AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Powers of the National Government/Power to Regulate Commerce

**Upstate Citizens for Equality, Inc. v. United States, \_\_\_ U.S. \_\_\_** (2017)

*Dirk Kempthorne, the Secretary of the Interior in the Bush II Administration, in 2008 took 13,000 acres located in upstate New York into trust for the Oneida Nation. Doing so exempted the land from most aspects of state sovereignty, including taxation, civil jurisdiction and criminal jurisdiction. Kemphorne claimed he was authorized to take the land by the Indian Reorganization Act (IRA). Local government authorities and a citizens group, Upstate Citizens for Equality, insisted that Congress did not have power to take strip states of sovereignty over state land. A lower federal court rejected their lawsuit and that rejection was affirmed by the Court of Appeals for the Second Circuit. Upstate Citizens for Equality appealed to the Supreme Court of the United States.*

 *The Supreme Court denied certiorari. Justice Clarence Thomas’s dissent insisted that the justices should have taken certiorari to reconsider the scope of the Indian Commerce Clause. He claimed that the Indian Commerce Clause could not have been intended to permit the federal government to take land into trust for Native Americans, otherwise the federal government could swallow up entire states. To what extent is Thomas’s objection to the Indian Commerce Clause rooted in his narrow interpretation of federal commerce power? To what extend is this a different kind of objection to federal power? Are his objections sound?*

JUSTICE THOMAS, dissenting from the denials of certiorari.

. . . .

. . . . I would grant the petitions for writs of certiorari to reconsider our Indian Commerce Clause precedents.

Those precedents have acquiesced in Congress' assertion of a ‘plenary power to legislate in the field of Indian affairs.‘ But ‘neither the text nor the original understanding of the [Indian Commerce] Clause supports Congress' claim to such 'plenary’ power.‘  Instead, . . . the Clause extends only to ‘regulat[ing] trade with Indian tribes--that is, Indians who had not been incorporated into the body-politic of any State.‘

Understood this way, the Indian Commerce Clause does not appear to give Congress the power to authorize the taking of land into trust under the IRA. Even assuming that land transactions are ‘Commerce‘ within the scope of the Clause, many applications of the IRA do not involve trade of any kind. The IRA permits the Secretary to take into trust land that an Indian tribe *already owns*. And in cases like these, where the tribe already owns the land, neither money nor property changes hands. Instead, title is slightly modified by adding ‘the United States in trust for‘ in front of the name of ‘the Indian tribe or individual Indian‘ who owns the land. This arrangement does not affect the Indian tribe's beneficial ownership of the property, and it does not afford the United States any meaningful property rights. In short, because no exchange takes place, these trust arrangements do not resemble ‘'trade with Indians.’‘

Applying our precedents, the Second Circuit concluded that the Indian Commerce Clause empowered the Federal Government to take into trust the land at issue here. In so doing, it showed how far our precedents interpreting the Indian Commerce Clause have strayed from the original understanding, and how much Congress' power has grown as a result. Asserting plenary power, Congress authorized the Secretary to take 13,000 acres of New York and to declare it sovereign Oneida territory. It did so even though the land had been under New York's sovereign control for more than two centuries.  And it did so even though restoring tribal sovereignty over the land would ‘'seriously burde[n] the administration of state and local governments' and would adversely affect landowners neighboring the tribal patches.‘

Under our precedents, Congress has thus obtained the power to take any state land and strip the State of almost all sovereign power over it ‘for the purpose of providing land for Indians.‘  This means Congress could reduce a State to near nonexistence by taking all land within its borders and declaring it sovereign Indian territory. It is highly implausible that the Founders understood the Indian Commerce Clause, which was virtually unopposed at the founding, as giving Congress the power to destroy the States' territorial integrity. Indeed, they would have been shocked to find such a power lurking in a Clause they understood to give Congress the limited authority ‘to regulate trade with Indian tribes living beyond state borders.‘

When our precedents permit such an absurd result, something has gone seriously awry. It is time to fix our error. We should have granted certiorari to reexamine our Indian Commerce Clause precedents, instead of standing idly by as Congress, the Executive, and the lower courts stray further and further from the Constitution. I respectfully dissent from the denials of certiorari.