1) the number of cases in the caseload of the State agency administering the plan approved under this part in which the service is needed; and
>
> (2) the number of such cases in which the service has actually been provided.

42 U.S.C.A. § 669(a) (West 2013). Part (b) of this statute explains that the statistics required by subsection (a) will be separated "between paternity establishment services and child support obligation establishment services." 42 U.S.C.A. § 669(b) (West 2013).

138. Morgan, *supra* note 132, at 11.

139. Beld & Biernat, *supra* note 134, at 168.

140. For example, Michigan used to have its own version of the ICWA. *See* MICH. CT. R. 3.980 (West 1985) (repealed 2010). It was repealed in February 2010 and other statutes were amended to incorporate the ICWA. This includes the statutes regarding juvenile proceedings (MICH. CT. R. 3.920 (West 1985)); adoption (MICH. CT. R. 3.800 (West 1985) and MICH. CT. R. 3.807 (West 1985)); and guardianship (MICH. CT. R. 5.402 (West 1985)).

programs that the state may lose for not complying with the child support guidelines. Because it is the responsibility of state and local governments to provide aid to poor families, this would further motivate the states in complying with the ICWA to receive more funding for these programs.[141]

If state funding was attached to the ICWA, attorneys at the state level would be more familiar with its provisions and state courts would be more comfortable applying the Act. With the added consequence of losing federal funding for noncompliance, attorneys and judges would be more vigilant and careful when dealing with an ICWA case.

2. Lack of Uniformity

A possible counter argument to each state adopting its own version of the ICWA is lack of uniformity. Problems could arise from each state having its own version and thus having fifty different versions of the statute overall. Lack of uniformity could lead to different results across jurisdictions and no predictability as to how each individual jurisdiction may decide an ICWA case.

However, no two states have identical child support guidelines after the federal government mandated that the states enact such guidelines.[142] Each state merely needs to review its guidelines to ensure correct child support amounts are being awarded.[143] Similarly, such safeguards could be added to each state's version of the ICWA. Each state could be required to review and update its ICWA statute every few years to make sure that it is properly applied. This would allow each state's ICWA statute to be flexible and impressionable according to each state's specific needs regarding the child custody of Indian children within its jurisdiction. As with child support, the child custody of Indian children can be a very localized problem, and a state-specific version of the ICWA would at least provide uniformity within each state as to how these cases are decided.

Another way to meet the uniformity concern would be to require that the states' versions of the ICWA specifically further the goals of the federal act. This includes keeping Native American families intact and protecting the tribe's culture and stability.[144] This way, the objectives that drove the enactment of the federal ICWA in the first place would be further implemented by the state-specific versions. Each state could cater

141. Morgan, *supra* note 132, at 13.
142. Beld & Biernat, *supra* note 134, at 168.
143. *Id.*
144. 25 U.S.C.A. §§ 1901-1963 (West 2013).

their version of the ICWA to meet these federal and nationwide goals, while still maintaining a state-specific statute that meets that specific state's needs and which local attorneys and judges would be comfortable applying. The policy concerns behind the ICWA are nationwide and should be maintained, but since child custody is typically a concern of state law, a state-specific ICWA that included these goals and was accessible and better understood by state attorneys and judges may help the current problems of implementation.

3. Constitutionality

Another attack on this recommendation would be the constitutionality of the federal government conditioning a state receiving federal funds based upon the state enacting a new law. This argument was made in opposition to the child support system in *State of Kansas v. United States*.[145]

In this case, Kansas challenged amendments to the Child Support Enforcement Program that were enacted under the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)[146] as unconstitutional, arguing that PRWORA exceeded congressional authority under Article 1, Section 8 of the Constitution[147] and violated dual sovereignty and the Tenth Amendment.[148] In other words, Kansas

145. 24 F. Supp. 2d 1192 (D. Kan. 1998).

146. *See generally* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996). This act was "popularly known as 'welfare reform'" and is most commonly known for "abolish[ing] Aid to Families with Dependent Children (AFDC) and creat[ing] Temporary Assistance for Needy Families (TANF)." *Kansas*, 24 F. Supp. 2d at 1194. Under TANF, states are given federal block grants for public assistance programs in exchange for compliance with federal regulations, including the child support guidelines. *Kansas*, 24 F. Supp. 2d at 1194.

147. U.S. CONST. art. I, § 8, cl. 1. This provision states in pertinent part that "[t]he Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the *common Defense and general Welfare* of the United States . . . ." (emphasis added). Under *South Dakota v. Dole*, the court determined that under the Constitution, the federal government may condition funds if:

> (1) the spending is in furtherance of the general welfare; (2) Congress does so unambiguously to the end that states may knowingly exercise their choice to either accept or reject the funds; (3) the conditions imposed are reasonably related to the federal interest in the particular program; and (4) no constitutional provision "provide[s] an independent bar to the conditional grant of federal funds."

Kansas, 24 F. Supp. 2d at 1196 (citing South Dakota v. Dole, 483 U.S. 203, 207-08 (1987)).

148. *Kansas*, 24 F. Supp. 2d at 1193; *see also* U.S. CONST. amend X. The Tenth Amendment states "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

argued that PRWORA was unconstitutional because it was a federal intrusion into the local matter of child support.[149]

The *Kansas* court held that Congress is allowed to condition a state receiving federal funds on that state enacting a law or regulation, pursuant to *South Dakota v. Dole*,[150] if that condition is "in pursuit of the general welfare."[151] Because the goal of PRWORA was to protect children and enforce child support payment, the Kansas district court concluded that collecting child support payments is, indeed, for the general welfare.[152] Thus, federal authority over child support was determined to be in pursuit of the general welfare and a power of Congress under the spending power and the Commerce Clause power.[153]

Similarly, it can be argued that the goal of ICWA, like the goal of PRWORA, is in pursuit of the general welfare. It is for the general welfare that Indian children are placed in proper custody pursuant to the ICWA. It is in the interest of the general welfare that Native American families stay intact so that their culture and community stay strong within our country. Therefore, arguments opposed to states adopting their own ICWA and receiving federal funds as unconstitutional are similarly struck down by the holding presented in the *Kansas* case. Like child support, the ICWA is in pursuit of the general welfare, and thus, the federal government should be allowed to condition federal funding on each state adopting and complying with its own version of the ICWA.

U.S. CONST. amend X. The main argument of the state of Kansas was based on the Tenth Amendment because the state argued it was "coerced" into participating in the welfare program because otherwise Kansas would lose all of its funds from the federal government for child support enforcement services and other aid to poor children, and this would greatly injure many Kansas citizens. *Kansas*, 24 F. Supp. 2d at 1195-96.

149. Morgan, *supra* note 132, at 14.

150. 483 U.S. 203 (1987).

151. Morgan, *supra* note 132, at 14.

152. *Id.*

153. *Id.* Morgan even goes so far as to say, "[i]t seems clear that congressional authority over child support *knows no bounds*, under either the Spending Power or the Commerce Clause. It may well be that national child support guidelines are closer than we think." *Id.* (emphasis added). It is hard to imagine when a time would come that Congress and the federal government would have complete control over child support, an area of locally governed family law. Regardless, the author makes a valid point that the federal government continuously encroaches on state authority by intervening in the area of family law, and the *Kansas* case demonstrates that this imposition is seen as constitutional given the nature of the child support statutes.

IV. CONCLUSION

The "Baby Veronica" case demonstrates that after almost thirty-five years since the ICWA was passed, states still do not properly apply the Act to child custody proceedings regarding Indian children. In this case, the South Carolina family court should have transferred jurisdiction of Veronica's custody proceeding to the Cherokee Tribal Court, or at least offered that alternative, pursuant to *Holyfield*. Had the tribe been given proper notice to intervene, this case never would have reached the South Carolina Supreme Court, let alone the United States Supreme Court.

A possible solution for future state compliance with the ICWA would be for each state to adopt its own version of the statute. That way, attorneys and judges in state court would be more comfortable applying it. Much like the child support system in place, the ICWA should include a consequence to the states for their failure to comply with the Act. Like the child support system, withholding federal funds for welfare programs from the states should motivate the states to comply.

The "Baby Veronica" case may have been the modern case the Supreme Court needed to hear to address the fact that the ICWA is still unfamiliar to state-level attorneys and judges and to bring to the public's attention that measures need to be taken to ensure proper future compliance with the ICWA.