

Michigan Law Review

Volume 121 | Issue 6

2023

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Recommended Citation

M. A. Pearl, *The Indian Child Welfare Act in the Multiverse*, 121 MICH. L. REV. 1101 (2023).
Available at: <https://repository.law.umich.edu/mlr/vol121/iss6/14>

<https://doi.org/10.36644/mlr.121.6.indian>

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THE INDIAN CHILD WELFARE ACT IN THE MULTIVERSE

*M. Alexander Pearl**

Adoptive Couple v. Baby Girl. By *Matthew L.M. Fletcher and Kathryn E. Fort*, in *CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW* 452, 471. Edited by *Bennett Capers, Devon W. Carbado, R.A. Lenhardt and Angela Onwuachi-Willig*. Cambridge: Cambridge University Press. 2022. Pp. xxx, 694. Cloth, \$84.75; paper, \$39.19.

INTRODUCTION

As a kid, I grew up reading comic books. Among my favorites were those wherein the old and well-known characters, like Captain America or Spider-Man, were given a different origin story, persona, and set of objectives. It presented an alternative reality to the one all readers had come to know. Those stories made the old and predictable characters more interesting and spurred some imaginative reconstruction of comic book events in my nine-year-old mind. With the new box-office-dominating comic book movies now tracking this idea of the multiverse, the notion of different realities is part of popular culture. This opinion, written by Matthew Fletcher¹ and Kathryn Fort,² meets this moment's cultural mindset and reimagines a very different legal and social existence for Tribal Nations. In that alternative universe, the trajectory and coherence of federal Indian law have veered away from disorder and the courts are not directly presented with the question of whether to dismantle the federal protection of Indigenous children. Like those old alternative comic books I loved, I vastly prefer the world created by Fletcher and Fort's opinion in *Adoptive Couple v. Baby Girl* to the one we are all forced to live in today.

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The original first line from Justice Alito's majority opinion does violence, to use Robert Cover's term,³ in stating that "[t]his case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee."⁴ At first read, the line may seem innocuous enough. But its casual tone and matter-of-fact approach is violent. It is violent in its improper and inaccurate, racialized characterization of Baby Girl's status and in introducing the coming destruction of a Native family. In stark contrast, Fletcher and Fort's first line plainly conveys a different framing, but it contains much more than that. This Review amplifies three key components of the rewritten opinion. All three of these components are embedded within the very first line of the new opinion, which reads: "This case is about a little girl (Baby Girl) who is a citizen of the Cherokee Nation, like her father, grandparents, and a multitude of generations before her" (p. 452). First, this opinion shares in the emerging tradition of reengaging with and restating the history that served to produce a particular statute or legal dispute. Second, from a jurisprudential standpoint, the opinion does significant work in recasting longstanding concepts in federal Indian law, thereby increasing coherence and confidence in that body of law to the benefit of Tribal Nations, States, and the federal government. Finally, and perhaps most dynamically, the opinion offers a central place for the role of Tribal laws—emanating from Tribal culture and customary law—to be treated on par with state and federal counterparts.

I. THE ROLE OF HISTORY

"This case is about a little girl (Baby Girl) who is a citizen of the Cherokee Nation, like her father, grandparents, and a multitude of generations before her" (p. 452).

Including the "multitude of generations" language in the first line implicitly recognizes an idea central to the heart of the opinion: the events in *Adoptive Couple* are not necessarily new or unique to our contemporary moment—they are part of a long history. The invocation of the "multitude of generations before her" (p. 452) directs the reader's attention to the long story of Indian children in the United States, and it draws readers into that story from the Indigenous perspective. On the surface, the new holding speaks to the meaning of a statutory term and protects the rights of Native biological parents consistent with the general understanding of the statute's purpose set forth by the Court in its first case interpreting the Indian Child Welfare Act ("ICWA"),

3. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) ("Legal interpretation takes place in a field of pain and death. This is true in several senses. Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur." (footnotes omitted)).

4. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 641 (2013).

Mississippi Band of Choctaw Indians v. Holyfield.⁵ But this decision goes much deeper by interpreting the statutory meaning in light of the significant historical background which demanded a legislative response by Congress in the first place. It couches this history and the need to act legislatively in the context of the federal government's longstanding duty to protect Indian Nations and Native children. The decision operates on two planes—the superficial and the deep. What unites these two planes is the role of history in producing these meanings.

In recent federal Indian law decisions, the Court—in particular Justice Gorsuch—has deployed similar historically situated reasoning to address legal disputes in Indian Country. Two cases in particular demonstrate this approach: *Washington State Department of Licensing v. Cougar Den, Inc.* and *McGirt v. Oklahoma*.⁶ In *Cougar Den*, the Yakama Nation argued it was immune from state taxation of fuel importers under its 1855 treaty.⁷ While the majority opinion ruled in favor of the Yakama Nation,⁸ Justice Gorsuch wrote separately in a concurrence to (1) emphasize the history producing that treaty and (2) acknowledge that the treaty was more likely imposed on the Tribal Nation than negotiated at arm's length.⁹ The amplification of the historical origins of the treaty from the Tribal Nation's perspective is critical in conceptualizing the present dispute and how it arose.

Justice Gorsuch used a similar mechanism in the *McGirt* majority opinion.¹⁰ *McGirt* asked whether the boundaries of the Muscogee Creek Reservation had been diminished.¹¹ Like Fletcher and Fort's first line, the *McGirt* introductory sentence embodies so much in but a few words. The first line of the opinion—"[o]n the far end of the Trail of Tears was a promise"—embraces the usage of history viewed from the Indigenous perspective.¹² The "promise" was made by the federal government to the benefit of the Muscogee Creek Nation. And the only people reaching the "far end of the Trail of Tears"¹³ were those forced to walk it—the Muscogee people. The Court could have started with the text of the statute at issue in the case. It did not. It could have started with the language in the treaties, but it did not start there either. It started,

5. 490 U.S. 30, 32 (1989) ("The Indian Child Welfare Act of 1978 . . . was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes."); see Diane Allbaugh, *Tribal Jurisdiction over Indian Children: Mississippi Band of Choctaw Indians v. Holyfield*, 16 AM. INDIAN L. REV. 533, 533 (1991).

6. Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000 (2019); *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

7. *Cougar Den*, 139 S. Ct. 1000.

8. *Id.*

9. See *id.* at 1016–18 (Gorsuch, J., concurring).

10. *McGirt*, 140 S. Ct. 2452.

11. *Id.*

12. *Id.* at 2459.

13. *Id.*

instead, with history. More importantly, it started from the vantage point of the Indigenous experience of that history and centered that perspective.

This is the essence of a historically informed description of a law. Interpretation starts with that history rather than simply rushing to the text, dictionary at the ready. The isolation of text from the history that produced it leads to off-target results. Fletcher and Fort invite incorporation of the long history of the treatment of Indian children in that first line. The entire first section of their opinion takes time to expand on the events and experiences of Native communities and Indian children.¹⁴ As opposed to constituting an entirely morality-driven and unheard-of analysis, Fletcher and Fort's opinion represents thoughtful decisionmaking grounded in the realities of the parties.

II. CHASING COHERENCE IN FEDERAL INDIAN LAW

"This case is about a little girl (Baby Girl) who is a citizen of the Cherokee Nation, like her father, grandparents, and a multitude of generations before her" (p. 452).

Without the benefit of the contrast presented by the original first line of Justice Alito's majority opinion, Fletcher and Fort's new first line is entirely banal in the context of federal Indian law. That it states the plaintiff is a "citizen of the Cherokee Nation" (p. 452) is, standing alone, uninteresting—as it should be. In addition, the first line places the legal import of belonging to a Tribal Nation in its proper place—at the beginning. This legal fact dictates the operation of a statute and the legal obligations owed by the United States. But Justice Alito's insistence on racializing Baby Girl awakens deeply troubling jurisprudential cracks in all of federal Indian law while offering serious doubts as to the constitutionality of the Indian Child Welfare Act. The correction of Justice Alito's erroneous and unilateral assertion of identity on behalf of Baby Girl takes us to a universe where the fractures of federal Indian law now surfacing in cases like *Brackeen v. Haaland*¹⁵ do not exist.

Now, Justice Alito is not himself responsible for calling into question the validity or coherence of federal Indian law. Indeed, Justice Thomas, in his concurrence in *United States v. Lara*, famously remarked that "the time has come to reexamine the premises and logic of our tribal sovereignty cases. It seems to me that much of the confusion reflected in our precedent arises from two largely incompatible and doubtful assumptions."¹⁶ Justice Alito's opinion

14. See pp. 452–61.

15. 994 F.3d 249 (5th Cir. 2021) (en banc) (per curiam), cert. granted, 142 S. Ct. 1205 (2022) (mem.).

16. *United States v. Lara*, 541 U.S. 193, 214–15 (2004) (Thomas, J., concurring) ("First, Congress (rather than some other part of the Federal Government) can regulate virtually every aspect of the tribes without rendering tribal sovereignty a nullity. Second, the Indian tribes retain inherent sovereignty to enforce their criminal laws against their own members. These assumptions, which I must accept as the case comes to us, dictate the outcome in this case, and I therefore concur in the judgment." (citations omitted)).

effectively responded to Justice Thomas's call to reevaluate that "premise[] and logic."¹⁷

Two critical concepts in federal Indian law are regularly misunderstood—one of which draws Justice Thomas's ire. Critics may identify these two concepts as inconsistent, in tension, or evidence of continuing nonsense in the field of federal Indian law. And to be fair, ambiguous precedents, and inartful language within them, permit easy misunderstandings. These problematic concepts, although related, are distinct: (1) the guardianship analogy offered in *Cherokee Nation v. Georgia*,¹⁸ and (2) the plenary power doctrine described in *United States v. Kagama*.¹⁹ In Justice Thomas's famous concurrence, his general call for reexamination of precedents involved questioning the plenary power doctrine, but not the guardianship analogy.²⁰ This highlights the significant problems created in the whole of federal Indian law by the unfettered and unexplained existence of plenary power. Fletcher and Fort help bring coherence to federal Indian law by reframing these concepts.

In *Cherokee Nation*, Chief Justice Marshall wrote that Indian Tribes' "relation to the United States resembles that of a ward to his guardian."²¹ As Fletcher and Fort point out, this was written as an analogy—not as the full description of the legal relationship between Tribal Nations and the federal government (p. 456). How could it be? The history is simply too multifaceted and the governing legal documents (the Constitution, treaties, etc.) are too complex to permit summary via a handful of words in a metaphor. Fletcher and Fort shine a disinfecting light on that cursory literary device that has wrought violence, pain, and continuing impressions of inferiority upon Indigenous peoples. Fletcher and Fort correct the impression that Indian tribes were "ever" the wards of the United States (p. 456). Instead, the opinion reiterates the distinction between a treaty and international-law-based legal obligation to provide "protection," and the legal status of a ward.²²

That legal relationship between Indian Tribes and the United States cannot simply be discarded—it exists as a matter of history and law. However, Fletcher and Fort acknowledge the regular misuse of the metaphor to the detriment of Native people and seek to put an end to that well-worn path by recasting a runaway analogy as a defensible, historically grounded legal concept. By restating the principle as emanating from the duty of protection, they render its basis in law rather than in the manufactured inferiority and dependency of Tribal communities. By correcting the source of the concept, Fletcher and Fort's opinion produces a different legal obligation. This is exactly the type of reevaluation that Justice Thomas called for—and it improves the coherence within federal Indian law.

17. *Id.* at 214.

18. 30 U.S. (5 Pet.) 1, 17 (1831).

19. 118 U.S. 375, 384–85 (1886).

20. *Lara*, 541 U.S. 193 (Thomas, J., concurring).

21. *Cherokee Nation*, 30 U.S. at 17.

22. P. 456 (quoting *Cherokee Nation*, 30 U.S. at 17).

Closely related to the problematic existence of the guardianship analogy is the characterization of the scope of Congress's plenary power over Indian affairs. Even in *Kagama*, among the first decisions to evaluate the scope and source of federal authority over Indian tribes, the Court linked the power over Indian tribes to the duty of protection and, of course, the self-perpetuating myth of Indian inferiority.²³ Indian law scholars have characterized *Kagama* as confirming the plenary power doctrine.²⁴ The power of Congress to act with respect to Indian Country appears to be relatively unchecked.²⁵ The notion of a "plenary power" coexisting with tribal sovereignty is, to put it mildly, a cumbersome fit. If Tribal Nations are sovereign while simultaneously being subject to complete defeasance by a simple legislative act of Congress, then that seems a far cry from *true* sovereignty. To be sure, an answer to this puzzle exists, and the Supreme Court has already offered it in *Morton v. Mancari*.²⁶

In *Mancari*, the Court held that federal statutes that seek to provide differential treatment to Native people "will not be disturbed" as long as "the special treatment can be tied rationally to the fulfillment of Congress'[s] unique obligation toward the Indians."²⁷ For some reason, despite clear language from *Mancari*, the conception of this unchecked congressional authority seems to continue. Here, as with the guardianship analogy, Fletcher and Fort solve the puzzle without disturbing other precedent. As opposed to simply quoting and restating the language from *Mancari*, the strength of Fletcher and Fort's analysis derives from the design of the interlocking pieces—the duty of protection and the obligation of the federal government to enact laws for Tribal communities (pp. 467–68). Correcting the skewed legal conceptions of these two components sets federal Indian law on a new trajectory that creates confidence in its internal structure and honors actual history.

III. REPOSITIONING TRIBAL LAW

"This case is about a little girl (Baby Girl) who is a citizen of the Cherokee Nation, like her father, grandparents, and a multitude of generations before her" (p. 452).

The language "who is a citizen of the Cherokee Nation" (p. 452) throws a double light. As stated, this phrase centers the legal obligations of the United States as arising from its relationship with a Tribal Nation. At the same time, however, this phrase emphasizes the Cherokee Nation's role in determining

23. *Kagama*, 118 U.S. at 384 (characterizing Tribal Nations as dependent on the United States for "their daily food . . . their political rights").

24. Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 59 (1996); see also Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 442 (2005).

25. *But see* *Hodel v. Irving*, 481 U.S. 704 (1987) (holding the Indian Land Consolidation Act unconstitutional as a taking without just compensation); *Babbitt v. Youpee*, 519 U.S. 234 (1997) (holding same).

26. 417 U.S. 535, 541–42 (1974).

27. *Mancari*, 417 U.S. at 555.

who belongs in its community. These meanings are binary stars, gravitationally bound to orbit each other. One triggers the application of refined legal obligations, and the other emphasizes that the legal choices made, and not made, are rendered by the Tribal Nation through its tribal laws—rather than the federal government.

Fletcher and Fort’s inclusion of the Anishinaabe custom of extending “considerable respect and deference to children,” and its incorporation into the Grand Traverse Band child welfare law, is the best component of the opinion.²⁸ First, it speaks to what the law should be—a reflection of the culture of a community. Second, it highlights the beautiful and dynamic work being done in Indian Country that exists apart from federal partners, courts, and statutes. These are *Tribal laws* that give breath to the multitude of generations that have come before and the ways that they have sustained tribal communities despite colonial efforts at destruction and assimilation. Tribal laws need not look like state or federal laws, but regardless of whether they do or do not, Tribal laws should absolutely be viewed as on par with their local, state, and federal counterparts.²⁹

CONCLUSION

Guiding my interpretation of Fletcher and Fort’s opinion is the first line of the opinion. Not only is it a proper characterization of the legal status of Baby Girl, but it also has the benefit of refusing to perpetuate a longstanding misapprehension about the racial status of Native people. To put it another way, Fletcher and Fort’s first line is both legally and socially correct while avoiding racist tropes. The painful contrast of the Fletcher and Fort opinion to our lived reality is uncomfortably apparent because the protection of *all* Native children hangs in the balance this Supreme Court term.³⁰ The very real threat facing Tribal communities and Native children in 2023 would not be present if Fletcher and Fort’s first line was real. Race-based concerns have long been present in federal Indian law, but Justice Alito’s opinion telegraphed the arguments now before the Court nine years later.

The problems addressed by ICWA—regular removal of Native children and denial of Tribal communal interests in their children—will arise again and metastasize if the forthcoming *Brackeen* opinion continues in the misguided vision of the world expressed by Justice Alito. Hopefully, the Court will reject that racialized worldview and instead deploy a careful, historically informed analysis grounded in the legal obligations owed by the United States to Tribal Nations. The work done in Fletcher and Fort’s opinion will help guide the *Brackeen* Court’s mindset in restating a version of federal Indian law where

28. See pp. 459–60.

29. See Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555 (2021).

30. *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021) (en banc) (per curiam), *cert. granted*, 142 S. Ct. 1205 (2022) (mem.); see also Matthew L.M. Fletcher & Wenona T. Singel, *Lawyering the Indian Child Welfare Act*, 120 MICH. L. REV. 1755 (2022).

the guardianship analogy gives way to a legal duty of protection and the plenary power doctrine is constrained by that duty and the necessity of connecting the statutory directive to improving the wellbeing of Tribal communities. Hope lies in the recent Supreme Court opinions in *Cougar Den* and *McGirt*. But the ahistorical disaster that is *Adoptive Couple* is part of our present reality.