FROM: PRAWFSBLAWG

CONSTITUTIONAL AVOIDANCE IN BABY GIRL

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After listening to the oral arguments in Adoptive Couple v. Baby Girl,[1] I expected the final opinion or some separate writings to have a lot of discussion of constitutional law (perhaps through the lens of constitutional avoidance). But I expected it to be about equal protection – I expected hints that members of the Supreme Court thought that modern Indian law was highly troubling as a matter of disparate racial treatment, perhaps with further hints that some members of the Court would reconsider (or at least radically narrow) Morton v. Mancari.[2]

So in fact I was surprised to see absolutely none. Justice Alito says of the dissent, in one sentence, "Such an interpretation would raise equal protection concerns, but the plain text of §§ 1912(f) and (d) makes clear that neither provision applies in the present context." Justice Thomas's opinion (more on which in a second) contains only a footnote saying he won't reach the issues. ("I need not address this argument because I am satisfied that Congress lacks authority to regulate the child custody proceedings in this case.") Based on where things seemed headed at argument, supporters of modern Indian law ought to regard this case as dodging a bullet.

(For that reason I wholly disagree with Eric Posner's assessment[3]

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[1] www.scotusblog.com/case-files/cases/adoptive-couple-v-baby-girl/.

[2] supreme.justia.com/cases/federal/us/417/535/case.html.

[3] www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme

that "the majority has laid the groundwork for a future equal protection challenge to Indian classifications and fortified its position that the equal protection clause bans racial preferences like affirmative action." Maybe they will do so in a future case, but they haven't done so here, and if they do it, it will be in an opinion joined by Justice Scalia and not one joined by Justice Breyer. Given Breyer's concurrence, why would he join an opinion that lays the "groundwork" that Posner suggests?)

That said, Justice Thomas's concurring opinion is astounding. It's a surprising, radical rethinking of federal enumerated power over Indians, making the (expected) point that Thomas's narrow view of the interstate commerce clause implies a narrow view of the Indian commerce clause. Basically, it's an inversion of the argument that Akhil Amar has made that early perspectives on the Indian commerce clause should demonstrate a broad view of the interstate clause. But more than that, it also has an interesting and narrow reading of "Indian tribes," ultimately concluding that "the ratifiers almost certainly understood the Clause to confer a relatively modest power on Congress – namely, the power to regulate trade with Indian tribes living beyond state borders."

For all of these conclusions, Thomas relies extremely heavily on Robert Natelson's Original Understanding of the Indian Commerce Clause,[4] (and a little on Sai Prakash) although I can't tell for sure if Thomas's conclusions perfectly match theirs. But Jacob Levy argues[5] that Thomas has the original intent entirely backwards:

> Thomas is right that the Indian Commerce Clause should not be read in the Lone Wolf/ Kagama way to grant plenary power over all Indian affairs. But he's so utterly wrong about the jurisdiction to which the clause applies that the conclusion ends up backward: he would grant plenary power *to the states*, and declare the clause a dead letter now that there is no part of Indian Country that lies outside state boundaries. There is

_court_2013/baby_veronica_indian_adoption_and_the_supreme_court_justice_alito_s_ruling.html?utm_source=tw&utm_medium=sm&utm_campaign=button_toolbar.

[4] papers.ssrn.com/sol3/papers.cfm?abstract_id=1092628.

[5] jacobtlevy.blogspot.com/2013/06/quick-reaction-adoptive-couple-vs-baby.html.

> simply no evidence that the Founders envisioned the extinction of Indian Commerce Clause jurisdiction and a complete transfer of power to the states.

I am not sure where I stand on all of this. Levy's paper on Madison's drafting[6] of the Indian Commerce Clause (and the material it contains) is enough to convince me that Thomas is going a little too fast here, and that the extreme version of the argument he seems to be sketching may be wrong as an originalist matter. But I'm not yet sure exactly *where* Thomas or Natelson go wrong, if they do. Thomas is plainly right to reject federal "plenary power" over Indians. But are things like the end of the treaty era,[7] or the Indian Citizenship Act[8] relevant to federal power? There I am less sure.

Maybe it is time to rethink the federal Indian power. Or at least to figure out where it comes from and what it is. //

[6] www.academia.edu/422868/Indians_in_Madisons_Constitutional_Order.
[7] en.wikipedia.org/wiki/Indian_Appropriations_Act#1871_Act.
[8] en.wikipedia.org/wiki/Indian_Citizenship_Act_of_1924.