AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Federalism/Sovereign Immunity

**United Skagit Indian Tribe v. Lundgren, \_\_\_ U.S. \_\_\_** (2018)

*The United Skagit Indian Tribe had a property dispute over a barbed wire fence with Sharline and Ray Lundgren. The Tribe claimed the fence was on land the Tribe recently purchased. The Lundgrens claimed that they had acquired title to the property by adverse possession and mutual acquiescence over more than seventy years. When the Lundgrens filed a lawsuit to establish their title, the Tribe claimed sovereign immunity. The trial court rejected this defense as did the Supreme Court of Washington. The Tribe appealed to the Supreme Court of the United States.*

*The Supreme Court by a 7-2 vote remanded the case to the Supreme Court of Washington. Justice Neil Gorsuch’s majority opinion held that the state judges were mistaken in thinking that past precedent clearly rejected the sovereign immunity defense (the portion of the opinion is omitted). The Supreme Court of Washington, the majority declared, should decide whether the immovable property exception to sovereign immunity applies to Native American tribes. All the justices appear to agree that a government may not normally assert sovereign immunity during a lawsuit over land in a foreign country. What is the foundation of that rule and is that rule sound? Why does the majority think that an exception might be made for Native American tribes? Why does Justice Thomas think this case is a matter of “hornbook law?” Who has the better of that argument? Should tribes enjoy more or less sovereign immunity than other entitles.*

JUSTICE GORSUCH delivered the opinion of the Court.

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. . . . At common law, [the Lundgrens] say, sovereigns enjoyed no immunity from actions involving immovable property located in the territory of another sovereign. As our cases have put it, “[a] prince, by acquiring private property in a foreign country, . . . may be considered as so far laying down the prince, and assuming the character of a private individual.”  Relying on this line of reasoning, the Lundgrens argue, the Tribe cannot assert sovereign immunity because this suit relates to immovable property located in the State of Washington that the Tribe purchased in the “the character of a private individual.”

The Tribe and the federal government disagree. They note that immunity doctrines lifted from other contexts do not always neatly apply to Indian tribes. And since the founding, they say, the political branches rather than judges have held primary responsibility for determining when foreign sovereigns may be sued for their activities in this country.

We leave it to the Washington Supreme Court to address these arguments in the first instance. Although we have discretion to affirm on any ground supported by the law and the record that will not expand the relief granted below, in this case we think restraint is the best use of discretion. Determining the limits on the sovereign immunity held by Indian tribes is a grave question; the answer will affect all tribes, not just the one before us; and the alternative argument for affirmance did not emerge until late in this case. . . .

The dissent is displeased with our decision on this score, but a contradiction lies at the heart of its critique. First, the dissent assures us that the immovable property exception applies with irresistible force—nothing more than a matter of “hornbook law.”  But then, the dissent claims that allowing the Washington Supreme Court to address that exception is a “grave” decision that “casts uncertainty” over the law and leaves lower courts with insufficient “guidance.”  Both cannot be true. If the immovable property exception presents such an easy question, then it's hard to see what terrible things could happen if we allow the Washington Supreme Court to answer it. Surely our state court colleagues are no less versed than we in “hornbook law,” and we are confident they can and will faithfully apply it. And what if, instead, the question turns out to be more complicated than the dissent promises? In that case the virtues of inviting full adversarial testing will have proved themselves once again. Either way, we remain sanguine about the consequences.

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CHIEF JUSTICE ROBERTS, with whom JUSTICE KENNEDY joins, concurring.

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. . . . What precisely is someone in the Lundgrens' position supposed to do? There should be a means of resolving a mundane dispute over property ownership, even when one of the parties to the dispute—involving non-trust, non-reservation land—is an Indian tribe. The correct answer cannot be that the tribe always wins no matter what; otherwise a tribe could wield sovereign immunity as a sword and seize property with impunity, even without a colorable claim of right.

The Tribe suggests that the proper mode of redress is for the Lundgrens—who purchased their property long before the Tribe came into the picture—to negotiate with the Tribe. . . . That, in my mind at least, is not a meaningful remedy.

. . . . Taking up this Court's passing comment that a disappointed litigant may continue to assert his title, the Solicitor General more pointedly suggests that the Lundgrens should steer into the conflict: Go onto the disputed property and chop down some trees, build a shed, or otherwise attempt to “induce [the Tribe] to file a quiet-title action.” Such brazen tactics may well have the desired effect of causing the Tribe to waive its sovereign immunity. But I am skeptical that the law requires private individuals—who, again, had no prior dealings with the Tribe—to pick a fight in order to vindicate their interests.

The consequences of the Court's decision today thus seem intolerable, unless there is another means of resolving property disputes of this sort. Such a possibility was discussed in the Solicitor General's brief, the Lundgrens' brief, and the Tribe's reply brief, and extensively explored at oral argument—the exception to sovereign immunity for actions to determine rights in immovable property. . . . Since the 18th century, it has been a settled principle of international law that a foreign state holding real property outside its territory is treated just like a private individual. . . . The only question . . . is whether different principles afford Indian tribes a broader immunity from actions involving off-reservation land.

I do not object to the Court's determination to forgo consideration of the immovable-property rule at this time. But if it turns out that the rule does not extend to tribal assertions of rights in non-trust, non-reservation property, the applicability of sovereign immunity in such circumstances would, in my view, need to be addressed in a future case. At the very least, I hope the Lundgrens would carefully examine the full range of legal options for resolving this title dispute with their neighbors, before crossing onto the disputed land and firing up their chainsaws.

JUSTICE THOMAS, with whom JUSTICE ALITO joins, dissenting.

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. . . . The Court's only proffered reason [for remanding the case] is that the applicability of the immovable-property exception is a “grave question” that “will affect all tribes, not just the one before us.”  The exception's applicability might be “grave,” but it is also clear. And most questions decided by this Court will affect more than the parties “before us”; that is one of the primary reasons why we grant certiorari. . . . Moreover, the Court's decision to forgo answering the question presented is no less “grave.” It forces the Lundgrens to squander additional years and resources litigating their right to litigate. And it casts uncertainty over the sovereign rights of States to maintain jurisdiction over their respective territories.

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The immovable-property exception has been hornbook law almost as long as there have been hornbooks. For centuries, there has been “uniform authority in support of the view that there is no immunity from jurisdiction with respect to actions relating to immovable property.” This immovable-property exception predates both the founding and the Tribe's treaty with the United States. . . . Emer de Vattel explained that, when “sovereigns have fiefs and other possessions in the territory of another prince; in such cases they hold them after the manner of private individuals.”

The immovable-property exception is a corollary of the ancient principle of *lex rei sitae*. Sometimes called *lex situs*or *lex loci rei sitae,* the principle provides that “land is governed by the law of the place where it is situated*.*” It reflects the fact that a sovereign “cannot suffer its own laws ... to be changed” by another sovereign. As then-Judge Scalia explained, it is “self-evident” that “[a] territorial sovereign has a primeval interest in resolving all disputes over use or right to use of real property within its own domain.”  And because “land is so indissolubly connected with the territory of a State,” a State “cannot permit” a foreign sovereign to displace its jurisdiction by purchasing land and then claiming “immunity.” . . .

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The acceptance of the immovable-property exception has not wavered over time. In the 20th century, as nations increasingly owned foreign property, it remained “well settled in International law that foreign state immunity need not be extended in cases dealing with rights to interests in real property.” Countries around the world continued to recognize the exception in their statutory and decisional law. “All modern authors are, in fact, agreed that in all disputes *in rem* regarding immovable property, the judicial authorities of the State possess as full a jurisdiction over foreign States as they do over foreign individuals.”

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Given the centuries of uniform agreement on the immovable-property exception, it is no surprise that all three branches of the United States Government have recognized it. Writing for a unanimous Court . . ., Chief Justice Marshall noted that “the property of a foreign sovereign is not distinguishable by any legal exemption from the property of an ordinary individual.”  Thus, “[a] prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction ... and assuming the character of a private individual.”  The Court echoed this reasoning over a century later, holding that state sovereign immunity does not extend to “[l]and acquired by one State in another State.”  In 1952, the State Department acknowledged that “[t]here is agreement[,] supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property.” Two decades later, Congress endorsed the immovable-property exception by including it in the Foreign Sovereign Immunities Act of 1976. . . .

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Because the immovable-property exception clearly applies to both state and foreign sovereign immunity, the only question is whether it also applies to tribal immunity. It does.

Just last Term, this Court refused to “exten[d]” tribal immunity “beyond what common-law sovereign immunity principles would recognize.”  Tribes are “domestic dependent nations,” that “no longer posses[s] the full attributes of sovereignty,”  Given the “limited character” of their sovereignty,  Indian tribes possess only “the common-law immunity from suit traditionally enjoyed by sovereign powers,”  That is why this Court recently declined an invitation to make tribal immunity “broader than the protection offered by state or federal sovereign immunity.”  Accordingly, because States and foreign countries are subject to the immovable-property exception, Indian tribes are too. . . .

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. . . [T]he Court notes that “immunity doctrines lifted from other contexts do not always neatly apply to Indian tribes.”  But the Court's authority for that proposition merely states that tribal immunity “is not coextensive with that of *the States*.”  Even assuming that is so, it does not mean that the Tribe's immunity can be more expansive than any recognized form of sovereign immunity, including the immunity of the United States and foreign countries. . . .

. . . . [T]he Court cites two decisions for the proposition that “since the founding ... the political branches rather than judges have held primary responsibility for determining when foreign sovereigns may be sued for their activities in this country.”  . . . These cases encourage deference to the political branches on sensitive questions of foreign affairs. But they do not suggest that courts can ignore longstanding limits on sovereign immunity, such as the immovable-property exception. And they do not suggest that courts can abdicate their judicial duty to decide the scope of tribal immunity—a duty this Court exercised just last Term.

In fact, those present at “the founding,” would be shocked to learn that an Indian tribe could acquire property in a State and then claim immunity from that State's jurisdiction. Tribal immunity is “a judicial doctrine” that is not mandated by the Constitution.  It “developed almost by accident,” was reiterated “with little analysis,” and does not reflect the realities of modern-day Indian tribes. . . . Extending it even further here would contradict the bedrock principle that each State is “entitled to the sovereignty and jurisdiction over all the territory within her limits.” . . . Allowing the judge-made doctrine of tribal immunity to intrude on such a fundamental aspect of state sovereignty contradicts the Constitution's design, which “‘leaves to the several States a residuary and inviolable sovereignty.’”