Justice Gorsuch and Native American Law

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[00:00:00] Jeffrey Rosen: At the end of the term, the Supreme Court handed down two major decisions about Native American law. In Arizona against Navajo Nation, the court ruled that a treaty didn't require the US government to secure water for the Navajo Nation. And in Haaland versus Brackeen, the court upheld the Indian Child Welfare Act. In this episode, we break down those decisions and dive more deeply into the opinions of Justice Gorsuch and his unique approach to how the Constitution applies to issues relating to Native American tribes.

[00:00:36] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a non-partisan, nonprofit, chartered by Congress to increase awareness and understanding of the Constitution among the American people.

[00:00:53] Jeffrey Rosen: In this episode, I'm joined by two of America's leading Native American law experts. Marcia Zug is Miles and Ann Loadholt, professor of Family Law at the University of South Carolina Law School. She has advised many organizations, including the National Indian Child Welfare Association and the Southern Poverty Law Center on issues involving Native Americans and immigrant families. And her most recent book is Buying a Bride: An Engaging History of Mail-Order Matches. Marcia, it is wonderful to welcome you to We the People.

[00:01:27] Marcia Zug: Hi, thank you so much for having me.

[00:01:29] Jeffrey Rosen: And Tim Sandefur is vice president for legal affairs at the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation, and he holds the Duncan Chair in Constitutional Government. He's the author of more than 50 scholarly articles on subjects ranging from Indian law and antitrust, to copyright law. And his most recent book is Freedom's Furies: How Isabel Paterson, Rose Wilder Lane, and Ayn Rand Found Liberty in an Age of Darkness. Tim, it's great to welcome you back to We the People.

[00:01:58] Tim Sandefur: Thanks for having me back, Jeff.

[00:02:00] Jeffrey Rosen: Marcia, let's start with the Brackeen case which have held the Indian Child Welfare Act. What did Justice Barrett hold for the court, and why is the case significant?

[00:02:13] Marcia Zug: Well one of the most significant parts of the case, at least from where I'm standing, is what it didn't do. In my wildest hopes I thought there would still be some diminishment of the Indian Child Welfare Act, and that's not what happened in this case. They did not reach some of the issues that were very concerning, and they made a very forceful statement about Congress's authority to pass the Indian Child Welfare Act, to issue this kind of legislation, that the real concern many Indian law advocates had was that if they struck down the ICWA, this could mean the end of Indian law, in general, that it would be the slippery slope leading to who knows what.

[00:03:07] Marcia Zug: And they didn't do that. They made it very clear that this is within Congress's power to issue such laws and that that's just going forward not going to be something they're going to entertain. Then, it also held that other arguments. There was an anti-commandeering argument saying that the law was forcing states to implement, you know, federal policy in a way that was unconstitutional. They struck that down. And they also found that for the equal protection arguments, which many of us were very concerned about, that the parties didn't have standing.

[00:03:46] Jeffrey Rosen: Thank you so much for that. Tim Sandefur, there was a vigorous dissent by Justice Clarence Thomas, who said that the federal government is one of enumerated powers and lacked authority in this case over family law. Tell us about both the majority opinion what it held and didn't held, and about the dissent.

[00:04:07] Tim Sandefur: Yeah. So there were basically two arguments against the constitutionality of the Indian Child Welfare Act going before the court. The first one was that Congress lacks constitutional authority to pass a statute. And then the second argument is that the statute is unconstitutional because it crosses the line into race-based legislation. And as the professor said, the court said that nobody had standing to raise that second argument, so the court focused its attention on these, these federalism issues. Does Congress have authority to pass this statute in the first place?

[00:04:37] Tim Sandefur: And the majority held that the answer was yes on the grounds of what's called the plenary power doctrine, which is a legal theory about Congress's authority with respect to legislating regarding American Indians. The dissenting opinion by Justice Thomas argues that there is no plenary power, that this plenary power is really sort of cobbled together through what we used to call emanations and penumbras of various different provisions of the Constitution that are sort of stitched together like Frankenstein's monster into a power that is plenary.

[00:05:10] Tim Sandefur: Now, that word plenary is really important because the word plenary actually has two different meanings. Plenary can mean to the exclusion of states. Congress has the plenary power in the sense that states can't interfere if Congress does something, or plenary can mean absolute, supreme, unlimited authority to do whatever it wants to. And the problem in the majority opinion uses that ambiguity, exploits that ambiguity in order to get away with something that the Constitution does not authorize. Congress does not have plenary of power over anything whatsoever, because Congress has only enumerated powers, the powers that are created by the Constitution. The whole point of having the Constitution is that our Congress does not have supreme, absolute, unlimited authority over anything.

[00:06:03] Tim Sandefur: On the other hand, if by plenary all we mean is that when Congress acts, the states can't interfere, that's trivial. That's obvious, because the Supremacy Clause already does that. Nobody disputes that when Congress does something that it has legitimate authority to do, the states have to stand back and respect that. So by exploiting this ambiguity, the majority says, "Oh, yes, Congress has a supreme, absolute, unlimited power." And then, they back off, and they say, "Oh, but, well, we don't mean to say that they have supreme, absolute, unlimited power." So they're trying to have it both ways which is a point that Justice Alito, in his dissenting opinion draws out quite clearly.

[00:06:41] Tim Sandefur: Justice Thomas disagrees with the idea that there is a plenary power. He says that there's a commerce power, there are treaty powers, there's the Congress's power with respect to, you know foreign policy. There's various enumerated powers, and you can point to those for authority, but you can't put them together into a plenary power.

[00:06:58] Tim Sandefur: I think the most interesting part of the case is that Justice Gorsuch, who nevertheless believes the Indian Child Welfare Act is constitutional, agrees with the dissent that there is no plenary power. For those of us who are constitutional law nerds, which I hope is all of your listeners, that's the most interesting part of this opinion.

[00:07:19] Jeffrey Rosen: Excellent. Well, let's delve into Justice Gorsuch's opinion. Marcia, Justice Gorsuch locates broad congressional power over Native American affairs in a host of constitutional texts, including what he calls the three distinct clauses rolled into the Commerce Clause, namely a Foreign Commerce Clause, an Interstate Commerce Clause and an Indian Commerce Clause. He also cites the Treaty Clause which divests the states of the power to enter into treaties with the tribes as well as other clauses. This is one of his major statements about why broad congressional authority is consistent with original understanding. Tell us about the significance of Justice Gorsuch's concurrence and where he locates congressional power in the Constitution.

[00:08:03] Marcia Zug: Justice Gorsuch is an originalist. And he looks to the original documents. He pulls out the dictionary. He looks up terms, and he says that, "Nothing the court is doing is, in any way inconsistent with what the founders would have expected." Sometimes, I think people are surprised that with Gorsuch's Indian law opinions, because he'll often dissent in other types of cases that people will consider similar, meaning other types of cases that they see as race-based. But these Indian law cases, as Gorsuch would say, and Indian law scholars in general would say as well, are not race-based.

[00:08:51] Marcia Zug: So they are about treating tribes as sovereign entities, as separate nations. And that is a concept that comes back to the original understanding of this relationship. It's written into the Constitution. It predates the Constitution. And Gorsuch's opinions are very, very consistent in this. His opinions are about a recognition of a promise of bargains made between the United States and Native nations, and he's holding the United States to their promises. He is saying that when we promised something, when we gave peace, did we not also get it? When we made a promise, it wasn't just out of the kindness of our hearts.

[00:09:35] Marcia Zug: We, the United States, benefited from these problems, and we have an obligation to abide by our promises. And that's what is consistent throughout his opinions

and why he looks at these original understandings and says that even if certain things have changed, that's not a reason not to uphold these promises that we made.

[00:10:00] Jeffrey Rosen: Tim, describe, if you would, the constitutional clauses on which Justice Gorsuch rests his argument that the original understanding of the Constitution favors broad Native American sovereignty and congressional power over Indian affairs. And then give us a sense of why Justice Thomas and Justice Alito disagree with it.

[00:10:21] Tim Sandefur: Well, you hinted at it when you used the phrase three different commerce clauses. The Constitution actually contains only a single commerce clause, and the dispute is over whether it should be read in three different ways. So the text of the clause says, "Congress has power to regulate commerce with four nations and among the several states and with the Indian tribes." So uses the word commerce only one time.

[00:10:46] Tim Sandefur: And for that reason, as a matter of grammar, one is inclined to interpret that as meaning the same thing with respect to states, foreign nations, and Indian tribes. What falls within the definition of commerce, whatever that category might include, is the same with respect to those three things as a matter of grammar. But Gorsuch disagrees with that. He says, "No, that's, that's not the case." What qualifies as commerce with respect to states or foreign nations might be different than what qualifies as commerce with respect to Indian tribes.

[00:11:16] Tim Sandefur: This is how, for you non-lawyers out there, the attention to the level of detail with the attention to the text in the Constitution gets quite extreme sometimes. And here's a good example of it. Justice Gorsuch points out that the prepositions are different with respect to these three things. He says, "Commerce among the states is different than commerce with the Indian tribes." And he finds that to be significant as a matter of law.

[00:11:44] Tim Sandefur: He believes that the term commerce, when it comes to the Indian tribes, includes not merely buying and selling products and services, which is what we would normally expect the term commerce to mean and what the court has said it means when we're talking about commerce among the civil states. He says, "It also includes a broader power, a power to regulate the American peoples, American citizens' actions with respect to Indians, even if they do not qualify as commercial trade, and so forth."

[00:12:13] Tim Sandefur: Now, that's a point that Justice Thomas disputes. He says, "There's no textual basis for that. It violates the rules of grammar. There's no proof in the records of the authorship of the Constitution, the Philadelphia Convention debates, anything like that." There's no proof that that was what the founders intended to do. And in fact, the evidence suggests quite the opposite, because the Articles of Confederation before the Constitution said that Congress had power to regulate Indian affairs. And we know from the records of the Philadelphia Convention that the framers chose to eliminate the word affairs and chose instead to combine the power with respect to Indian tribes into this single sentence, regulate commerce among the several states with foreign nations and with the Indian tribes.

[00:12:59] Tim Sandefur: You might say, it seems like an abstruse, sort of obscure kind of an argument that involves some grammatical tinkering and hyper-specification. I mean, that's a huge difference. That's a very important point. Does Congress's power to regulate

commerce mean just the power to regulate buying and selling, or is it more expansive? Does it mean Congress has authority to regulate basically any kind of personal behavior of non-Indians with Indians?

[00:13:31] Tim Sandefur: Now, Justice Thomas, incidentally, he's written on this subject in previous cases most notably in a case called United States versus Lara, that one of the big problems with federal Indian law today is that we use these broad sort of generic terms, instead of looking specifically at the history of particular tribes. We refer to the sovereignty of tribes just sort of in a general all-purpose way. And he says what we ought to do if we're serious about interpreting this provision, what we ought to do is look at the history of particular tribes and their treaties because not all tribes have the same arrangements with respect to the federal government.

[00:14:07] Tim Sandefur: If you read these treaties, some of them agreed to some things. Others agreed to other things, and we should go down to a tribe by tribe interpretation of Congress's power, which is what Justice Thomas has said. Of course, that issue does not get resolved or even fully addressed in the Brackeen decision.

[00:14:25] Jeffrey Rosen: Marcia, Justice Gorsuch, in addition to what he calls the three-part Commerce Clause, invokes other clauses to confirm his broad thesis that the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the nation's history. And then, he gives an extensive sense of that history, both in the early republic and subsequently, which he says, "Confirms the understanding and notes that beginning with the Washington administration, the government insisted that the federal government enjoyed exclusive constitutional authority over managing relations with the Indian tribes." Tell us about Justice Gorsuch's unique understanding of how history supports his reading of the text.

[00:15:08] Marcia Zug: So in Justice Gorsuch's opinion, you're correct. He doesn't just use the Indian Commerce Clause. He looks at a number of different both provisions and extra-constitutional historical actions to explain Indian law today and how we've gotten here. So in addition to the Commerce Clause, he talks about the treaty power. One of the really important things to recognize with the treaty powers, even though we no longer make treaties with Native nations, the fact that we did, right, sets them up clearly as sovereign entities, as something other than a state. We don't have treaties with states, right?

[00:15:44] Marcia Zug: So, you know, one of the arguments against states and tribes should all be treated the same in the Commerce Clause, they're clearly not the same. Historically, we didn't recognize them as the same. Tribes were independent sovereign nations that we've created treaties with much more like the other foreign nations, except, we have three parts of the Commerce Clause, arguably, the foreign nations, the states, and the tribes.

[00:16:10] Marcia Zug: Part of that recognition of tribal sovereignty as well is the history of what was going on. You had a situation in North America where you had fights over control, right? And if the United States was going to control this land and control relations with the tribes, it had to have certain types of powers of nationality that are just going to be different than how they were, certainly how they were relating to other states.

[00:16:45] Marcia Zug: But after those periods of hostility ended the law changes, the history changes, and we have something called the trust doctrine, which again is not specifically in the Constitution, but it has been created through our Indian law jurisprudence, which is this recognition. And Gorsuch is very aware of this. This recognition that what the United States did to Native nations even if it was legally justified, had to still come from a place of protection, right? Once they're no longer a threat to the United States, then the US has an obligation to treat them fairly certainly, and recognize the dependency that they have created.

[00:17:35] Marcia Zug: And the Indian Child Welfare Act is very much a recognition of a lot of the problems that Native nations and Native families still struggle with today directly traced back to US policy. And as part of this trust doctrine, it's the idea that we have an obligation, a legal obligation, to recognize this history and our part in it, and act accordingly, that we can't just look at things as they are at this moment in time. But we need the entire history. And our decisions need to be based on the full history and not ignore it.

[00:18:13] Jeffrey Rosen: Tim, what's Justice Thomas's response? Is he looking at the history at a more specific level of abstraction, tribe by tribe? And, what is his broad response to Justice Gorsuch's claims that the policy of non-state interference is pervasive from the Washington administration to today?

[00:18:33] Tim Sandefur: Yeah. This gets to what I mentioned about the ambiguity of the term plenary that I don't think Justice Thomas disputes that when Congress acts within its legitimate authority that states have to respect that and stand back and not interfere with that. The dispute instead turns on whether a statute like ICWA which, first of all, does not govern child welfare matters on reservation land. This is a law that governs child welfare matters off reservation land, and which applies to children based on their biological eligibility for tribal membership, meaning it is triggered by a child's biological ancestry alone, whether that is a regulation of commerce. We're talking about child adoption cases, child abuse cases, foster care, and so forth, which clearly are not within the term commerce if it were done with regard to commerce among the several states, right?

[00:19:27] Tim Sandefur: In the United States v Morrison and the predecessor case, United States v Lopez, the Supreme Court made clear that Congress can't use the commerce among the several states clause as a rationale for adopting laws that govern things like violent crime or family law matters or other things that fall within the power of the states.

[00:19:47] Tim Sandefur: So then, what about the Indian Commerce Clause is any different? And Justice Thomas says it's not different. They are the same power with respect to tribes and as it is with respect to among the several states.

[00:20:00] Tim Sandefur: Now, one thing we've been talking about that justice is paying attention to history, one element of history that is shockingly omitted by both the majority opinion and the concurring opinion and the dissenting opinion is the 1924 Indian Citizenship Act. This is a law that declared all American Indians to be citizens of the United States.

[00:20:24] Tim Sandefur: And to my way of thinking, that ought to make a huge amount of difference in how we interpret Congress's authority in the present day world. All of this focus

on the founding era practice or on 19th century practice or the theory of plenary power that comes out of cases like Kagama, which is an 1880's Supreme Court decision that really is where the plenary power idea originated. Those cases all treat American Indians as if they were foreigners, indeed as conquered enemies whose very existence is entirely at the mercy of the federal government.

[00:21:03] Tim Sandefur: And because their existence is at the mercy of the federal government, therefore, the court said in Kagama, "Congress has this plenary power plus this moral obligation to use this power wisely." It kind of interpreting federal power as the power of a wartime conqueror over its defeated enemy. You might imagine like American control over occupied Japan after World War II, for example.

[00:21:27] Tim Sandefur: Well, the problem with that is that is no longer an applicable paradigm if you're talking about anything after 1924. After 1924, when American Indians are citizens of the United States, they must be treated as equal American citizens with the same civil rights as everybody else, not as people who can be dealt with however Congress chooses. So this plenary power doctrine really should not apply. And unfortunately, nobody even addresses how the Indian Citizenship Act can interact with this plenary power that, as I said, is cobbled together from a whole list of different powers that predicts or historical experiences that predate the 1924 Act.

[00:22:13] Tim Sandefur: Even if the court had just addressed this to say, "Well, here's why it doesn't make a difference," that would have been satisfying. But to completely ignore what, to me, seems like a transformative moment in American Indian law is really quite shocking.

[00:22:26] Jeffrey Rosen: Marcia, your thoughts on whether or not the 1924 Act changes the plenary power paradigm. And, more broadly, this is just such a fascinating debate about what lens of history matters. Justice Gorsuch has a powerful part of his opinion, saying, "The Indian Child Welfare Act didn't emerge from a vacuum. It came about as a direct response to the mass removal of Indian children from their families during the '50s, '60s, and '70s." Justice Gorsuch says that this practice, in turn, was the latest iteration of the older policy of removing Indian children from their families, which dates back 150 years. Tell us about how that modern history for Justice Gorsuch confirms the older paradigm and why that matters.

[00:23:09] Marcia Zug: Maybe that answers Mr. Sandefur's question to some extent. If the Citizenship Act actually had been transformative maybe that would have not required things like the Indian Child Welfare Act. But the way I view the Citizenship Act is it changed how native people tribal members were treated within the United States and outside of the reservations. But within the reservations, they are still recognized as quasi sovereign entities. And the fact that they are also US citizens doesn't change that. So they are in a unique position.

[00:23:45] Marcia Zug: The Citizenship Act isn't like when you're an immigrant and you become a US citizen and you give up your citizenship in another country. You are now American, and you're no longer German, let's say. When you are a tribal member, you are still a member of a Native nation. And there are, and have been since the founding, the pre-founding, different rules that apply to tribal citizens.

[00:24:09] Marcia Zug: And I wanna push back on a little bit is, and a lots of times the Supreme Court, when they're ruling against tribes, will emphasize the biological aspect. And tribal citizenship, it's citizenship, it's a political affiliation. Most tribes do have a genetic component to it but there are plenty of people who have Native American ancestry who are not legally Indian. So it is a political affiliation. And therefore, different rules that apply to tribal members because of this political affiliation is what sets them apart.

[00:24:47] Marcia Zug: So, even once they become US citizens, they still are tribal citizens. And therefore, special laws can still apply to them. And 1924 can't erase everything that's happened before, especially, as you point out, so many of the same policies continued. So pre-1924, you have the boarding school era, where children are, for generations, ripped apart from their families, sent to horrific boarding schools intentionally to destroy tribal culture, the tribal way of life.

[00:25:21] Marcia Zug: Thousands, maybe hundreds of thousands of children die in these schools. And it's not that when they decided that the boarding schools were problematic that they ended the policy. They just decided the schools were problematic. They still thought the removal was good. So you have the '50s, the '60s still removing these kids based on the presumption that the children are better off with non-Indian families.

[00:25:42] Marcia Zug: And finally, in 1978, Congress passes the Indian Child Welfare Act to stop this. I come at this from a family law perspective. And one of the things that you see when you look at Native child removals as opposed to all other removals is not that they have so many more protections than other kids. It's that these protections are the only things that keep them from this horrific repeat of centuries of removal. It puts them in a similar spot, as opposed to treating them differently, is what I have found in my research.

[00:26:20] Jeffrey Rosen: Tim Sandefur, Marcia Zug argues, like the tribal governments, that ICWA isn't race-based, noting that in the Morton case from 1974, the court said tribes are political entities rather than racial groups. You note that distinction but you argue that it was eligibility rules triggered by tribal DNA, not tribal membership. The court avoided this debate in Brackeen. But tell us about this debate about whether or not this is a racial or a political classification and what the implications are for Indian law.

[00:26:57] Tim Sandefur: Sure. Let me begin by encouraging listeners who are interested to listen to the podcast that you and I did some months ago, where we got a little bit more into detail on just this issue. And I should also distinguish right away between tribal citizenship on one hand and Indian child status under ICWA on the other. Those are two different things. Tribal citizenship is a factor of tribal laws. Tribes are free to set whatever standards they want in that regard, and that's perfectly fine.

[00:27:25] Tim Sandefur: But Indian child status under ICWA is a function of federal and state law, which means that it has to be subordinate to the constitutional standards. And that includes the prohibition on laws that treat people differently based on their biological ancestry. ICWA does the latter in many different ways, among other things. It strips Indian children of legal protections that apply to children of other ethnicities and makes it more difficult for states to protect abused Indian children from harm than is the case with respect to children of any other ethnicity.

[00:27:58] Tim Sandefur: Now, ICWA defines Indian child and is triggered by the presence of an Indian child, defines Indian child as a child who is either a tribal member or who is biologically eligible for tribal membership, and also who has a biological parent who is a tribal member. So what that means is that political, religious, social, cultural, linguistic affiliation with a tribe, none of that matters. All that matters for a child to be determined to be an Indian child under ICWA is biological ancestry.

[00:28:29] Tim Sandefur: If the child has no connection in a social, political, religious, or linguistic sense with a tribe, has no idea that, that the child is Indian, has never visited tribal lands, the child is still deemed an Indian child based exclusively on the blood in her veins.

[00:28:45] Tim Sandefur: On the other hand, the child who is fully acculturated with a tribe, who speaks a tribal language, practices a tribal religion, etcetera, that child would not qualify as an Indian child under ICWA if that child lacked the biological requirements for tribal citizenship. So ICWA is triggered by biology, not by political affiliation. And the reason that's important is 'cause that Morton v Mancari case that you mentioned, it says that tribal affiliation is a political affiliation, and that's true.

[00:29:14] Tim Sandefur: And therefore, a law that's triggered by tribal affiliation doesn't trigger the heightened scrutiny that applies to a biologically-based law. ICWA clearly falls outside of the Mancari rule because it's not applicable based on political or social or cultural affiliation, and so forth. For example, there was a man named William Holland Thomas, who was a chief among the Cherokee in the 19th century. He was born a white man, spoke Cherokee, was adopted into the tribe, and rose to become a chief of, of the Cherokee. He would not qualify as an Indian child if he were alive today because he lacks the biological requirements for tribal membership.

[00:29:57] Tim Sandefur: Same thing with Sam Houston, who was adopted into the Cherokee tribe when he was a teenager and actually became the tribe's ambassador to the United States in the 19th century. He also would not qualify as an Indian child under ICWA because he lacks the correct DNA in his blood vessels. On the other hand, a child like Lexi, the six-year-old child in California, who in 2016 was deemed to be an Indian child, she was deemed Indian based entirely on the fact that she had a distant ancestor who was a full-blooded Choctaw.

[00:30:25] Tim Sandefur: So ICWA is very unique, and this is important because this shows why it is false to say that declaring ICWA unconstitutional would somehow threaten other federal Indian law. In fact, ICWA is the only federal Indian law that is triggered exclusively by biological ancestry. The other federal Indian laws are triggered by tribal membership or residency on tribal lands or, or factors of that sort, which do not raise these concerns about race-based legislation.

[00:30:52] Tim Sandefur: But as you said, none of these issues were resolved in the Brackeen case because the court said that none of the parties had standing to raise them. So that means that those questions will have to be resolved in future litigation.

[00:31:03] Jeffrey Rosen: Marcia, tell us why you disagree that ICWA uniquely among Indian law is a race-based classification. And if the court does resolve this in the future, how do you expect the court to resolve the issue?

[00:31:17] Marcia Zug: One of the problems with this idea that we should see who is connected to the tribe is that so many of these children are you know, they could be removed at birth. And then we say that, "Oh, well, you could have no connection to the tribe." There's a doctrine called the Existing Indian Family Doctrine, which has now been repudiated, but it was based exactly on that idea that, "Oh, ICWA shouldn't apply to children if the family that they were living with is not the Native family, right?" So a child has a Native parent and a non-Native parent. They were living with a non-Native family. They got removed. That kid doesn't know anything about their native heritage. It shouldn't apply.

[00:31:58] Marcia Zug: This was rejected because this isn't about that. And this is where a lot of people push back, it isn't just about the Indian child. It's about the history of this and what's happened to the tribes. There was a deliberate centuries-long policy of destroying tribes by removing their children by assimilating them.

[00:32:17] Marcia Zug: And the result is that you often have a situation where children may not have a connection to their tribal families and ancestors. But once we have this break in the family, 'cause that's what we're talking about under ICWA cases, right, where the child's either been removed or the child's being put up for adoption. So they're going to go to a new home. It's at that point the question is, "Where should they go?" And if these are children who are Native under the act, then the idea is that it is better for native children to have a connection with their culture, with their people. And there are lots of studies showing this.

[00:33:02] Marcia Zug: The studies on the ICWA show that it's been highly protective of children, that it's not this law that rips children away from loving homes and puts them in unsafe situations. It's typically keeping, I mean, historically, it's about keeping the state from imposing its idea of what's best for Indian families on them.

[00:33:29] Marcia Zug: I mean, there are still cases. There was a case out of South Dakota a few years ago brought by the ACLU because there was a judge there, 100% of the Indian child cases that came before him. He terminated the parental rights. None of these children were returned.

[00:33:44] Marcia Zug: As a family law matter, that doesn't make sense unless we're saying that all Native families are just so much worse than any other family that this type of ruling would be justified. So what ICWA does is it recognizes this long history of racism towards Indian families and different methods of trying to circumvent it and gives them a fighting chance, gives Native families a fighting chance to keep their children. If they're unsafe, the kids can be removed. Nothing in ICWA stops that from happening.

[00:34:22] Jeffrey Rosen: Tim, let's broaden back to Justice Gorsuch's approach to Indian law. At the same time that he voted with a majority in rejecting the constitutional challenges to the Indian Child Welfare Act, he was the lone dissenter in a case concerning the applicability of bankruptcy law to Indian tribes. And here, he said "Taking the long view, the

Constitution's text and two centuries of history and precedent establish that tribes enjoy a unique status in our law."

[00:34:52] Jeffrey Rosen: And, of course, this is just the latest in his series of opinions about Native American law, beginning with the McGirt case, where he established himself as the court's leading defender of Native American rights. What do these other cases say about his unique approach to Native American rights and to textualism and original understanding?

[00:35:14] Tim Sandefur: Well, I think the most interesting thing in a broad sense about cases like McGirt. For example, in McGirt, the question basically boils down to, the law says one thing, but everybody's been doing the opposite, right? The idea here is that historically speaking, there's a treaty that says that this land belongs to the tribe. But then over time, historically, for a century, people have been behaving as if that law wasn't in place.

[00:35:45] Tim Sandefur: And so now, the question comes up, "What should we do? Should we follow the rule that is written on the paper that people have been kind of disregarding, or should we follow the rule, even though that will disrupt a lot of what people have expected the situation to be?" And Gorsuch says, "We follow the rule. We follow what's written on, on the paper."

[00:36:07] Tim Sandefur: I have a lot of respect for that. I actually admire although I differ with him in this case in some respects. I admire Justice Gorsuch a great deal because he's a very logical thinker when it comes to the law. He's very into legal reasoning as opposed to some judges out there who tend to be more politically or socially oriented and, and their jurisprudence tends to be mushy and hard to follow and hard, hard to reason out.

[00:36:34] Tim Sandefur: And Justice Gorsuch likes clear rules. He likes philosophically logical arguments. And when it comes to a conflict between theory and practice, he tends to go with the theory, and he says, "No, this is the promise. Nobody has ever changed it. Even though people kind of thought that had been changed, it never actually was changed. And we're gonna stick with it, even though that may cause a lot of political discomfort and disruption. And if it causes enough political discomfort and disruption," he says, "Congress is there to resolve this problem. We can come up with a political solution if these problems are severe."

[00:37:08] Tim Sandefur: And whatever you think about that outcome, I think that you got to respect somebody who's willing to, to take such a really striking position, and to back it up with a lot of scholarly and intellectual rigor, which he really does quite effectively in McGirt and in other opinions.

[00:37:27] Jeffrey Rosen: McGirt, of course, was a statutory case. The majority argued that for the Major Crimes Act, the land reserved for Creek Nations remains Indian country. And it was based on a reading of the 1856 Treaty the dissents say that if the state wasn't allowed to punish serious crimes, decades of past convictions would be thrown out, and it would destabilize the governance in Eastern Oklahoma. Marcia, what does Justice Gorsuch's statutory reading, his textualist reading, in McGirt say about his broader approach? And why is it that in many of these cases, the liberal justices who are not generally textualists and originalists are willing to join him?

[00:38:06] Marcia Zug: Well, I agree with Mr. Sandefur that I have a lot of respect for Gorsuch in this opinion because it was hard. It was so big and so potentially disruptive and divisive that I was shocked that he was willing to do it. But, he is a textualist. He believes in these promises. I mean, he has the beautiful line at the beginning of the opinion, at the far side of the Trail of Tears was a promise, that we made a promise to these tribes that this would be their land. And, yes, we have diminished this land over and over again, and we can do that under US law. The only protection that tribes have against this is that Congress has to actually do it.

[00:38:54] Marcia Zug: It seems like nothing, but the history of Indian law. So there's a famous Indian law scholar, Felix Cohen. And part of his brilliance was recognizing basically the idea of what wasn't taken away remains, right? So there are two ways you could look at Indian law and Indian rights. And you can look at it as given by Congress so the rights the tribes have are given by the federal government or they are inherent, meaning they have all of the rights of sovereignty unless and until they've been taken away.

[00:39:29] Marcia Zug: And that's, that's the idea under the McGirt decision. Gorsuch believes that very strongly, that tribes are sovereign nations. They have all of the attributes of sovereignty. Some were taken away immediately basically under the doctrine of discovery at the time. But if they weren't taken away, they're still there. And that's what's happening in McGirt that you say it was taken away pointed out.

[00:39:54] Marcia Zug: And, the state points to this, and they point to that. And Gorsuch going, "Nope, that didn't do that. Nope. That also didn't do that." So it works very much with his originalist understandings, his textualist understandings why the liberal justices join him. I don't think it's particularly for those reasons except for the broader idea that they do believe in these promises that were made to Native nations. And they also agree that the fact that things have changed, that tribes are no longer, you know, a formidable enemy. And therefore, we had to make deals with them, right?

[00:40:35] Marcia Zug: We don't fear the military might have tribes anymore, but that's not a reason that we should abrogate our promises. And, in fact, with liberal conceptions that you don't take away the rights of people just because they're weaker. So in that way they're in line with each other.

[00:40:54] Jeffrey Rosen: Very interesting. Tim a central disagreement in McGirt was the role of precedent. The dissenters argued that the government of Oklahoma and the federal government have acted as though the land wasn't a reservation, and there were strong reliance interests in avoiding a radical reframing of the legal status of half of Oklahoma. In general, is Justice Gorsuch's reading of Native American laws willing to disrupt a great deal of precedent or not? And how does that fit into the broader dispute between him and the other conservatives?

[00:41:23] Tim Sandefur: It fits in perfectly well with what some of the conservative justices are willing to do in other areas of the law. I think we've seen in the past several terms, the court is willing to overturn precedents that people have thought for a long time were really written in stone. Roe v Wade is an obvious example. My own view is I think that the

law, it's more important to get the law right than to stick with what people thought the law was.

[00:41:51] Tim Sandefur: And so if it's a conflict between the existing precedent and getting the law right, my tendency if I were sitting on the court would be to go with getting the law right. But doing so can be so disruptive in some cases that it is worth it to stick with what you've got and perhaps let Congress to make those changes.

[00:42:13] Tim Sandefur: The, the dispute over altering existing precedent or, or the, the stare decisis principle often turns not so much on should we stick with the wrong decision, 'cause I think everybody kind of thinks that you ought to change wrong decisions. But should it be us who change this decision? Should it be, or should we say, "We're gonna stick with this. And if Congress wants to change it, they can," or something like that, right?

[00:42:40] Tim Sandefur: And so I think Justice Gorsuch tends usually to be willing to stick with what he thinks the correct interpretation of the existing law is even if previous courts got it wrong and even if that kind of overthrows people's expectations, whereas other judges, depending on the subject or the context, they tend to be more willing to say, "No, we're gonna stick with it. And if the lawmakers dislike it, then, they can come up with a different rule and that sort of thing."

[00:43:06] Tim Sandefur: I tend to be myself a little bit more legally what they call formalistic. I prefer the logic of the legal rules, and I think Justice Gorsuch is similar. Other justices, they tend to be more what they say, realistic or practical or pragmatic in their approach, and they tend to be more willing to stick with something just because it's always been that way because people expect that to be the rule, that sort of thing.

[00:43:33] Tim Sandefur: Again, this is a sort of about jurisprudential temperament, really, more than it's a specific issue to Indian law. You find justices, depending on the context, they might have a different approach depending on the circumstances.

[00:43:49] Jeffrey Rosen: Marcia, there have been a bunch of theories about the source of Justice Gorsuch's commitment to Native American law ranging from his childhood in the West his textualism his originalism, his experience dealing with tribal law cases while a judge on the 10th Circuit. How would you explain the source of his legacy in this matter? And what does it teach us about the broader debates about textualism and originalism on the court?

[00:44:18] Marcia Zug: Well, obviously, I don't have any personal insight to where this is really coming from, but it does strike me that the big difference is his experience, where he did grow up and having firsthand knowledge. I mean I live on the East Coast. One of the things that a lot of us on the East Coast lack is a living day-to-day experience with Native nations and Native people. Out west, it's very different.

[00:44:44] Marcia Zug: But I think for a lot of people on the East Coast and most of the justices, I think, are from the eastern half of the United States, it's not a living issue in the same way other things are. Native people are sort of this 19th century idea that stuff

happened in the past, and that was bad, but it's not continuing really today. It's not a pressing issue that matters.

[00:45:13] Marcia Zug: We certainly shouldn't cause lots of problems for ourselves to fix a problem that we created 100 or 200 years ago because that's often what's going on in these cases. When you look at some of the Indian land claims, they're dealing with violations of federal statutes from centuries ago. And the question is, "Should we upend, you know title to thousands, hundreds of thousands of people's, you know, homes because we violated the law a long time ago?"

[00:45:44] Marcia Zug: And the thing with Indian law is the reason a lot of these claims are so old and based on problems that happened so long ago is because there wasn't a court that was willing to, I don't know, be strong, be brave, make the hard decisions, do the right thing. So more and more time has passed, making it even harder now.

[00:46:06] Marcia Zug: And I think for Gorsuch, seeing how these problems still exist, that they're not going away unless the courts finally do the right things. I think that really does inform his decision-making in a way that it just can't for people who haven't had that firsthand experience.

[00:46:26] Jeffrey Rosen: Tim, how would you account for the sources of Justice Gorsuch's legacy on Native American law, ranging from his background and personal experience to his textualist and originalist philosophy?

[00:46:38] Tim Sandefur: Yeah, I totally agree with what Professor Zug said. It's very easy on the eastern half of the United States to sort of regard these issues as either obscure or maybe quaint, regarded as a historical curiosity or something. But, I live here in Arizona. The Navajo reservation is just right there. This is a piece of land that's the size of all of New England and has a population of 200,000.

[00:47:06] Tim Sandefur: It's a huge area. And then, that's just one of the reservations. About a quarter of all of Arizona is tribal land. And there's Tohono O'odham in the South, which is the second-largest reservation in the United States. So this is, and something that in the West, you are very familiar with. You see it these sorts of issues coming up every day, whereas it tends to be a rarity on the East Coast. So I think that's part of it.

[00:47:32] Tim Sandefur: As far as the originalism, textualism thing I do think that is important but not just for Gorsuch. I think it's also important for Thomas, who also is very much an originalist, probably the court's primary originalist. And I think it's because if you are an originalist, and you are really into the founding era and you study a lot about what James Madison and James Wilson and the rest of them were thinking in Philadelphia in the 1780s, the relations between the tribes and the American settlers and the American states, that was a very live issue at that time. I mean, that was a very important daily political issue. In fact, if you read the Federalist Papers, it's one of the leading reasons that they give for ratifying the Constitution.

[00:48:20] Tim Sandefur: They say, "Union between the states is crucial because states on, on their own, under the Articles of Confederation, states keep doing these things, these awful

things to the Indians," and then the Indians respond militarily, and maybe they attack the wrong people 'cause they don't know one person from another. And then, there's the states retaliate against them. They pick the wrong tribe, and it's gonna cause all these wars.

[00:48:45] Tim Sandefur: And so, it was a real problem corralling the American people into a single unit under the federal government in large part with respect to their relationships with Indian tribes. So if you are really into that history and the roots of the American constitution, American Indian issues really tend to take on a larger portion of your thinking than if your primary approach to the constitution is something like a political approach or one of the other jurisprudential approaches. And on the top of my head, but I think that may account largely for the focus on getting into the nitty-gritty, not just settling for the superficial single paragraph analysis that you find in American Indian law cases from a half century ago.

[00:49:35] Tim Sandefur: When you look at the cases, like I mentioned, the United States v Lara case or the Duro case, D-U-R-O, the Duro case from a few years ago, or this case, the Brackeen case, you see a lot more focus on getting into the specific details of particular history, which is just what Justice Thomas, at least, says, we must do if we're going to get these issues right.

[00:49:57] Jeffrey Rosen: Marcia, before we close, let's talk about the differing views of Justice Gorsuch and Justice Kavanaugh. At the end of June, there was another important Native American law case, Arizona against Navajo Nation, which involved the future divisions of the waters of the Colorado River, which is drying up.

[00:50:16] Jeffrey Rosen: And Justice Kavanaugh wrote the majority opinion joined by four other justices, which turned the Navajo away. Justice Gorsuch wrote a very vigorous dissent joined by the three liberal justices on behalf of the tribal rights. And there were similar clashes between Justice Kavanaugh in a five-to-four majority, and Justice Gorsuch in dissent in the 2022 Oklahoma and Castro-Huerta case where the court ruled that, for the first time in history, states have concurrent jurisdiction with the federal government to prosecute a lot of tribal crimes in Indian country. What is at the heart of the differing views of Justice Kavanaugh and Justice Gorsuch when it comes to Native American rights?

[00:50:56] Marcia Zug: I feel almost like he's like Thomas, but without the originalist bent. Like, he doesn't like rights for Native tribes. He doesn't think that they should exist, that they're problematic that they ask too much of the federal government, that they treat Native people differently in a problematic way. And there's no justification for them. But I don't think he goes into most cases. I disagree with the way Thomas defends his opinions. But at least he is trying to find original support for them.

[00:51:31] Marcia Zug: I think Kavanaugh is more fed up the way a lot of people are when it comes to Indian law issues, that why are we still dealing with these? Tribes are not the powerful nations that they used to be. Why should they have the water case, why should still a relatively small group potentially be able to take the best part of the water when there are millions and millions of people who need that water as well? Why should their rights trump?

[00:52:04] Marcia Zug: The fact that they were there first, well, that's not convincing for a lot of people. The fact that we made a promise, again, it was a long time ago. And I think

that's a lot of where he's coming from. And I think that's a lot of opposition to Indian law as well. We talked about how tribes are often not on people's radar, or they're considered sort of this quaint historical thing. And then once in a while, they pop up, and they have these rights that actually can be quite strong. And people seem surprised and upset.

[00:52:37] Marcia Zug: There's a long history of the federal government trying to end this relationship. I mean, there was a period called termination where we actually did with many, many tribes end the federal government to government relationship with Native nations based on the idea that we wanted to be done with it. That was a disaster. But that strand of thought and desire is longstanding. And I think Kavanaugh's opinions are a modern iteration of that.

[00:53:07] Jeffrey Rosen: And Tim, how would you describe the debate between Justice Kavanaugh as well as Chief Justice Roberts and Justice Barrett and Justice Gorsuch in these cases?

[00:53:19] Tim Sandefur: Well, I think I would just say I mentioned earlier that Justice Gorsuch tends to be more willing to follow sort of the written law and the theoretical implications from those written words beyond the level of what a lot of other judges think is pragmatic. And that has been the source of a lot of dispute when you find Justice Gorsuch on the other side from what we tend to call the conservative block, which is very interesting. I think I love it when Justice Gorsuch disagrees with, Justice Thomas or somebody because they're so bright, and their writing is so interesting that those debates are always fascinating.

[00:54:03] Tim Sandefur: The most obvious example is in Gorsuch's opinion in the Bostock case, where the Supreme Court held that the federal civil rights laws protect same sex couples. That is a deep, profound philosophical dispute. I think, Justice Kavanaugh, he tends to be more of your moderately conservative pragmatic kind of approach, whereas Gorsuch has a philosophical bent that makes him certainly one of the most interesting justices to read.

[00:54:38] Jeffrey Rosen: Thank you for describing that clash between the more philosophical and the more pragmatic justices. Well, it's time for closing thoughts in this really illuminating discussion. Thank you both for having taught us about the contours of the debate and, and interest in all of us in learning more about it. Marcia, what are the cutting edge issues in Native American law that the court will be deciding in the coming years and how is Justice Gorsuch likely to decide them?

[00:55:05] Marcia Zug: I think a lot of the cutting edge issues are still going to be the same issues. I mean one of the, the interesting and also frustrating things in Indian law is we've seen most of these cases before. So I think questions of tribal sovereignty, the contours of it, land claims obviously, gaming may be an issue as tribes try to expand gaming in ways that may or may not be permissible. There's also one of the things that I think is very interesting has to do with maybe tribal political representation. The Cherokee Nation, they've been promised a delegate in Congress for over a century, and they've never been seated, but they're really trying to have that happen now.

[00:55:48] Marcia Zug: Maybe, tribes are going to push to have a greater seat at the governmental table. And I think that would be really good for us as a nation to have their perspective on lots of the issues facing America.

[00:56:05] Jeffrey Rosen: Thank you for that. And Tim, last word in this great discussion to you what are the issues that you see involving Native American law on the horizon and, and how is Justice Gorsuch likely to decide them?

[00:56:16] Tim Sandefur: Well, of course, Brackeen did not resolve a lot of the really important issues raised by ICWA and the way that it deprives Indian children of legal protections that they need. I mean, Indian children are the most at-risk demographic in the United States. They're at risk of, of almost every social malady that you could care to name. And yet, ICWA makes it harder to protect these children from those harms, makes it virtually impossible to offer them safe, loving, permanent adoptive homes when needed based entirely on the blood in their veins. And that's really obscene, but it's the federal law. They're the only children against whom it is actually legal, indeed mandatory, to discriminate based on race. So that issue is not going to go away. It just got put off for a little while in the Brackeen case.

[00:57:03] Tim Sandefur: And we're going to see the litigation is gonna have to come through the state courts. You're not gonna see like in Brackeen, that case started in federal court, went up to the circuit, went up to the Supreme Court. Instead, what you're gonna have to see is these cases go through state courts in individual adoption or foster care cases. And in the Brackeen case, for example, that case is actually part of that case or half of that case is still going on in Texas State Court. So it could very well go right back to the Supreme Court one way or the other.

[00:57:31] Tim Sandefur: So I think that's what we're going to see. These issues are going to have to be resolved at some point, and something is going to have to be done to fix ICWA so that it doesn't do what it's doing now, making it, making it more difficult for Indian children to get the protections that they need.

[00:57:48] Jeffrey Rosen: Thank you so much, Marcia Zug and Tim Sandefur, for a wide-ranging, deep and really illuminating discussion about Justice Gorsuch and Native American law. Marcia, Tim, thank you so much for joining me.

[00:58:01] Tim Sandefur: Thanks.

[00:58:01] Marcia Zug: Thank you.

[00:58:06] Jeffrey Rosen: Today's episode was produced by Lana Ulrich, Bill Pollock, and Samson Mostashari. It was engineered by Bill Pollock. Research was provided by Yara Daraiseh, Lana Ulrich, Samson Mostashari, Tomas Vallejo, Connor Rust, and Rosemary Li. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional debate. Sign up for the newsletter at constitutioncenter.org/connect, and always remember whether you wake or whether you sleep that the National Constitution Center is a private nonprofit. We rely on the generosity, the passion, the engagement, the devotion to lifelong learning about the Constitution of people like you who are inspired by our nonpartisan mission. Support it by becoming a member at constitutioncenter.org/membership or give a donation of any amount, $5, $10, or more, to support our work, including the podcast at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.