

Turtle Talk

Indigenous Law and Policy Center Blog
Michigan State University College of
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Greg Ablavsky Guest Post: What Justice Thomas Gets Wrong About Constitutional History: Part I—the Indian Commerce Clause

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SCOTUS denied cert in two cases challenging the constitutionality of Section 5 of the Indian Reorganization Act, the statute that authorizes the Secretary of the Interior to take land into trust for Indian tribes. The petitions are [here](#) and [here](#).

Justice Thomas [dissented](#) from the denial of certiorari [begins on page 13 of the link]. We asked Greg Ablavsky to comment on that dissent [Part II will be later today]:

What Justice Thomas Gets Wrong About Constitutional History: Part I—the Indian Commerce Clause

Just in time for the end of Native American Heritage Month, Justice Thomas has written a [dissent](#) from the Court's denial of certiorari in *Upstate Citizens for Equality v. United States*, which challenged Congress's constitutional power to take land into trust under the Indian Reorganization Act. The dissent picks up a familiar refrain in Thomas's Indian law jurisprudence, running from *Lara* through *Adoptive Couple* through *Bryant*: the argument that the original understanding of the Constitution does not support Congress's plenary power over Indian affairs, including, in this instance, the authority to enact the IRA.

I find Justice Thomas's arguments on this theme as unpersuasive now as I did two years ago, when I published a law review article, [Beyond the Indian Commerce Clause](#), that evaluated the Justice's historical claims and found them lacking. If you want all the details and evidence, you should see the full article, but, in this two-part post, I'll try to do two things. First, I want to briefly assess Thomas's arguments about the text of the Indian Commerce Clause. Then, in the second post, I'll take up the question of ratification debates, and also a new twist that Thomas added in this dissent that warrants its own investigation.

OK, onto Justice Thomas's take on the Indian Commerce Clause:

1. "[T]he Clause extends only to 'regulat[ing] trade with Indian tribes.'" There is little evidence to support this rewriting of the Indian Commerce Clause. Though the literal phrase "commerce with the Indian tribes" was comparatively rare in eighteenth-century texts, among its handful of appearances were several times when it meant something other than trade as Thomas narrowly construes it. But there was a term that showed up far more often to describe U.S. relations with Native nations—the capacious term "intercourse," defined as a meaning of commerce in no less than Samuel Johnson's Dictionary quoted by Justice Thomas's in his *Adoptive Couple* concurrence. I offer a more formal tally in my article, but my highly unscientific count within the database of Founding-era Indian affairs documents I've compiled identified 142 such uses of the term "intercourse" between 1783 and 1800. ("Commerce," by contrast, only gets 51 mentions—many of these referring to the Clause itself).
2. "[A]ssuming that land transactions are 'Commerce' within the scope of the Clause." This doesn't require much of an assumption, since [Attorney General Edmund Randolph](#) specifically said they were in 1791: he described such

dealing in Indian lands as “this commerce” in the context of the Clause. Clearly, the First Congress also thought it had the constitutional power to regulate Indian lands when, soon into its first sitting, it enacted the [Trade and Intercourse Act](#), which specifically barred the sale of lands by Indians “to any person or persons, or to any state.”

3. “[B]ecause no exchange takes place, these trust arrangements do not resemble ‘trade with Indians.’” This proposes an odd interpretation in which the explicit transfer of formal title from one sovereign owner to another is a transaction in which “neither money nor property changes hands,” a view that would not fare well on my property exam. But you don’t have to take my word for it: we know, again through the repeated [revisions](#) of the Trade and Intercourse Act over the course of the 1790s, that Congress thought it had power to regulate any “purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation or tribe of Indians, within the bounds of the United States”—language that clearly and unambiguously encompasses land-to-trust transfers under the IRA.

4. “[U]nder the Indian Commerce Clause.” Even if one accepts Thomas’s questionable Commerce Clause interpretations, there is still the possibility that Congress has the authority under other constitutional provisions to enact the IRA. For instance, even Thomas’s favorite citation, Robert Natelson’s [article](#) on the Indian Commerce Clause (about which more in the next post) concedes that Congress had the authority to enact Trade and Intercourse Act under the Treaty Power to enforce its treaties. If that’s true, then the federal government’s treaties with the Haudenosaunee, including the Oneidas, that acknowledged and protected their lands would seem an additional constitutional hook.

I could continue, but you may not share my passion for eighteenth-century arcana; if you do, there’s plenty more in the full article. But the brief upshot is that there’s little new, other than Thomas’s odd interpretation of land transactions, in this dissent. Rather, Thomas continues to retread the same arguments, ones that rely less on actual historical evidence than Thomas’s repeated and firm convictions about what the Founders must have thought.

In the succeeding post, I’ll take up a bit of what is new and distinctive in Thomas’s dissent.



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