

Imani Gandy: Hello fellow law nerds. Welcome to a special reaction episode of "Boom! Lawyered," a Rewire News Group podcast hosted by the legal journalism team that is super jazzed that Democrats outperformed expectations. I'm Rewire News Group's editor-at-large, Imani Gandy.

Jess Pieklo: And I'm Jess Pieklo, Rewire News Group's executive editor. Rewire News Group is the one and only home for expert repro journalism that encourages you to enjoy some cautious optimism coming out of the midterms because, whoa, and the "Boom! Lawyered," Podcast is part of that mission. So big thanks to our subscribers, a welcome to our new listeners, hey viewers, what?

Imani Gandy: Hey, so exciting. So this morning, the Supreme Court heard oral arguments in another case that can best be described as a case about white grievance.

Jess Pieklo: Oh.

Imani Gandy: Right? That seems to be the theme this season, right Jess?

Jess Pieklo: Yeah, absolutely. I mean, let's see. We've already covered how white people are pretty mad that Black people can vote, right? White people are pretty upset about Black and brown folks potentially taking spots at Harvard and the University of North Carolina. But today we may have the pinnacle case about white grievance before the Supreme Court so far, and that is Brackeen v. Haaland. And in this case, white folks are mad that they can't adopt Indigenous kids and sever their ties to their tribes and heritage, Imani.

Imani Gandy: Yeah, it's bad, and ridiculous, and gross, and genocidal, and we're gonna talk about why that is. So, yes, SCOTUS heard oral arguments today in a case that's going to upend the Indian Child Welfare Act, will likely upend the Indian Child Welfare Act, 'cause Gorsuch might be able to pull some people to his side, but we're gonna get into that later as well. The statute is only 44 years old, which, you know, we've talked about this. What is the deal with the 40-year itch when it comes to precedent, right?

Jess Pieklo: Yeah.

Imani Gandy: Roe, 40 years old, there was the union case a few years, 40 years old. I mean, it just seems like every 40 years we're just gonna change the law. So the Indian Child Welfare Act was enacted in 1978 in response to a crisis affecting Native American children, families, and tribes, right? Journalist Rebecca Nagle, in her podcast "This Land." describes ICWA, I-C-W-A, as a set of guardrails intended to make sure that Native children sort of pass through the foster care and adoption process safely.

Jess Pieklo: Right? We heard that in oral arguments when they were describing it as the gold standard for child placement statutes, like that jumped out to me, sorry, I didn't mean to interrupt.

Imani Gandy: No, absolutely.

Jess Pieklo: I was like, whoa.

Imani Gandy: It's the gold standard for child welfare in 23 states. I mean, it is an excellent law that prioritizes the safety and well-being of Native children. And according to the National Indian Child Welfare Association, studies have revealed that large numbers of Native children were being separated from their families, their extended families, and their communities by state child welfare and private adoption agencies. We're talking 25 to 35 percent, a quarter to a third, of all Native children were removed from their families, and 85 percent of them were being placed outside of their families and communities, even when fit and willing relatives were available to adopt.

Now, Nagle talks about this sort of the placement of children in white Christian evangelical families as following on the heels of this mass removal of Indian children to boarding schools. I mean, we're talking Indian children were put on trains, they were sent to these boarding schools where their hair was cut, right? I mean, they did the same thing to enslaved Africans, right? Cut their hair, remove their ties to their culture, right?

And then their names would be changed to Christian names, white Christian names like, you know, Mary and Joe and John. And the point of this was to reduce the number of Native children and in turn the number of Native people, right? And then by reducing the number of children, Native people, you're reducing the number of tribes. You're killing tribal sovereignty. So let's talk about what this Brackeen case is about.

Jess Pieklo: Brackeen fits into the theme of this term that we've been talking about so far, and we're only even, like, a month and a half in, it's wild, which is a whitening project, an erasing project. And what folks need to know about Brackeen in this case in particular, is that it is a political campaign being exercised through the courts. And so let me explain what I mean by that. Brackeen's actually a collection of cases, right? It's an amalgamation of three cases, but the lead case is actually a challenge that was filed in the state of Texas in front of a judge, we've talked about quite a bit on this podcast before, Judge Reed O'Connor, and he held that ICWA violates the US Constitution, just violates it, it's bad, it's bad, but let's like break that down.

So I said, it's a political case. In oral arguments today, we heard the challengers talk about how at its core, this is a case about family law, right? Family law. Well, the challengers in this case had an entire battalion of legal representation behind them, advocacy organizations, pro bono law firms. Have you been involved in a family law dispute? This is highly unusual. This is not how they go, all right? It's also a facial challenge to ICWA which is, saying straight up this law is unconstitutional, as opposed to, hey, we were denied adoption in this process and have some grievances about how that process went. That would've been an applied challenge, all right? None of that matters to Reed O'Connor who is a safe judge for conservatives. And he says, ICWA is out, all right? I first reported on this case in 2018, that's how long conservatives have

been at this. Reed O'Connor's decision is so unprecedented, the Fifth Circuit Court of Appeals doesn't even go along with it. They're like, "Hmm, what, sir, are you, like-"

Imani Gandy: The uber liberal Fifth Circuit Court of Appeals, right?

Jess Pieklo: In Texas, said no. Like the Fifth Circuit Court of Appeals, like one of the most conservative federal appellate circuits in the country, they wouldn't even go along with O'Connor's nonsense. In fact, there's not a single federal court in the country that has ever declared ICWA unconstitutional.

Even the Supreme Court has previously rejected arguments related to the constitutionality, or similar statutes to ICWA. It's wild that we're here, but we are, and in fact, the Supreme Court's even rejected arguments that federal statutes generally related to Indigenous people, which was big issue here, violate the Equal Protection Clause, and get this Imani, we got to hear today about the Indian Commerce Clause.

Imani Gandy: Oh Lord! Why are we so steeped in the Commerce Clause? I normally hate the Commerce Clause. Now we've been talking about the regular-ass commerce... The regular ass Commerce Clause-

Jess Pieklo: The regular-ass Commerce Clause.

Imani Gandy: You know, your basic bitch Commerce Clause. And then we talked about the Dormant Commerce Clause. Remember when we talked about the pig and the pork cases and whether or not Congress could regulate commerce when it wasn't regulating commerce, when it was just telling states to not screw up commerce? And now we're talking about the Indian Commerce Clause, which the Constitution grants Congress the authority to regulate the goings on, the affairs between Indian people and non-Indian people.

Jess Pieklo: Mm-hmm.

Imani Gandy: And that's what this is, right? This is the case about the affairs between Indian people, between Native American people, and non-Native American people.

Jess Pieklo: I just think the fact that we're talking about the Commerce Clause so much this term is payback for all the civil procedure we had to talk about last term that I was stuck with.

Imani Gandy: Fair enough.

Jess Pieklo: All right, OK. We should not be here, one of the themes of this Supreme Court term is that, we should not be here. This is a cooked up political challenge, but the Supreme Court has stepped in and so that's bad, and I guess we have to get into it, so, Imani.

Imani Gandy: Yes.

Jess Pieklo: We had some constitutional law at the court today, it was kind of sexy. What are the, I'm sorry, constitutional law is a little sexy. What are the big constitutional issues though in this case?

Imani Gandy: Well, Jess, let's talk about it. So the first one is something called the Anti-Commandeering rule. It's a principle that says that states are not required to sort of implement the rules and regulations that the federal government tells them to, right?

Jess Pieklo: Okay.

Imani Gandy: Petitioners are claiming the people challenging ICWA are claiming that only states have the power over child custody battles, right? And even though that has never been the case for Indigenous children, right? This idea that the federal government cannot commandeer states to implement its rules regarding the affairs between Native Americans and non-Native Americans, it's always been the case that Congress can do that. And so claiming that Congress can't do that goes against pretty much every precedent imaginable, right?

It goes against legal precedent, it goes against the constitutional text itself. It goes against the original intent of the framers, if you wanna start talking about originalism, and we're gonna get into that because Justice Jackson is still riding the originalism train, and she's doing it better than the quote unquote "originalists" themselves. What petitioners are asking goes against the existence of tribal sovereignty and the history of the relationship between colonizers, right-White Americans-and Native people.

Jess Pieklo: I think-

Imani Gandy: It's a basic case of originalism cutting in favor of what Congress has done and has been doing for nearly two centuries, and against essentially the claims of whiny white people who want to upend hundreds of years of precedent in order to get what they want. And what they want is Native kids.

Jess Pieklo: I mean, in a nutshell, it's true. So we have like almost warring conservative arguments here. We have conservatives making a functionally states' rights argument that states have the right to dictate how and why and when they do family law proceedings like child placements, including for Native children, and also that it doesn't matter why ICWA came to be, because now it's harmful to both white folks and Native children. That it's actually harmful to keep Native kids with tribal relationships.

Imani Gandy: Yeah-

Jess Pieklo: I need a breath after that.

Imani Gandy: I know, first of all, it's just nonsense, it's nonsense. Congress has always had the authority to regulate all, quote, "intercourse" between Indians and non-Indians, stop smiling because I'm not talking about sexual intercourse. This is not a podcast about Indians and non-Indians having sexual relationships. But when we talk about intercourse, we mean trade intercourse, right? Commerce, just affairs, relations. And you know, we talked about the Dormant Commerce Clause a few weeks ago, well, this is the Indian Commerce Clause.

Congress has the power, plenary power, we heard a lot of talk about plenary power in arguments today. They have the full authority to regulate commerce, to regulate Indian affairs, and that specifically includes the power to protect Native children, right? And Texas and the Brackeens are arguing that ICWA intrudes on this traditionally state sphere, the sphere of family law as you talked about. But when it comes to Indigenous children, I cannot stress this enough, that has always been in the federal sphere, always.

So this is a matter of the supremacy clause. This is a matter of Congress abrogating to itself the power to regulate Indian affairs and superseding any contrary state laws. What's that? That's the Supremacy Clause, that's just straight Supremacy Clause. It has nothing to do with the Tenth Amendment, and it has nothing to do with commandeering because the federal government isn't asking the state to do anything. The federal government is saying, get out of the way, this is our purview.

Jess Pieklo: And you really heard that when Texas was trying to make its case, and what came through for me is the reality that Texas just does not... The solicitor general's office for the state of Texas just doesn't believe in tribal sovereignty, like it's just not a thing that like registers in the way that they understand it. Because if you consider the ways in which the federal government has historically treated its relationship with tribal nations, I mean, it makes sense, right? The white colonizing folks are in the United States set up a system of government that was relational to the folks who were already here to begin with.

Imani Gandy: Right.

Jess Pieklo: Texas doesn't care.

Imani Gandy: No.

Jess Pieklo: They're like, you know, up from the ashes of, you know, tribal lands comes the phoenix of the state of Oklahoma. Those were the kinds of arguments that they were making, that truly this evangelical project of whitening the country it's their core belief.

Imani Gandy: It is their core belief. And, you know, I'm gonna mention, re-mention, I'm gonna mention Rebecca Nagle again, who has drawn the connections between what Texas is doing and the lawyers that have been hired in this case, right? One of the lawyers in this case is a guy named, I don't know if it's Mike McGill, Chad McGill, Brian McGill, I'm not sure, but he's a Gibson and Dunn like power attorney. Why is Gibson and Dunn representing the Brackeens in a

family law case? Why? Because Gibson and Dunn represents big oil in Texas, huge oil companies, and what are we talking about here? All of the oil, something like \$1.3 trillion I read worth of oil is located on tribal lands.

So if they can figure out a way to undercut ICWA then it undercuts tribal sovereignty altogether, and it allows white folks to come in and start grabbing oil, to start grabbing casinos, to start pushing people off of the lands that they negotiated with the United States government to live on, right? So that's a huge issue. But let's talk about the second big constitutional issue.

Jess Pieklo: OK.

Imani Gandy: Which is whether or not the Brackeens-Chad, of course his name is Chad Brackeen-Chad and Julie Brackeen, they think that they're being discriminated against in violation of the Equal Protection Clause. Let's talk about that for a moment.

Jess Pieklo: They're not?

Imani Gandy: Yeah, they're not. Next question.

Jess Pieklo: I mean, we have to get into it because it was such a core component of the oral arguments. But you know, listeners, viewers, they're not. Let me just, like, rest assured that they're not. But here's the nugget of their argument. So petitioners are claiming a violation of the Equal Protection Clause by arguing that being, quote unquote, Indian is a racial classification rather than a political one. And this is really important, and Imani and I are gonna walk through this because it's messy and it's a little complicated.

So if petitioners win and being Indian for purposes of ICWA is a racial classification, then that means strict scrutiny applies. And listeners, viewers, we've talked about strict scrutiny a bunch on this podcast before. That is a constitutional standard of review that applies to things like racial classifications in the law, which is the argument here that the challengers are making. And there's like a 5,000 pounds, like, but hold up onto that statement. Congress can pass laws like ICWA, which gives preferences to Indigenous people because of Congress's unique authority under the Constitution to protect Native Americans, and as Imani was talking about, regulate the goings on between Native Americans and non-Native Americans under the Indian Commerce Clause.

So challengers just wanna ignore that, they just wanna straight up ignore the part of the constitution that directly says what Congress can do in this case and say, no, it's actually unfair to white folks.

Imani Gandy: And from a group of people who normally like to dry hump the Constitution with such vigor that there's probably chafing involved, right? The fact that they just wanna look at the Indian Commerce Clause and look at the provisions of the Constitution that talk about Indians being regulated as a separate sovereign, right? They talk about excluding, you know, 3/5ths of

people and Indians not fairly taxed, like the Constitution specifically talks about Native American people. So for the quote unquote originalists on the court to be willing to ignore that because it doesn't comport with the whitening of America, right?

With this white supremacist project that the Supreme Court is now spearheading in effect, it really demonstrates the lack of principles that are involved when you're talking about conservatives on the court. Because originalism only works for them when originalism advances white supremacy. If, in this case, when originalism pushes back against white supremacy, then suddenly originalism doesn't matter anymore. And it's really all about the feelings of white folks like the Brackeens who just want to adopt Native children, right?

Jess Pleklo: Yeah, absolutely. And the thing is the Supreme Court has been very clear. There is a lot of precedent, which, you know, listeners, viewers of this podcast, you know, precedent schmeecedent it at this point. But there is, there is so much precedent that says that, when Congress legislates based on affiliation with federally recognized tribes, these are political classifications rather than racial, political classifications. And it makes sense, again, if we go back to understanding how Congress was originally dealing with tribal nations, which was as sovereigns from the jump, okay? Imani?

Imani Gandy: Yeah.

Jess Pieklo: It gets even worse.

Imani Gandy: No.

Jess Pieklo: It does.

Imani Gandy: No.

Jess Pieklo: That's like my, it gets even worse, because I kind of hinted at this, but the challengers are arguing that ICWA actually hurts children, OK? That not being exposed to whiteness is the real injury here. That not being ripped from tribal identity is not in the best interest of the children. Let me do that without the double negative, that it is in the best interest of Native children to be placed in white families as part of this experiment.

Imani Gandy: Yeah, Texas even wrote in their brief that the Equal Protection Clause applies here because Native American childrens, childrens, our childrens aren't learning.

Jess Pieklo: Our childrens aren't learning, oh, Texas.

Imani Gandy: But Native American children are being harmed, prevented from being raised according to white middle class standard, they actually argued that.

Jess Pieklo: Yeah.

Imani Gandy: And that goes against everything Congress literally found in 1978, not even just in the legislative sessions and the hearings, but in the actual legislative findings of the statute that Indian children are benefited, Native American children benefit when they either remain in their communities, are placed with extended family, or communities, or placed in a related tribe, right? But it is not harmful to make white people wait a few placements down, until there is no connection to their Native history that can be found. Then they can be placed with white folks. But not before that.

Jess Pieklo: Right.

Imani Gandy: And so essentially the through line, the bottom line is that, the word Indian and the word Native, they're political classifications and always have been since the founding, always have been. For purposes of Congress's constitutional authority, Indian and Native are not racial classifications. That's why the Constitution treats Indians, quote unquote Indians, differently, because the founders recognize them to be sovereign entities.

Jess Pieklo: So has the Supreme Court.

Imani Gandy: Yes.

Jess Pieklo: So has the Supreme Court, all right? And we heard a lot about this in arguments today, particularly a case called *Morton v. Mancari*. That's a 1974 case about a preference in hiring for the Bureau of Indian Affairs. And in that case, tribal members had a preference over other people to get jobs at BIA, and the Supreme Court said, "That is completely legitimate, that is fine." It's not a violation of the Equal Protection Clause, why? The classification is political, not racial.

Imani Gandy: Yeah, I mean, we really can't stress this enough, and that's because it's confusing, right?

Jess Pieklo: Right.

Imani Gandy: Like when you think about racial classifications or when people are talking about BIPOC people, you know, Black, Indigenous People of Color, that's a racial classification. But when you're talking about the status of Native Americans in relation to the United States government, it's a political classification, because these classifications are based on their tribal membership, right?

It's based on the citizenship in the sovereign nations. So the preference for placing Native children with Native people helps protect the Native child's status as a Native American, and that entitles them to certain benefits that non-Native American children, that children that don't have tribal affiliations, aren't entitled to, right? They're entitled to stuff like health care, employment preferences, housing. They're entitled to do things like pluck the feathers off of

eagles, even though eagles are extinct because that sort of ritual is inherent in their culture and was stripped from them when white people came over and just pillaged the place, let's say, right? So, you know, just to make clear, Indian nations are called domestic dependent nations, that's wording that the Supreme Court used in a case from 1831.

Jess Pieklo: So this isn't like a new thing that the court decided in 1974, this goes back to days of old, days of yore, yesteryear if you will, right?

Imani Gandy: Yeah. And the fact that these sovereigns preexist the United States, that's what governs the relationship between the United States and tribes. And actually one of the lawyers used a very just kind of icky term, but talked about the federal subjugation of Indian tribes as sovereign states. And that really tells you about the level of colonization, settler colonialism that we're dealing with here, and the ways in which white folks are trying to undercut that because they want to assimilate Native children.

Jess Pieklo: Yeah, yeah. I mean, yes, Imani.

Imani Gandy: Yeah.

Jess Pieklo: Yes, it's bad. But so let's talk about Mancari a little bit more because under Mancari, the court said that the Constitution authorizes this kind of special legislation specifically for the quote unquote problems of Indians, and I hate that. But like that's-look it is the language, we're stuck with it. Which means that Congress gets to pass legislation that gives special treatment to Native Americans, and that legislation won't be subject to this really high constitutional standard because of this horrific relationship in history between the federal government and the sovereign nation states of Indian tribes. So it's just there, it's not even like-

Imani Gandy: It's not a question.

Jess Pieklo: Hey, is there an open question? Maybe a lot has changed in the political climate, no. This is an evangelical project come before the court.

Imani Gandy: And just to be clear, it wouldn't even make sense for strict scrutiny to apply to legislation related to Indian commerce with affairs of Indians, if Indian and Native were viewed as a racial classification, because then every treaty, every piece of legislation, and Sonia Sotomayor and Elena Kagan were going back and talking about all of these treaties from way back in the day, they would all be presumptively invalid. And that just doesn't make sense. It cannot be that these legislation, these statutes, the relationship is presumptively invalid. So let's get into-

Jess Pieklo: But that's as radical as the argument that they wanted to make, right?

Imani Gandy: Yeah.

Jess Pieklo: And they called out on it. They're literally trying to argue that the historical relations and laws that have flown from that between the United States and tribal nations.

Imani Gandy: Don't matter.

Jess Pieklo: Don't matter.

Imani Gandy: So let's get into the oral arguments a bit, because your favorite pandemic beard haver, Neil Gorsuch, he's known to be good on Native American issues. He's from Colorado, Western state. There's a lot of history here. And he was good. He was raking the challenger's attorneys over the coals.

Jess Pieklo: He was, you know, Neil Gorsuch had a very good day, but he is a snake who cannot be trusted. And it doesn't matter that I like his beard or I want him to read me calm meditations at night 'cause that voice is silky smooth. He may do some good in this case, he may stop the conservative majority, the FedSoc Six, from fully upending the Indian Child Welfare Act here because of all of those things.

Because he comes from a region that has a very different understanding of tribal relations than, you know, an academic exercise, for example, before the Court. He has historically ruled in good ways here, and you saw that in, or you heard that in arguments today. And he was really boxing in the challengers here and explaining how radical their position was, and maybe bringing, you know, Justice Kavanaugh along with him. I've gotta say every single time though he is introduced Justice Kavanaugh, I expect him to come in with a belch.

Imani Gandy: Or a beer.

Jess Pieklo: You hear Chief Justice John Roberts be like, and Justice Kavanaugh. And I'm like, you know, it's like full on, where's that? But Gorsuch had a good day. And if we end up with a fractured opinion that preserves some tribal sovereignty, I think that it will be a large part of his doing.

Imani Gandy: I think what one of the things that struck me the most about Gorsuch is questioning and then Kavanaugh's questioning following up, is this issue about whether or not Congress is permitted to regulate quote Indians, just on their tribal lands, or whether they're able to regulate Indians off of their tribal lands.

Jess Pieklo: Yes.

Imani Gandy: What the challengers were saying is that, you know, sometimes these Native kids aren't even living on tribal lands, they don't necessarily have a connection to any particular tribe. And so why is it that Congress can regulate the goings on of Indians everywhere, right? They should be limited to regulating the Indian affairs on reservations. And Gorsuch was like, what the hell man, that doesn't even make any sense.

Jess Pieklo: That's exactly what he said.

Imani Gandy: He literally, he was just like, huh? And then specifically said, that can't possibly make sense because there are landless tribes, right? There are tribes who have been removed from their land, they don't have any land, either because they weren't granted land or because they've been pushed off of their land or for whatever reasons, or whether it's financial, economic, personal.

But that doesn't mean just because they don't have two feet on the reservation that they're no longer Native American people. And Kavanaugh seemed to be on board for that argument. The last attorney who argued was a man named Gershengorn, I think he's from Jenner & Block so he's a big power, big law attorney. He was really good at making these points, he made these points very clearly, much more clearly than the lawyer arguing for the DOJ did, right? But he made these points very clearly. And Kavanaugh, you know, after he stopped, like belching seemed to be like, yeah, that kind of makes sense. So, you know, I'll be interested to see if Gorsuch is able to bring Kavanaugh along and sort of generate this fractured opinion that, you know, I think may actually happen.

Jess Pieklo: Yeah, I know. I was surprised by that. And Gorsuch was very not interested in answering the equal protection argument also.

Imani Gandy: Oh yeah.

Jess Pieklo: So I just have no idea. And I mean, my suspicion is he's not interested in answering the equal protection argument because of the absolute disaster that that can open up for folks. And so he's looking for a way to, you know, probably maintain some kind of sovereignty without giving, or with ability to deliver some kind of conservative win, we saw that when we talked about the Bostock decision, right?

I asked you Imani, in our little Slack conversation while we were listening to arguments, is there a way that that Gorsuch could Bostock this decision and give us something that feels good and is a win? I'm not going to call Bostock, that's the case for those of you who are new that says Title VII protects LGBTQ employees from being fired if they're gay or trans, Gorsuch wrote that opinion. Could we get a similarly narrow decision that preserves ICWA in some capacity, but creates the potential for future fuckery? I think maybe.

Imani Gandy: I think maybe.

Jess Pieklo: Yeah, so I got a question for you Imani.

Imani Gandy: Yeah, hit me.

Jess Pieklo: Are vaccines and babies the same thing?

Imani Gandy: I'm sorry, what now?

Jess Pieklo: Are vaccines and babies the same thing?

Imani Gandy: I'm gonna go with no.

Jess Pieklo: Sam Alito seems to think they are.

Imani Gandy: Yeah, he really does. Sam Alito, for love of God, bless his heart. So Sam Alito came in with a question about, well, 'cause the discussion was about preferences, right?

Jess Pieklo: Yeah.

Imani Gandy: It sets up a system by which there are preferences given to certain people, right? So the first preference is that the child is placed with their extended family, and the second preference is that the child is placed with just like a relative, and then the third preference I believe, is that the child is just placed in a Native American home, irrespective of whether or not that child is a member of the tribe that they are homed in.

Jess Pieklo: Yeah.

Imani Gandy: And Sam Alito was talking about like whether or not facing children or like handing out children and providing preferences to Native American families would be the same as handing out COVID vaccines and providing preferences to Native Americans, right? His question was, would it be constitutional for Congress to say that we are gonna give vaccines to Native Americans first, and if it isn't constitutional, why isn't it constitutional? He seems to think that vaccines and babies are similar. And in our Slack conversation, while the arguments were ongoing, you made the very good point that Sam Alito sees babies as commodities.

Jess Pieklo: Yeah.

Imani Gandy: The way that he sees vaccines as commodities.

Jess Pieklo: Yeah.

Imani Gandy: What the hell, man.

Jess Pieklo: It's the reliable supply of domestic infants.

Imani Gandy: Yeah.

Jess Pieklo: This is the Dobbs decision rearing its head in an ICWA case, right?

Imani Gandy: Yeah.

Jess Pieklo: So we're talking about the Commerce Clause. What does the Commerce Clause regulate? Well, commerce, right? So health care is commerce. Are babies commerce is basically what it came down to in that line of questioning. And John Roberts was apparently down for this. He loved this line of questioning and was willing to jump in and carry it along to say, well basically if we're gonna say the federal government gets to make preferences for, you know, for Native folks in whatever capacity they want to, why can't they say, well, you get COVID vaccines before you know other folks, and then you know, what about that? And they were mad.

Imani Gandy: They were mad. And the fact of the matter is, no vaccines are not like babies. And the reason that Gershengorn, the lawyer from Jenner & Block who I was very, very impressed with, A, he was charming, B, he was one of the first white guy attorneys that I have watched or listened to in oral arguments who actually didn't try to barrel over the female justices when being questioned, right? Like he would start to interrupt them and then he would say, oh, I'm sorry, excuse me, Justice Sotomayor, please finish your question. And that's a rare thing to see from white male attorneys. So props to him for that.

But, you know, he made the point that, when it comes to babies, you know, if you're gonna wanna try and call babies commodities when it comes to delivering babies or distributing babies, the issue with ICWA is that the classification is political, right? These babies have a political position in the tribe, and that political position entitles them to certain benefits. And that's why it is critical to ensure that they can maintain their status as citizens of a particular tribe so that they can access these benefits. That's not the same thing as vaccines, right?

Jess Pieklo: No.

Imani Gandy: If Congress were to pass a law saying we're gonna give priority to Indians just full stop, that would be giving priority to Indians, not as political entities, but to Indians qua Indians, and that's just like a Latin term, Indians as their status as Indians, that would be racial, and it kind of makes sense, right? I mentioned before, when you talk about brown, Indigenous, people of color, that's a racial classification. So if you were gonna say, we're gonna give BIPOC people vaccines, that would be racial, but that's not what's happening with these child placements. Children are being placed as political entities in order to maintain their status as citizens of this political entity, and I think that that is critical.

Jess Pieklo: Which again, not to go back to my favorite pandemic beard, but here I am doing that, was the point that Justice Gorsuch actually was really great on looking to, hey, the United States government does this in all sorts of other contexts, right? There's the, hey, you each just win, there are disputes, even in custody cases that involve independent sovereigns. Independent sovereigns being the key there. The federal government is free to act.

Imani Gandy: Right? Right, I mean, it doesn't make any sense otherwise, right? It doesn't, as I said, everything involving relationships between Native Americans and non-Native Americans would be presumptively invalid, and that cannot be even the long history of oppression and genocide when it comes to this country and Native Americans.

Jess Pieklo: It cannot be. But what a weird line of argument. And I haven't talked about Justice Barrett yet, this podcast, this was where she was the most animated in my opinion too. And I honestly, I'm gonna say I expected to hear more from her in this argument, given her identity, and during her confirmation hearing. Hey, Imani, did you know that Amy Coney Barrett is a mom?

Imani Gandy: Oh god, yeah. Did you know that she adopted some Black children? I heard that once.

Jess Pieklo: Yeah, so, I remember covering her confirmation hearing, and all we heard was about the fact that she was a mom and that she was an adoptive mother, and that this was a core central part of her identity. And that didn't seem to carry through, which I was frankly a little surprised, but also relieved for because it didn't need to. But she really got into this idea about, you know, whether or not there is this, you know, distribution of infants. And I just don't like it when she talks about any of that stuff.

Imani Gandy: No, it's not great. You know what else I don't like?

Jess Pieklo: What?

Imani Gandy: Sam Alito like making fake, you know, concern trolling about the fungibility of tribes, right? So there's this whole-

Jess Pieklo: What does that mean? OK, what does fungibility mean?

Imani Gandy: Fungibility. So fungible means when one good can replace another, right? Like, money is fungible, take a \$5 bill, take a \$10 bill, you replace one, it's no big deal. So the question becomes, when it comes to placement of children, right? This third category of placement where you place a child with any Native American home before you place a child with like some white Christian evangelicals. So Sam Alito brought up the point that, that doesn't make sense to do that because, prior to white folks coming into this country and murdering a bunch of Native Americans, the Native American tribes were at war with each other.

Jess Pieklo: Yeah.

Imani Gandy: So why would a Native American tribe based in Maine want to have any sort of relationship with tribal children based in Arizona? So are you saying that tribes are fungible and that it doesn't matter that the tribe in Maine is different from the tribe in Arizona? And the answer to that question is, don't be such a jackass, Sam. Honestly, stop being a jackass. First of all, the

clearly the point is that yeah, maybe tribes were warring before white folks got here and decided to start murdering everyone. But shit has changed, Sam. And right now Native American communities have been siphoned off, squirreled off, into these particular areas, in particular regions purposefully so-

Jess Pieklo: Yeah.

Imani Gandy: They were ripped apart, tribal relationships between tribes were ripped apart. And so it doesn't make any sense at 2022 to be talking about warring tribes in 1750- whatever the fuck! Like, it doesn't make any sense. And moreover, as Ger... I keep pronouncing his name different ways, but the Jenner & Block attorney, Gershenhorn, Gershengorn, said essentially that that is not happening, there is no case before the court where a tribe from Arizona just up and decided to pluck a Native child from Maine.

Normally what happens when you're placing children in a Native American home that is not their tribe, it's because these Native American children are living on different tribes than the tribe that they're from, or they're living on multiple tribal lands. And, you know, maybe I don't wanna next, I'm not gonna name any nations because I don't have enough familiarity with them, but you know, Native American nation number one may want to adopt a child from Native American nation number two, because of the relationship between those two tribes. Just because they don't have the same name doesn't mean they're not related. And specifically, you know, when settler colonialism happened, I imagine disparate Native American tribes that maybe weren't friendly with each other before, found themselves in a common cause.

And that common cause was keeping the white man from either murdering them, taking their children, or forcing them off their land. So it was just such a disingenuous argument from such a disingenuous man, who just, he grinds my gears.

Jess Pieklo: And rightly so. But it sums up the evangelical project that is at the heart of this case. Because even the Brackeens themselves, or one of the families, maybe not the Brackeens one of the families involved absolutely sees their role as a fostive and adoptive parent, as a white Christian fostive and adoptive parent, as part of this mission, right? I mean, this is entrenched. I know we don't teach civics in this country anymore, but this whole idea of civilizing the savages is part of the evangelical project. Kathryn Joyce has an entire book about this called "The Child Catchers." Everybody go read that book because it's here and it's abroad. And Sam Alito basically was like, yeah, this is a thing that we believe, that white people come in and civilize these spaces. And one ways that they do that is by providing homes that are in the best interest of Native children.

Imani Gandy: And that means removing Native children from their communities. And one of the arguments that really, really angered me is when the attorney for the Brackeens and by the way it was the Brackeens, it is the Brackeens-

Jess Pieklo: Was it?

Imani Gandy: To see that the adopting and fostering as service to God. Julie Brackeen before the Brackeen case even came about when she adopted her first child, a three year old, who then she returned to social services because it was too difficult for her. Returned, she just returned, and then she wanted a baby 'cause it's easier to raise a baby from jump, right? But she said, when while she was struggling for the five months she had this three year old that she considered it a sacrifice, right? Because serving God is not supposed to be easy. It wasn't about the best interest of this child.

Jess Pieklo: No.

Imani Gandy: It was about her interest in appeasing God in some way. So that's absolutely the white Christian evangelical project is front and center in this case. But another argument that really made me angry was when the Brackeen's attorney said that removing children, removing Native children and placing them with white families won't affect tribal sovereignty one iota. That's what he said. It won't affect tribal sovereignty one iota.

And listeners, viewers, let me tell you how genocide works, right? What you do when you're trying to remove a population is you remove their children, right? Because if you remove their children, if you remove Native children from their communities, if you strip them of their culture and you assimilate them into white evangelical spaces, then there are no more Native children. Like they are still Native, but they're going to marry likely white people or non-Native people, and that is going to destroy tribal sovereignty. You can't have a tribe if you don't have anymore members of that tribe. So it is absolutely unconscionable to be out here arguing that there is no effect that removing Native children from their tribes is going to have on tribal sovereignty. It's just ridiculous. You need kids to procreate. Why do you think they banned abortion?

Jess Pieklo: I mean-

Imani Gandy: Right? What are you talking about? I can't.

Jess Pieklo: So I missed Solicitor General Prelogar today.

Imani Gandy: Oh my God. Oh my God. Kneedler, I don't know who he's, let's never put him in front of SCOTUS again when it comes to cases that are this critical to the rights of marginalized and oppressed people, because he was awful.

Jess Pieklo: So the last livestream that Imani and I did was in response to the affirmative action challenges before the Supreme Court. And they just went completely so off the rails that we were here live streaming while they were still doing arguments because they just wouldn't stop talking about it. But one of the things in that livestream that we mentioned was how well Solicitor General Elizabeth Prelogar performed for the Biden administration in those cases. And she had an impossible job, which was basically to defend race-based affirmative action policies on the merits before six justices who were hellbent on striking it. And she came in and understood

that, yes, there was law that the court was supposed to be arguing, but she had a political mission to do, and she did it. I don't know that it'll change the outcome of the cases, but she did it. The attorney who was arguing on behalf of the Department of the Interior today, walked in as though he was having a good faith argument on the merits of the law and absolutely got his handed to him by conservative justices who have no good faith.

Imani Gandy: Yeah, absolutely. Yeah, he walked in like it was the first day of torts class and he was being called on for the Socratic method, people who went to law school, you don't understand what I mean, right? Like you have a back and forth about the actual facts and the law and that's it, with no political agenda.

Jess Pieklo: Yeah.

Imani Gandy: But clearly this is a political case. So you can't walk into the Supreme Court and think you're just gonna argue the law, and that's gonna be it. I mean, he was tripped up time and time again, his argument was disjointed, it didn't make a lot of sense. It wasn't structured properly, it was not good. It was just night and day between Prelogar and this guy. And it really just tells a tale about, I don't know who decided or why it was decided that this guy was gonna go, maybe it's because he was with the Department of Interior, not the department, I don't know. But we need more Elizabeth Prelogar and we need to push guys like Kneeder into the cornfield because he just he didn't do the Biden Administration any favors.

Imani Gandy: Right, right. I mean, Justice Kegstand tripped him up.

Jess Pieklo: Yeah, how you gonna let Justice Keg, that man is a stone cold dumbass. Like I am sorry, it bugs me to no end that this jackass is on the Supreme Court. If you can't even hold your own in an argument with Justice Kegstand with Brad McBeer, even my dog is upset about it, you can hear him in the background.

Imani Gandy: I mean, truly.

Jess Pieklo: It's truly absurd.

Imani Gandy: I will say, you know, on the whole today's arguments, kind of like the midterm election, went better than I anticipated, but I am still sort of like nervous in my innards about what is gonna happen. And I'm not gonna let the fact that Justice Gorsuch had such a good day or that he sounds so silky smooth, lead me to believe that he's doing big good here, I don't think he is. But we're not gonna know for a while 'cause we probably won't get a decision until June.

Jess Pieklo: Yeah, this is one of those June cases, and we have so many, you know, as we talked about in the beginning of the show, and as we've been talking about all season, we have four or five cases that are directly about the Supreme Court's mission to help conservatives install whiteness, to reinstall whiteness. And here's a thought that just occurred to me, right?

You've got Tucker Carlson and white folks just all up in arms about "great replacement" theory, right?

Imani Gandy: So they're all up in arms about white people being replaced by Black and brown people and anchor babies and yada yada yada. But somehow they can't wrap their minds around the fact that maybe Native children are being replaced by white people, right? Like the "great replacement" theory when it comes to Native children. They can't wrap their minds around that. They can't wrap their minds around Native children being removed from their culture and therefore having their culture be destroyed.

Now mind you, Indian culture and white culture, there's no such thing as, white culture is racist culture, there may be Irish culture, Italian culture, whatever. There's no such thing as white culture besides fucking racism, and you're not gonna convince me otherwise. But the point remains, the fact that they can't step outside of their selves and look at what they're arguing in relationship to another group of people, it's just stark to me. It's mind boggling, that's not mind boggling. It's actually pretty mind un-boggling. But the point is it was a stark difference in the tenor of the arguments.

Jess Pieklo: What a day.

Imani Gandy: What a day. What a day. At least the arguments didn't go for five hours the way they did in the affirmative action cases, my God.

Jess Pieklo: We had finished this live stream and they were still talking.

Imani Gandy: They were still talking. So thankfully that didn't happen today.

Jess Pieklo: No.

Imani Gandy: But I know the midterms, in the midterm aftermath, a lot of people weren't paying attention to this case.

Jess Pieklo: Yeah.

Imani Gandy: So if you have any further questions, if you wanna talk to us about any of this stuff, you can always find me on Twitter. I'm @AngryBlackLady, Jess is on Twitter @Hegemommy, ♪ H to the E, to the G ♪ ♪ To the E, to the M ♪ ♪ To the O, to the M-M-Y ♪ Why? Because we love her.

Jess Pieklo: Oh my God.

Imani Gandy: Also you can, and you should follow, blah, blah, blah. We Wire News Group. You should follow We Wire News Group. Rewire News Group on Twitter, on Instagram, and subscribe to our YouTube channel. That way you can get a notification whenever our podcasts

get uploaded or whenever about to go live. We're so excited to be live, this season to be on video so you can look at our faces. But if you don't wanna look at our faces today, we get it. We ain't mad at you, we get it. You can listen to us wherever you get your podcast normally.

Jess Pieklo: Absolutely, absolutely.

Imani Gandy: Google podcast and Apple podcast, Overcast, Spotify, wherever, Macy's, I dunno.

Jess Pieklo: The podcast of Macy's?

Imani Gandy: Yeah, I don't know, who knows?

Jess Pieklo: And I know, like this case being argued the day after the midterm elections, everybody's talking about the elections. It was a big night for folks who are fans of abortion rights and access. And so Imani and I are absolutely gonna be talking about what all of that means in our next episode. But we wanted to make sure that this case got the attention that it deserved because it is one of the most monumental cases before the Court this term and barely anybody's talking about it.

Imani Gandy: And it has huge implications that go beyond family law. I mean, we're talking about the literal destruction of tribal sovereignty as it's been in place for centuries. And that should concern everyone.

Jess Pieklo: I think I need to get a drink now.

Imani Gandy: I think I do too. So let's go get those drinks and what are we gonna do?

Jess Pieklo: We'll see on the tubes folks. See you on the tubes, and the YouTubes.

Imani Gandy: And the YouTubes. Thanks for joining.