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Indian Child Custody, Tribal Bankruptcy Coverage, and Criminal Case Venue Occupy Today's Docket – SCOTUS Today

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Indian tribal rights led the Supreme Court's docket today. In one case, the Court held that the federal Bankruptcy Code abrogated the sovereign immunity of tribal governments. And in another, this time upholding tribal rights, the Court held upheld the constitutionality of the Indian Child Welfare Act (ICWA), with its arguably discriminatory provision requiring the placement of foster or adoptive Indian children with Indian caretakers. Justice Gorsuch, perhaps the Court's most interested and knowledgeable member concerning tribal rights and interests, was the lone dissenter in the bankruptcy case and provided a unique historical perspective in a scholarly concurrence in the ICWA case. Finally, a unanimous Court held that the Constitution allows the retrial of a defendant who had been tried in an improper venue before jurors drawn from the wrong district. Three interesting and detailed opinions, none reflecting any major division in the Court, though perhaps Justices Thomas and Alito might seem to live on an island of their own.

Haaland v. Brackeen is the case that arose from several child custody proceedings governed by the ICWA, a statute that strongly "aims to keep Indian children connected to Indian families." In governing state court adoption and foster care proceedings in which an Indian child is involved, the law imposes a hierarchical preference that grants a preference to Indian families or institutions from *any* tribe, not just that with ties to the child, and the child's tribe may alter a prioritization order. In most cases (unless a court finds "good cause" otherwise), the preference of the Indian child or parent cannot trump the statute or tribal resolution. The instant case was initiated by a birth mother, foster parents, adoptive parents, and the State of Texas, all challenging the constitutionality of the ICWA as beyond congressional authority and claiming that several of its provisions violate the "anticommandeering principle" of the Tenth Amendment. Against arguments concerning, among other things, anti-delegation, separation of powers, and the rights of the States concerning family law. With only Justices Thomas and Alito dissenting, Justice Barrett wrote for the majority, rejecting the petitioner's Article I claim, rehearsing the long line of cases that have described Congress as having "plenary and exclusive" power to legislate with respect to Indian tribes, derived from the Constitution's Indian Commerce Clause that authorizes Congress "[t]o regulate Commerce . . . with the Indian Tribes," U. S. Const., Art. I, §8, cl. 3, as well as Article II's Treaty Clause and also historical precedent concerning Indian relations. The petitioners' anticommandeering challenges to the ICWA's preferential provisions concerning involuntary and placement proceedings were rejected largely on the grounds that they apply "evenhandedly" to both state and private actors. Finally, the

Court elected not to reach equal protection and nondelegation challenges to the ICWA, finding that no party had standing to raise them.

Brian Coughlin, who had borrowed money from a federally recognized Indian tribe before declaring bankruptcy, complained that he was subject to abusive practices when the tribe ignored the federal Bankruptcy Code's automatic stay provision. The tribe contested coverage by the Code. Writing for all but Justice Gorsuch, Justice Jackson's opinion in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin* holds that the Bankruptcy Code's express abrogation of the sovereign immunity of "governmental unit[s]" for specified purposes, 11 U. S. C. §106(a), extends to federally recognized Indian tribes. While Congress must make its intent to abrogate sovereign immunity "unmistakably clear," the abrogation provision of §106(a) of the Code and the definition of "governmental unit" in §101(27), taken together, unambiguously abrogate the sovereign immunity of federally recognized tribes. Since federally recognized tribes otherwise have the power to assert sovereign immunity, they clearly are subject to the Code's coverage.

Finally, in *Smith v. United States,* an opinion by Justice Alito, a unanimous Court resolved a split in the circuits, holding that the Constitution permits the retrial of a defendant who had been found guilty in a trial that had been held unconstitutionally in the wrong venue and conducted before a jury drawn from the wrong district. Except as prohibited by the Double Jeopardy Clause, which this case is not, it "has long been the rule that when a defendant obtains a reversal of a prior, unsatisfied conviction, he may be retried in the normal course of events." "In all circumstances outside of the Speedy Trial Clause, the strongest appropriate remedy for trial error is a new trial, not a judgment barring reprosecution." The case applies two constitutional clauses, the Venue Clause and the Vicinage Clause, which are well known to federal prosecutors but not to many others. The Court has concluded that neither of these clauses provides an exception to the rule allowing the retrial of a person whose conviction has been reversed under the circumstances presented here. The Venue Clause mandates that the "Trial of all Crimes . . . shall be held in the State where the . . . Crimes shall have been committed." U. S. Const., Art. III, §2, cl. 3. Nothing about this language suggests that a new trial in the proper venue is not an adequate remedy for its violation or that retrial somehow involves the imposition of an excessive burden or inconvenience upon the defendant. Indeed, although the most convenient place for a trial might be where a defendant lives, the Venue Clause is tied to the location of the crime. So, convenience is a non-issue. The Vicinage Clause of the Sixth Amendment guarantees "the right to . . . an impartial jury of the State and district wherein the crime shall have been committed." Again, nothing in that clause suggests that retrial is not sufficient if its terms have not been satisfied. The Court finds a useful analogy in cases where a defendant is convicted by a jury that does not reflect a fair cross-section of the community. Looking to historical background, as many members of the Court are inclined to do, suggests no departure at common law from the sufficiency of the retrial remedy.

In so holding, the Court reiterates that the application of the Double Jeopardy Clause results from the fact that it is impossible for courts to be certain about the ground for the verdict without improperly delving into jury deliberations. Hence, the basis for the jury's verdict cannot be a ground for setting aside an acquittal. It is the general rule that "[c]ulpability . . . is the touchstone" for determining whether retrial is permitted under the Double Jeopardy Clause." Thus, when a trial concludes with a verdict that the defendant's "criminal culpability had not been established," retrial is prohibited. On the other hand, retrial is permissible when a trial terminates "on a basis unrelated to factual guilt or innocence of the offence of which [the defendant] is accused," for example, in a case of jury deadlock (and here as well).

I'm still bombarded with questions concerning when and how the Court will resolve the issue of

affirmative action in the Harvard and UNC cases. The answers remain TBD while less contentious cases continue to be decided.

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