FILED
02-02-2022
CLERK OF WISCONSIN
COURT OF APPEALS

The Wisconsin Court of Appeals
District III

21-AP-1378

State of Wisconsin,
Plaintiff-Respondent

v.

Douglas L. House
Defendant-Appellant

Appeal from The Circuit Court of Brown County
The Honorable Thomas J. Walsh, presiding

Reply Brief of Appellant Douglas L. House

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Argument

The State presents a thoughtful, well reasoned, brief. The State argues Public Law 280 is within Congress's inherent, plenary power. The State provides this Court with a number of opinions which generally support its position. In the course of outlining its position, the State concedes the Supreme Court of the United States has never "squarely addressed whether Public Law 280 is constitutional" and the precise source of Congress's purported plenary authority is "a matter of some historical debate". (States Br. 14, 12).

If *stare decisis* and appellate precedent were the supreme law of the land, the State's position would be much stronger. But *stare decisis* and appellate decisions are not the supreme law of the land; the United States' Constitution is.[1] Our federal government is one of *defined* and *limited* powers.[2] When an act of Congress exceeds these boundaries, it is "repugnant to the constitution" and void.[3]

I. The State's argument Congress has the authority to manage Indian affairs via the Treaty Clause and the Commerce Clause is inapplicable

The powers of Congress are defined and limited. The Constitution was written so these limits may not be mistaken or forgotten.[4] The United States's Constitution does grant Congress some power to regulate affairs with the Native Nations. These grants are vested in the Commerce Clause and the Treaty

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[1] *Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60 (1803).

[2] *Marbury* at 176

[3] *Marbury*, at 180(Emphasis added).

[4] *Marbury* at 176

Clause.[5] Neither of these grants of power are applicable to Mr. House– a member of the Oneida Nation.

A. The Commerce Clause does not give broad plenary power to Congress.

Congress shall have power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.[6] In *Lara*, the Supreme Court stated the "The central function fo the Indian Commerce Clause we have said is to provide Congress with plenary power to legislate in the field of Indian affairs."[7] At the same time, the Court has stated the Commerce Clause does not grant Congress with authority to regulate noneconomic, violent conduct based on the aggregate effects on interstate commerce.[8]

As a general principle of legal interpretation, statutes *in pari material* are to be interpreted together, as though they were one law.[9] Here, one grant of power has been interpreted in two manners. It is truly incongruent to interpret the exact same grant of power in such a divergent manner, yet the Supreme Court's prior inadequate constitutional analyses have led to this exact result. This divergent interpretation can only be solved through reasoned constitutional analysis–the job specifically entrusted to the judicial branch.[10]

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[5] *United States v. Lara,* 541 U.S. 193, 200, 124 S.Ct. 1628 (2004)

[6] U.S. Const., Art. I, §8, cl. 3.

[7] *Lara* at 200

[8] *United States v. Morrison*, 529 U.S. 598, 619 (2000)

[9] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation fo Legal Texts* 252, (2012)

[10] *Marbury*, at 179.

The Commerce Clause is a substantial grant of legislative authority. It clearly gives Congress *some* authority to legislate in the Native Nations, just as it does amongst the States. When the Court interpreted the entirety of the Commerce Clause in *United States v. Morrison*, the Court noted Congress may: regulate the use of the channels of interstate commerce; regulate and protect the instrumentalities of interstate commerce; and regulate those activities which have a substantial relation to interstate commerce.[11] The Court specifically rejected a "but-for causal chain" proposed by the petitioner to justify Congress's power to regulate a noneconomic violent crime. This proposal would have completely obliterated the distinction between national and local authority.[12]

Like the defendant in *Morrison*, the crime Mr. House has been convicted of is simply a noneconomic, violent crime.[13] The only difference is the fiction that Congress possess plenary power over the Native American Nations.[14]

B. The Treaty Clause does not grant Congress power to regulate the Oneida

Treaties made pursuant to the powers of the treaty clause may authorize Congress to deal with matters which otherwise Congress would not have authority.[15] The State makes the

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[11] *United States v. Morrison*, 529 U.S. 598, 608-09, 120 S. Ct. 1740 (2000).

[12] *Id*. at 615.

[13] In its brief, the State mentions Mr. House does not dispute he committed the crime. Mr. House has, and continues to maintain his innocence. Given the applicable legal standards and evidence in this case, Mr. House is not raising a sufficiency of the evidence challenge. While Mr. House strongly disagrees with the jury's verdict, he ultimately respects this verdict.

[14] *United States v. Bryant*, 136 S. Ct. 1954, 1968-69, 195 L. Ed. 2d 317 (Thomas, J., concurring).

[15] *Lara*, at 201.

argument "tribes at onetime may have had the status of independent nations, but they lost their full independence–a loss that was later ratified by treaties."[16] It may be some of the Native American Nations suffered this fate. The Oneida have not. (Br. 15-17, 20, 22).

The State's argument rests on the notion all Native American Nations are fungible. They are not. They have varied origins, discrete treaties with the United States, and different patterns of assimilation and conquest.[17] The Oneida Nation, to which Mr. House is a member, has never undergone assimilation and conquest. They maintain their sovereign status, and there is no treaty which would give Congress plenary power over the nation, or delegate the sovereign prerogative of prosecuting its own members.[18]

II. The Supreme Court's decisions claiming Congress has plenary power over the Native Nations have always been wrong. It is time for courts to serious question these repugnant precedents.

In his concurrence in *Lara*, Justice Thomas urged the Court and litigants to begin reconsidering the precedents regarding "Indian law".[19] He noted the amorphous and ahistorical assumptions as well as the problematic "paternalistic theory that Congress must assume all-encompassing control over

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[16] States Br. 17 (Internal quotations omitted)

[17] *Bryant*, at 1968 (Thomas, J., concurring)

[18] The 1789 Treaty of Fort Harmar grants limited criminal jurisdiction over members of the Oneida. If a member of the Oneida were to rob, murder, or steal the horses of an American citizen, the United States would be authorized to have that individual prosecuted by the state government. Mr. House is not accused of robbery, murder, or horse theft. This grant of criminal jurisdiction does not apply to him.

[19] *Id*.

the 'remnants of a race' for its own good" as reasons for reconsidering these precedents. The Court has begun to answer Justice Thomas's call. In 2020, the Court ruled much of Northeastern Oklahoma was still "Indian land".[20] While this case did not question or overturn these precedents, it did signal the Court's willingness to vindicate the rights of the Native American Nations.

In 2021, Justice Hagedorn issued his own request to litigants: when raising claims of a novel character, recourse to first principles is most appropriate…bring us a textual analysis rooted in the original public meaning of the words.[21]

Mr. House is answering this call.

As the State concedes, the United States Supreme Court has never dealt with the constitutionality of Public Law 280, much less whether it can be constitutional as applied to a member of the Oneida Nation. A discussion of first principles and the original meaning of the applicable texts is the most appropriate manner to engage in this substantial question.

These principles make it clear clear Congress lacks plenary power over the Oneida Nation. James Madison proposed granting Congress this power, and his proposal was rejected.[22] After the ratification of the Constitution, the United States

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[20] *McGirt v. Oklahoma*, 140 S.Ct. 2452, 207 L.Ed. 2d 985 (2020)

[21] *James v. Heinrich*, 2021 WI 58, ¶62, 397 Wis. 2d 516, 960 N.W.2d 350 (Hagedorn, J., concurring)

[22] Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 AM. INDIAN L. REV. 57, 73 (1991)(Internal citations omitted).

continued to engage in treaty making with the Oneida.[23] Chief Justice John Marshall confirmed this interpretation.[24]

Kagama and its progeny have eaten away at the limitations the Constitution placed on Congress's ability to regulate the affairs of the Native American Nations. *Kagama* created Congress's plenary power out of thin air. This does not comport with our understanding ours is a government of limited and defined powers. Rather than admitting *Kagama* was wrong, the Court has doubled down, finding this purported power stems from the Commerce Clause. This theory was correctly rejected in *Kagam* and had been rejected when applied to the States. Congress's plenary power over the Native American Nations, particularly the Oneida, is nothing short of a convenient myth.

Rather than engage in a principled argument based on a the text, history, and tradition of the Constitution, the State resorts to an out-of-state decision from an intermediate appellate court.[25] This decision is easily distinguished. The defendant was found guilty of driving a motor vehicle while under the influence of alcohol.[26] The Commerce Clause gives Congress the authority to regulate the use of channels of interstate commerce.[27] There is an express grant of congressional power which underpins this

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[23] (Treaty of Fort Hamar, 1789; Treaty of Canandaigua, 1794; Treaty with the Oneida, 1794; Treaty with the Oneida, 1838)

[24] *Worcester v. Georgia*, 31 U.S. 515, 559-561 (1832)

[25] The State claims this case collects cases relevant to Mr. House's claim. There are two cases cited, but the author of the decision chose to include citations for every State and Federal decision related to the case, making this collection appear much more substantial than it actually was. Further, the later case expressly relies on the first. This is far from an astounding collection of legal reasoning.

[26] *State v. Fanning*, 114 Idaho 646, 646, 759 P.2d 937 (1988).

[27] *Morrison*. at 615.

conviction, even if the defendant was similarly situated to Mr. House. There are two lower court decisions cited in *Fanning* which purportedly address the constitutionality of Public Law 280. The decisions do not devote much substance or critical thought to this question of constitutionality. This Court should not sell its reason for so little.

Conclusion

Our Nation has repeatedly failed to honor the promises we have made to the Native American Nations. In doing so, we have failed to live up to the ideals on which our nation was founded. We cannot change the past–the United States has committed atrocities against the Native American Nations. We can change our future. Someone must be brave and take the first step towards a better tomorrow. Mr. House hopes this Court will answer his call. Be brave. Recognize Congress has no inherent plenary power over the Oneida Nation. Vacate his conviction and release him from State custody so he may be judged by his Nation's own government.

Dated: Monday, November 1, 2021
Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (8)

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 1,792 words.

Electronically Signed By: Steven Roy