THE ORIGINAL UNDERSTANDING OF THE INDIAN COMMERCE CLAUSE

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ABSTRACT

The United States Congress claims plenary and exclusive power over federal affairs with the Indian tribes, based primarily on the Constitution's Indian Commerce Clause. This article is the first comprehensive analysis of the original meaning of, and understanding behind, that constitutional provision. The author concludes that, as originally understood, congressional power over the tribes was to be neither plenary nor exclusive.

"[A]s exception strengthens the force of a law in cases not excepted; so enumeration weakens it in cases not enumerated."

– Sir Francis Bacon[1]

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All translations from Latin to English in this Article are by the author, and all opinions and errors are his sole responsibility.

1. LORD BACON, ADVANCEMENT OF LEARNING 399 (Joseph Devey ed., 1901).

2. *Bibliographical Note*: This footnote collects alphabetically the secondary sources cited more than once in this Article. The sources and short form citations used are as follows:

Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1940-41).

FRANCIS ALLEN, A COMPLETE ENGLISH DICTIONARY (London 1765) [hereinafter ALLEN, DICTIONARY].

N. BAILEY, A UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (Edinburgh 25th ed. 1783) [hereinafter BAILEY, DICTIONARY].

RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY (1980).

Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055 (1995) [hereinafter Clinton, *Dormant*].

Robert N. Clinton, *Review*, 47 U. CHI. L. REV. 846 (1979-80) [hereinafter Clinton, *Review*].

Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002) [hereinafter Clinton, *Supremacy*].

FELIX COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (LexisNexis 2005).

VINE DELORIA, JR. & CLIFFORD LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY (Pantheon Books 1984).

THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Jensen et al. eds., 1976) [hereinafter DOCUMENTARY HISTORY] (multiple vols. projected; not all completed).

EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789 (Alden T. Vaughan ed., 1998-2004) [hereinafter EARLY AMERICAN INDIAN DOCUMENTS].

JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (photo reprint 1941) (2d ed. 1836) [hereinafter ELLIOT'S DEBATES].

THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1937) [hereinafter FARRAND].

Matthew L.M. Fletcher, *Same-Sex Marriage, Indian Tribes, and the Constitution*, 61 U. MIAMI L. REV. 53 (2006) [hereinafter Fletcher, *Same-Sex Marriage*].

Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121 (2006) [hereinafter Fletcher, *Federal Indian Policy*].

I. INTRODUCTION: THE TANGLED ORIGINS OF FEDERAL SUPREMACY

A. Plenary Authority: The Search for a Convincing Justification

1. Justifying Plenary Authority by Extra-Constitutional Means

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ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787-88 (Paul Leicester Ford ed., 1892) [hereinafter FORD].

THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter THE FOUNDERS' CONSTITUTION].

GOVERNOR AND COMPANY OF CONNECTICUT AND MOHEGAN INDIANS, CERTIFIED COPY OF BOOK OF PROCEEDINGS BEFORE COMMISSIONERS OF REVIEW, MDCCXLIII (London 1769) [hereinafter MOHEGAN PROCEEDINGS].

GEORGE GRENVILLE, THE REGULATIONS LATELY MADE CONCERNING THE COLONIES, AND THE TAXES IMPOSED UPON THEM, CONSIDERED (London 3d ed. 1775).

ALEXANDER HAMILTON, JOHN JAY & JAMES MADISON, THE FEDERALIST (George W. Carey & James McClellan eds., 2001) [hereinafter THE FEDERALIST].

SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (James H. Hutson ed., 1987) [hereinafter HUTSON].

SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London 1756) [hereinafter JOHNSON, DICTIONARY].

2 INDIAN AFFAIRS: LAWS AND TREATIES (Charles J. Kappler ed., 1904) [hereinafter KAPPLER].

FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGIN OF THE CONSTITUTION (1985).

Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004) [hereinafter Natelson, *Public Trust*].

Robert G. Natelson, *The Enumerated Powers of States*, 3 Nev. L. J. 469 (2003) [hereinafter Natelson, *Enumerated*].

Robert G. Natelson, *The Founders' Hermeneutic*, 68 OHIO ST. L. J. (forthcoming 2007) [hereinafter Natelson, *Founders*].

Robert G. Natelson, *The Legal Meaning of "Commerce" in the Commerce Clause*, 80 ST. JOHN'S L. REV. 789 (2006) [hereinafter Natelson, *Commerce*].

Robert G. Natelson, *Tempering the Commerce Power*, 61 MONT. L. REV. 95 (2007) [hereinafter Natelson, *Tempering*].

THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW (Little, Brown and Company 5th ed. 1956).

Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069 (2004) [hereinafter Prakash, *Fungibility*].

Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of IntraSentence Uniformity*, 55 ARK. L. REV. 1149 (2003) [hereinafter Prakash, *Uniformity*].

MONROE E. PRICE & ROBERT N. CLINTON, LAW AND THE AMERICAN INDIAN (Michie 2d ed. 1983).

1 FRANCIS PAUL PRUCHA, THE GREAT FATHER (1984) [hereinafter PRUCHA].

Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379 (2000).

Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 AM. INDIAN L. REV. 57 (1991).

JOSEPH HENRY SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS (Columbia University Press 1950).

STATISTICAL RECORD OF NATIVE NORTH AMERICANS (Marlita A. Reddy ed., 1993).

Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335 (1934).

THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed., 1981) [hereinafter STORING].

CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY (London 2d. ed. 1793).

CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW (1987).

For many years, Congress has claimed, and the Supreme Court has conceded,[3] a plenary power over American Indian tribes.[4] As is true of so much else in Indian law,[5] the constitutional basis of this power is unclear.[6]

Courts and commentators have offered a variety of justifications for the plenary congressional power theory, all defective in various ways. One such justification is the doctrine of inherent sovereign authority: that federal control over Indian affairs is inherent in the nature of federal sovereignty.[7] The idea is that the British Crown transmitted extra-constitutional sovereign authority to the Continental Congress, which then passed it to the Confederation Congress, which in turn conveyed it to the federal government.[8]

The Supreme Court has acknowledged the theory, but only rarely and in limited respects. Dicta by Chief Justice Marshall are sometimes cited as recognizing it,[9] but in fact they do not.[10] A passage in Chief Justice Taney's opinion in *Dred Scott v. Sandford*[11] suggests an inherent sovereignty theory,[12] but later in the opinion Taney made it clear that he was invoking an enumerated power.[13] *United States v. Kagama*,[14] decided in 1886, did recognize unenumerated federal power over Indian affairs, but the Court's justification was Indian dependency on the fed-

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3. *See, e.g.*, United States v. Lara, 541 U.S. 193, 200 (2004); United States v. Wheeler, 435 U.S. 313, 319 (1978) ("Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government."); Williams v. Lee, 358 U.S. 217, 220 (1959); United States v. Kagama, 118 U.S. 375, 379 (1886); *see also* PRICE & CLINTON, *supra* note 2, at 132-35 (discussing the plenary power doctrine); PRUCHA, *supra* note 2, at 51 (discussing congressional claims of plenary power); Savage, *supra* note 2, at 61 ("Congress enjoys a plenary power over Native Americans . . . .").

4. *See* BARSH & HENDERSON, *supra* note 2, at 62-84, 112-34 (discussing the rise and development of the plenary power doctrine).

5. That Indian law is chaotic seems to be one of the few points of agreement among commentators on the subject. Prakash, *Fungibility*, *supra* note 2, at 1074-75 (collecting sources).

6. BARSH & HENDERSON, *supra* note 2, at 137-48 (criticizing as unprincipled judicial decisions in this area); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 43 (1996) ("The text of the Constitution lacks much of a hint of any plenary power."); Prakash, *Fungibility*, *supra* note 2, at 1079 ("[T]he Court has never explained how seemingly modest grants of authority might ever grant plenary authority over all Indian tribes.").

7. COHEN, *supra* note 2, at 397-98 (discussing the theory); *see also* Fletcher, *Same-Sex Marriage*, *supra* note 2, at 65-66 (stating that federal Indian law is "derived in large part from the Indian Commerce Clause, treaties with Indian tribes, and a 'pre-constitutional' federal authority to deal with Indian tribes").

8. United States v. Curtiss-Wright, 299 U.S. 304, 315-18 (1936).

9. *E.g.*, United States v. Lara, 541 U.S. 193, 201-02 (2004) (citing Marshall's opinion for the Court in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)).

10. *See infra* notes 28-33 and accompanying text.

11. 60 U.S. (19 How.) 393 (1857).

12. *Id.* at 443-45 (taking the position that federal territories acquired after adoption of the Constitution were administrated not pursuant to the Territories and Property Clause but from a "general right of sovereignty" derived from the ability to acquire new states).

13. *Id.* at 447 (resorting to the text of the Constitution authorizing the admission of new states).

14. 118 U.S. 375 (1886).

eral government, not inherent sovereignty.[15] Seven years later, in *Fong Yue Ting v. United States*,[16] the Court discussed the concept of inherency (although outside the Indian context), but the case can be read to mean that the power under consideration was inherent in the Constitution's enumerated powers rather than in extra-constitutional sovereignty.[17]

Kansas v. Colorado (1907),[18] the Supreme Court's clearest pronouncement on inherent sovereign authority in internal affairs, actually *rejected* the doctrine. *United States v. Curtiss-Wright*[19] resuscitated it, but only for foreign affairs. In 2004, the Court suggested an application to Indian concerns, but the Court's language was neither definitive nor necessary to its decision.[20]

The Supreme Court's reluctance to fully accept inherent sovereign authority is understandable, for the doctrine is fundamentally unconvincing. It clashes with the Constitution's underlying theory of enumerated powers,[21] and would render some enumerated powers redundant.[22] Moreover, as several commentators have pointed out, its historical assumptions are flatly false:[23] As a matter of historical record, the British

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15. *Id.* at 384 ("From the [tribes'] very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.").

16. 149 U.S. 698 (1893).

17. *Id.* at 711-13 (discussing inherent power to expel aliens as part of the foreign affairs power, but also using the term "inherent" as including powers within or incident to enumerated powers).

18. 206 U.S. 46 (1907). The court stated:

> [T]he proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers . . . . This natural construction of the original body of the Constitution is made absolutely certain by the *Tenth Amendment*.

Id. at 89-90.

19. 299 U.S. 304, 315-18 (1936).

20. United States v. Lara, 541 U.S. 193, 201 (2004) ("Moreover, 'at least during the first century of America's national existence . . . Indian affairs were more an aspect of military and foreign policy than a subject of domestic or municipal law.' Cohen 208 (footnotes omitted). Insofar as that is so, Congress's legislative authority would rest in part, not upon 'affirmative grants of the Constitution,' but upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that this Court has described as 'necessary concomitants of nationality.' *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-322.").

21. *Kansas*, 206 U.S. at 89; Prakash, *Fungibility*, *supra* note 2, at 1103 ("Of course, none of these rationales will win over those who steadfastly believe that the federal government is a government of enumerated powers."). The inherent power doctrine has a few defenders. *See, e.g.*, Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 36-37 (1996). Like most other commentators, Professor Frickey does not address the Tenth Amendment, which explicitly forestalls any extra-constitutional powers in the federal government. *See infra* notes 34-36 and accompanying text.

22. Prakash, *Fungibility*, *supra* note 2, at 1105. The presumption against superfluity was accepted in the Founding Era. 19 VINER, *supra* note 2, at 548 ("It is a known rule in interpretation of statutes, that such a sense is to be made upon the whole, as that *no clause, sentence, or word shall prove superfluous, void, or insignificant*, if by any other construction they may all be made useful and pertinent.").

23. *See, e.g.*, Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 26-33 (1972) (pointing out that sovereign foreign affairs powers could not have been transmitted directly from the Crown to Congress because the states exercised those powers for a time);

Crown did not transfer its foreign affairs powers to the Continental Congress, but to the states.[24] The Confederation Congress did not receive its authority from the Continental Congress, but from the states.[25] The federal government did not receive its powers from the Confederation Congress, but from the people.[26]

As already observed,[27] appeals to the authority of Chief Justice John Marshall do not add to the persuasiveness of the case for inherent sovereign authority because Marshall's dicta simply do not support the doctrine. Marshall observed in *Cherokee Nation v. Georgia*[28] that the federal-tribal relationship "resembles that of a ward to his guardian."[29] But a guardianship analogy implies a restricted, fiduciary power. The Founders themselves used the fiduciary analogy to emphasize the *limited* nature of federal authority.[30] Similarly, while Marshall's dictum in *Worcester v. Georgia*[31] suggested that federal governance of Indian affairs was exclusive of the states,[32] the pronouncement was unrelated to inherent sovereign authority. Neither dictum would be particularly probative of the Constitution's original meaning in any event, since they were issued more than four decades after the Constitution's ratification.[33]

Finally, the doctrine of inherent sovereign authority is simply contradicted by the text of the Constitution. Any extra-constitutional authority inhering in the federal government in 1789 was destroyed two years

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Julius Goebel, Jr., *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 571-73 (1938) (criticizing the theory as inconsistent with the Founders' rejection of the royal prerogative); David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 478-90 (1946) (making the same point as Berger); Charles A. Lofgren, United States v. Curtiss-Wright Export Corporation: *An Historical Reassessment*, 83 YALE. L.J. 1, 12-32 (1973) (criticizing *Curtiss-Wright* for faulty reliance on Joseph Story's *Commentaries* and other sources and for failure to recognize that before the Constitution's adoption the states had foreign affairs powers); Ramsey, *supra* note 2, at 387 (criticizing the doctrine as unhistorical).

24. MCDONALD, *supra* note 2, at 150 (pointing out that by the 1783 Treaty of Paris, the British King recognized the individual states, not Congress, as sovereign).

25. ARTS. OF CONFED. art. III ("The said States hereby severally enter into a firm league of friendship with each other . . . .").

26. U.S. CONST. pmbl. ("We the People . . . .").

27. *See supra* note 10 and accompanying text.

28. 30 U.S. (5 Pet.) 1 (1831); Clinton, *Supremacy*, *supra* note 2, at 173-74 (discussing the use of *Cherokee Nation* in *Kagama*).

29. 30 U.S. (5 Pet.) at 17. The language was dictum, for the holding of the case was to *deny* federal judicial power over a tribal challenge to a state claiming authority over that tribe. *Id.* at 20.

30. Natelson, *Public Trust*, *supra* note 2, at 1137-42 (explaining how "public trust" doctrine, invoked partly by identifying public officials as "guardians," required limitations on their authority).

31. 31 U.S. (6 Pet.) 515 (1832); *see* United States v. Lara, 541 U.S. 193, 201-02 (2004) (citing *Worcester* in conjunction with the inherent sovereign authority doctrine).

32. Marshall's statement that the Constitution conferred exclusive power over relations with all Indians was dicta; his ruling that the federal government had exclusive power over relations specifically with the Cherokees was not. *See infra* notes 75-76 and accompanying text.

33. Natelson, *Founders*, *supra* note 2 (discussing the low probative level of post-ratification evidence); *see also infra* Part IV.B. (discussing the post-ratification adoption of an Indian Intercourse Act).

later, when the Tenth Amendment[34] became effective. By its terms that Amendment precluded any federal power beyond those bestowed by the Constitution.[35] Indeed, one reason for the Amendment was precisely to re-assure Anti-Federalists who feared that the new government might claim powers beyond those enumerated.[36]

2. Justifying Plenary Authority by Constitutional Clauses

In addition to relying on the doctrine of inherent sovereign authority, apologists for plenary congressional control over Indian affairs resort to several of the Constitution's enumerated powers. These include the War Power,[37] the Executive Power,[38] the Necessary and Proper Clause,[39] the Treaty Clause,[40] the Territories and Property Clause,[41] the Indian Commerce Clause,[42] and an occasional combination of two or more of the foregoing.[43]

As foundations for plenary congressional control over Indian affairs, most of those provisions can be readily dismissed. The War Power

34. Kansas v. Colorado, 206 U.S. 46, 89-90 (1907) (stating that the lack of any inherent sovereign authority "is made absolutely certain by the 10th Amendment"); Ramsey, *supra* note 2, at 380.

35. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

36. *See, e.g.*, *The Fallacies of the Freeman Detected by A Farmer*, PHILADELPHIA FREEMAN'S J., Apr. 1788, *reprinted in* 3 STORING, *supra* note 2, at 190 ("All the prerogatives, all the essential characteristics of sovereignty, both of the internal and external kind, are vested in the general government, and consequently the several states would not be possessed of any essential power, or effective guard of sovereignty."); *Essays of an Old Whig*, *Essay II*, PHILADELPHIA INDEPENDENT GAZETTER, Oct. 1787 - Feb. 1788, *reprinted in* 3 STORING, *supra* note 2, at 24 (claiming that grant of effectual sovereignty to the federal government would make it a government of uncontrolled power).

Concerns over the issue may have arisen because some "ardent nationalists" had been espousing the doctrine that the Continental and Confederation Congresses had inherent powers. MCDONALD, *supra* note 2, at 149-50.

37. PRUCHA, *supra* note 2, at 51 (calling it "national defense"); Prakash, *Fungibility*, *supra* note 2, at 1097-99 (criticizing this view).

38. Prakash, *Fungibility*, *supra* note 2, at 1099-1102 (criticizing this view).

39. *E.g.*, COHEN, *supra* note 2, at 391 (stating that the clause broadens the reach of other constitutional powers).

40. COHEN, *supra* note 2, at 393-95; PRUCHA, *supra* note 2, at 51; *see* U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .").

41. COHEN, *supra* note 2, at 391-93; PRUCHA, *supra* note 2, at 51 (calling it the "national domain clause").

42. COHEN, *supra* note 2, at 395-97; PRUCHA, *supra* note 2, at 51; WILKINSON, *supra* note 2, at 12 n.27.

43. *E.g.*, United States v. Lara, 541 U.S. 193, 200-02 (2004) (citing the military and foreign affairs powers, the treaty power, the Indian Commerce Clause, and preconstitutional powers); David F. Forte, *Commerce with the Indian Tribes*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 107, 108 (Edwin Meese III, David F. Forte & Matthew Spalding eds., 2005) ("One can derive the plenary authority of Congress over the Indians from the Commerce Clause, the Treaty Clause . . . the Property Clause . . . and from the nature of the sovereign power of [the] federal government in relation to the Indians.").

is effective only during time of war[44] and perhaps for a short time thereafter.[45] The Executive Power is not congressional at all, and in any event is not plenary.[46] The Necessary and Proper Clause depends for its operation on other enumerated powers,[47] and, as leading Founders affirmed, is but a recital of the eighteenth-century doctrine of implied incidental powers,[48] without independent substantive force.[49] Treaties may grant substantial competence to Congress,[50] but many Indian tribes have never

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44. Prakash, *Fungibility*, *supra* note 2, at 1098 ("The mere existence of a war in the past does not sanction the indefinite existence of wartime powers.").

45. *Cf.* Woods v. Cloyd W. Miller Co., 333 U.S. 138, 147 (1948) (upholding exercise of federal power to minimize post-war disruptions).

46. Prakash, *Fungibility*, *supra* note 2, at 1099-1102 (identifying the weaknesses in the executive power as a basis for plenary congressional jurisdiction).

47. U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . . To make all Laws which shall be necessary and proper for carrying into Execution *the foregoing Powers, and all other Powers vested by this Constitution* in the Government of the United States, or in any Department or Officer thereof.") (emphasis added).

48. *See generally* Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243 (2004) (explaining how the clause and others like it were used in eighteenth century documents); Natelson, *Tempering*, *supra* note 2 (containing general discussions of the doctrine of principals and incidents and how it was embodied in the Necessary and Proper Clause).

49. On the Clause's lack of independent force, *see also* 4 ELLIOT'S DEBATES, *supra* note 2, at 141 (reporting Archibald MacLaine as making this point at the North Carolina ratifying convention); THE FEDERALIST, *supra* note 2, at 158 (No. 33, Alexander Hamilton) (stating that the Clause was "only declaratory of a truth, which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers"); THE FEDERALIST, *supra* note 2, at 234-35 (No. 44, James Madison) ("Had the Constitution been silent on this head, there can be no doubt that all the particular powers requisite as means of executing the general powers, would have resulted to the government, by unavoidable implication.").

50. *See, e.g.*, Treaty with the Cherokee art. 9, Nov. 28, 1785, 7 Stat. 18, *reprinted in* KAPPLER, *supra* note 2, at 10 ("[T]he United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper.").

Recent scholarship has cast doubt on whether the treaty power really gives Congress as much flexibility as the Supreme Court has claimed. *See generally* Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1 (2006) (arguing that even self-executing treaties must implement other powers in the Constitution); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005) (concluding that Missouri v. Holland, 252 U.S. 416 (1920), was wrongly decided as a matter of text and original meaning and that, according to the original meaning, Congress may not exercise authority it would not otherwise have by passing laws under non-self-executing treaties).

Both of these articles are well-argued. It is also true, though, that during the ratification debates over the Constitution, Anti-Federalists made predictions that the treaty power could be used by the federal government to exceed its enumerated powers, such as by establishing a national religion, and, outside the limits of public trust, Natelson, *Public Trust*, *supra* note 2, at 1151-52, these representations were largely uncontested. *See, e.g.*, Hampden, PITTSBURGH GAZETTE, Feb. 16, 1788, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 2, at 666 ("Treaties may be extended to almost every legislative object of the general government. Who is it that doth not know that by treaties in Europe the succession and constitution of many sovereign states hath been regulated."); 2 DOCUMENTARY HISTORY, *supra* note 2, at 514 (quoting Robert Whitehill) (warning at the Pennsylvania ratifying convention that "[t]reaties may be so made as to absorb the liberty of conscience, trust by jury, and all our liberties"); 4 ELLIOT'S DEBATES, *supra* note 2, at 191-92 (quoting Henry Abbott at the North Carolina ratifying convention, as stating that "[i]t is feared, by some people, that, by the power of making treaties, they might make a treaty engaging with foreign powers to adopt the Roman Catholic religion in the United States, which would prevent the people from worshipping God according to their own consciences.").

signed treaties. Indeed, no Indian treaty has been signed since 1868,[51] for in 1871 Congress announced that the federal government no longer would deal with the Natives in that way.[52] Congressional authority granted by Indian treaty is thus a tribe-by-tribe inquiry, and not a basis for plenary congressional power over all tribes.[53] Finally, the Territories and Property Clause enables Congress to adopt "needful" rules and regulations for federal lands.[54] Although this was a substantial source of congressional power over Indians when most of them lived in federal territories, this is no longer true. Today less than one percent of reservation land is titled beneficially to the federal government, and very few Indians live in federal territories.[55]

3. Justifying Plenary Authority by Trusts and Treaties

It is said that the federal government holds reservation land in trust for the various tribes.[56] If this theory is viable, then legal title to this land is federal "property" subject to congressional management under the Territories and Property Clause, and such title would give Congress at least some jurisdiction over the minority of Indians[57] who reside on reservations. But this begs the question of the source of authority for hold-

51. The list of Indian treaties appears at http://digital.library.okstate.edu/kappler/Vol2/Toc.htm.

52. 25 U.S.C.A. § 71 (2007) ("No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."); COHEN, *supra* note 2, at 395. The decision apparently arose from the demand of the House of Representatives that it enjoy a more active role in effectuating agreements with the Indians, since appropriations frequently were necessary to carry out Indian treaties. Clinton, *Supremacy*, *supra* note 2, at 167-68; *see also* BARSH & HENDERSON, *supra* note 2, at 67-69 (discussing adoption of this legislation).

53. COHEN, *supra* note 2, at 394 (claiming that Congress may act toward the Indians in ways apparently outside its enumerated powers if acting pursuant to treaty).

54. U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."); *see also* Kleppe v. New Mexico, 426 U.S. 529, 539 (1976) (stating a broad scope for the Property Clause).

55. Chart 675, *Acreage of Indian Lands, by State*, *in* STATISTICAL RECORD OF NATIVE NORTH AMERICANS, *supra* note 2, at 1053-54 (showing in 1990 that of 56,611,426.99 acres on Indian reservations, 46,327,469.33 acres are owned by tribes, 9,862,551.18 acres are owned by individuals [presumably including private entities], and 421,296.48 acres, about 0.74% of the total, are owned by governments, presumably not all by the federal government); *see also* COHEN, *supra* note 2, at 392 (stating that Indian lands are not administered under the Property Clause); Prakash, *Fungibility*, *supra* note 2, at 1092-94 (pointing out that no tribes are located in federal territories).

56. *E.g.*, 25 U.S.C.A. § 463f (2007) (authorizing the federal government to take land for certain Indians in trust); 25 U.S.C.A. § 465 (2007) (authorizing acquisition by federal government of land for tribes).

57. Chart 150, *American Indian Population On and Off Reservations, by Selected Tribal Affiliation, 1991*, *in* STATISTICAL RECORD OF NATIVE NORTH AMERICANS, *supra* note 2, at 254-55 (showing, for selected tribes, more tribal membership residing off than on reservations); *see also* Chart 151, *American Indian Population, by Reservation and Non-Reservation States, 1960*, *id.* at 255-57 (showing with more complete – although much older – figures, more Indians in states without any reservations than in states with reservations, even though not all Indians in the latter states live on reservations).

ing reservation land in trust.[58] As already noted, pre- or extra-constitutional power is not a viable answer.[59] Nor, as originally understood, is the Territories and Property Clause, for that Clause originally granted Congress the unlimited power to *dispose* of federal lands within state boundaries, but not the unlimited capacity to *retain or acquire* such lands.[60] As for the treaty power, it happens that *not a single Indian treaty provides that the government has retained or acquired trust title to the reservation*.[61] The sole references to trust arrangements in Indian treaties are peripheral provisions, such as temporary trusts incident to sale[62] and trusts to fund Indian schools and other amenities.[63]

4. Justifying Plenary Authority by the Indian Commerce Clause

The defects in all these theories of plenary congressional power, therefore, leaves only one other justification remaining: the Indian Commerce Clause.[64]

In *Kagama*, the Supreme Court rejected the Indian Commerce Clause as a source of plenary congressional authority.[65] Since that time, however, that Clause has become "the most often cited basis for modern

58. Prakash, *Fungibility*, *supra* note 2, at 1094-95 (pointing out that justifying the trust relationship through the plenary power doctrine is a form of bootstrapping).

59. *See supra* notes 21-36 and accompanying text. For an effort to trace both the plenary power and trust doctrines to pronouncements by the Marshall court, *see* Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 654-61 (2006). The "Marshall Trilogy" consists of Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). *Id.* at 628; *see also* WILKINSON, *supra* note 2, at 78-79 ("The Marshall Trilogy legitimized these congressional activities and announced federal powers under the Indian Commerce Clause that 'comprehend all that is required' to regulate Indian affairs.").

60. Robert G. Natelson, *Federal Land Retention and the Constitution's Property Clause: The Original Understanding*, 76 U. COLO. L. REV. 327, 376-77 (2005) (concluding that it violates the original understanding of the Constitution for the federal government to hold land within the states indefinitely for unenumerated purposes); *see also* Prakash, *Fungibility*, *supra* note 2, at 1092 n.142 (collecting citations).

61. This is based on a computer search of the word "trust" in KAPPLER, *supra* note 2 (which contains all federal Indian treaties), *available at* http://digital.library.okstate.edu/search.htm.

62. *E.g.*, Treaty with the Ottawa and Chippewa art. 1, July 31, 1855, 11 Stat. 621, *reprinted in* KAPPLER, *supra* note 2, at 725, 727 (authorizing trust of land title for ten years after land sales); Treaty With the Potawatomi art. 5, Nov. 15, 1861, 12 Stat. 1191, *reprinted in* KAPPLER, *supra* note 2, at 824, 826 (creating trust for funds from land sale).

63. Treaty with the Osage art. 2, Sept. 29, 1865, 14 Stat. 687, *reprinted in* KAPPLER, *supra* note 2, at 878, 879 (indicating proceeds of land sales to be held in trust "for building houses, purchasing agricultural implements and stock animals, and for the employment of a physician and mechanics, and for providing such other necessary aid as will enable said Indians to commence agricultural pursuits under favorable circumstances"); Treaty with the Potawatomi art. 6, Nov. 15, 1861, 12 Stat. 1191, *reprinted in* KAPPLER, *supra* note 2, at 824, 827 (creating trust for church and school).

64. *See, e.g.*, COHEN, *supra* note 2, at 392 (claiming that trust statutes are authorized by the Indian Commerce Clause).

65. United States v. Kagama, 118 U.S. 375, 378 (1886) (stating that it would be a "very strained construction" of the Clause to conclude that it authorized creation of a federal criminal code for Indian country).

legislation regarding Indian tribes."[66] Modern Supreme Court doctrine is that "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."[67] This Article will examine whether the Indian Commerce Clause can bear that much weight.

B. The Elusive Basis for Exclusive Authority

During the nineteenth century, judges and advocates began to advance the view that the federal power over foreign, interstate, and Indian commerce is exclusive, implicitly barring *all* state regulation within those spheres.[68] Their twenty-first century descendants make the same sort of claim about the Indian portion of the Commerce Power.[69]

Like the constitutional basis for the doctrine of congressional plenary power, the basis for the Indian version of the exclusivity doctrine is unclear.[70] The most frequently-cited ground[71] for the doctrine is Chief Justice Marshall's opinion in *Worcester v. Georgia*,[72] decided long after the ratification, in which the Court ruled that federal power to deal with the Cherokee tribe was exclusive. However, that case was governed by treaties requiring an exclusive federal-Cherokee relationship.[73]

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66. COHEN, *supra* note 2, at 397; *see also* Fletcher, *Federal Indian Policy*, *supra* note 2, at 137 ("As a matter of federal constitutional law, the Indian Commerce Clause grants Congress the only explicit constitutional authority to deal with Indian tribes.").

67. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989); *see also* United States v. Lara, 541 U.S. 193, 200 (2004); McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164, 172 n.7 (1973) ("The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making.").

68. *See* STUART STREICHER, JUSTICE CURTIS IN THE CIVIL WAR ERA 66-97 (2005). During the first few decades of operation under the Constitution, the validity of state commercial regulations, if not pre-empted by Congress, was taken for granted. When advocates of exclusive federal power began to raise their arguments during the ante-bellum period, they were forced to accommodate this understanding by classifying state commercial laws as "police power" measures rather than commercial regulations. *Id.* at 70.

69. *Lara*, 541 U.S. at 194; COHEN, *supra* note 2, at 398; DELORIA & LYTLE, *supra* note 2, at 2-3 (claiming that the congressional commerce power is "exclusive"); PRICE & CLINTON, *supra* note 2, at 73 (claiming that the Constitution gave "exclusive control over Indian affairs" to the federal government); Fletcher, *Same-Sex Marriage*, *supra* note 2, at 61 ("[I]t seems clear that the Founders intended to retain exclusive federal authority to deal with the Indian nations," while conceding, "but the Clause does not expressly state this.").

70. For an example of how this issue is fudged, *see, e.g.*, DELORIA & LYTLE, *supra* note 2, at 2-3 (claiming that the congressional commerce power is "exclusive," and *adding* that word to a paraphrase of the Commerce Clause).

71. *E.g.*, Williams v. Lee, 358 U.S. 217, 219-20 (1959) (claiming without examination that *Worcester* established the exclusivity principle for all Indians); Native Am. Church of N. Am. v. Navajo Tribal Council, 272 F.2d 131, 134 (10th Cir. 1959) (relying on *Worcester* for the conclusion that "Indian tribes . . . have a status higher than that of states. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States").

72. 31 U.S. (6 Pet.) 515 (1832).

73. The problems with relying on *Worcester* as a basis for the exclusivity doctrine are discussed *infra* Part IV.D.3.

On a practical level, the Indian branch of the commercial exclusivity doctrine raises the same sort of difficulties that ultimately led to the substantial rejection of its more expansive forerunner.[74] When coupled with the plenary power doctrine, "exclusivity"—literally construed—would mean that the states could not regulate *any* conduct by Indians,[75] even when state laws do not contradict federal legislation and even though Indians are enfranchised state citizens.[76] Purchases made off the reservation by individual Indians would not be subject to the local version of the Uniform Commercial Code. Indians visiting New York City would not have to obey the Big Apple's traffic laws. In the face of such difficulties, the Supreme Court has acknowledged exclusivity in some cases,[77] but rejected it in others. The border between the two domains has been less a border than a smudge.[78]

As this Article explains, all of this haze is unnecessary. The drafting history of the Constitution,[79] the document's text and structure,[80] and its ratification history[81] all show emphatically that the Indian Commerce Power was *not* intended to be exclusive.

C. The State of the Literature and Role of this Article

Scholarly commentary on the original force of the Indian Commerce Clause is relatively sparse, although some writers have touched on the issue within broader contexts.[82] Most of their commentary is confessedly agenda-driven.[83] Most is also plagued by errors of historical

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74. *See supra* note 69. Aside, of course, from the fairly restricted realm of the Dormant Commerce Clause.

75. Fletcher, *Same-Sex Marriage*, *supra* note 2, at 66 ("States have, as a general matter, no authority over reservation Indians.").

76. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

77. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 62 (1996) (Rehnquist, J.) ("[T]he States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes.").

78. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) ("[T]here is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members."); Williams v. Lee, 358 U.S. 217, 219 (1959) ("[T]his Court has modified these [exclusivity] principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized . . . .").

79. *See infra* Part II.B.

80. *See infra* Part II.D.

81. *See infra* Part III.

82. Abel, *supra* note 2, at 467-68; Clinton, *Dormant*, *supra* note 2, at 1058; Clinton, *Supremacy*, *supra* note 2, at 114-16; Prakash, *Fungibility*, *supra* note 2, at 1069-74; Prakash, *Uniformity*, *supra* note 2, at 1149-51; Savage, *supra* note 2, at 59-60; Stern, *supra* note 2, at 1342; *see also* BARSH & HENDERSON, *supra* note 2, at 59 (discussing in passing the original meaning of "Commerce").

83. *See, e.g.*, Clinton, *Supremacy*, *supra* note 2. Professor Clinton characterizes his article in this way:

> [A]n essay intended to translate into American constitutional terms the pride in tribal sovereignty and the deep grief over America's illegitimate colonial expropriation of that au-

method.[84] As a general proposition, the commentary reveals little or no familiarity with such fundamental interpretive tools of originalist analysis as eighteenth-century dictionaries, surveys of period literature, or contemporaneous legal materials.[85] A few authors address the federal convention proceedings, but only one—Professor Robert Clinton—examines the ratification.[86]

This Article represents an effort to ascertain, in a more comprehensive and objective[87] way, the original force of the Indian Commerce Clause. It addresses two principal kinds of questions. The first kind pertains to the *scope* of the Clause: Did it confer a broad police power or something narrower? If the scope was narrower, how can it be defined? The second kind of question pertains to *exclusivity*: Was the power granted to Congress exclusive of concurrent state jurisdiction? If not, what sort of state jurisdiction was to survive?

The standard of interpretation applied here is the same the founding generation would have applied. The standard calls for an inquiry into what eighteenth-century lawyers and judges called the "intent of the makers." The "makers" of the United States Constitution were understood to be the ratifiers. Their "intent" was their subjective understanding where recoverable. If not recoverable, the objective public meaning was sought and presumed to be the makers' intent.[88]

In employing the Founding-Era standard, one can proceed from either of two directions. One may seek the ratifiers' subjective understanding and then fill in any blanks with the original public meaning. Or one may first seek the original public meaning, and then determine if the

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> thority that the author has learned from working with tribal people for over a quarter-century . . . . [T]his paper is intended to provide a legal framework and constitutional roadmap for giving voice, in American constitutional terms, to legitimate tribal claims of federal encroachment on their sovereignty.

Id. at 113; *see also* BARSH & HENDERSON, *supra* note 2, at ix-x ("[W]e hope to transform, rather than negate, the consciousness of non-Indian Americans and preserve the continuity of both tribal and national government."); Abel, *supra* note 2 (dealing with the Indian Commerce Clause as a way to criticize the definition of interstate commerce promoted by advocates of the New Deal); Stern, *supra* note 2 (dealing with the Indian Commerce Clause as a way to defend the definition of interstate commerce promoted by advocates of the New Deal).

84. *See infra* Part IV. (discussing common errors, including errors of historical method).

85. *See, e.g.*, *infra* Part II.A. (showing that eighteenth-century word usages contradict the claim that the phrase "Commerce . . . with the Indian Tribes" had a broader meaning than "trade with the Indian tribes"); *see also infra* Part IV. (discussing instances of historical errors found in legal commentary, including use of anachronistic material and word-meanings).

86. Clinton, *Dormant*, *supra* note 2, at 1058-63. For example, Professor Saikrishna Prakash's otherwise fine study of the Indian Commerce Clause stopped with the proceedings at the federal convention. Prakash, *Fungibility*, *supra* note 2, at 1090. Professor Francis Paul Prucha spent no ink on the ratification process whatsoever, other than quoting in a completely different context one of Madison's numbers in *The Federalist*. PRUCHA, *supra* note 2, at 38.

87. The author is not involved in Indian affairs controversies and has no wider agenda pertaining to them.

88. *See infra* Part III.A.

evidence on the subjective understanding contradicts it. This Article employs the latter approach.

Thus, after this Introduction (Part I), Part II ascertains the original public meaning of the Indian Commerce Clause—that is, the meaning to an objective and reasonably-well-informed observer during the ratification era. Part III then seeks any specific understandings among the ratifiers to the contrary. Part IV examines some significant mistakes made by prior commentators on the Indian Commerce Clause. Part V is a short conclusion.

II. THE ORIGINAL PUBLIC MEANING OF "TO REGULATE 'COMMERCE' . . . WITH THE INDIAN TRIBES"

A. The Meaning of "Commerce" and "Affairs"

When deducing original public meaning, one usually begins with purely textual analysis, and then turns to surrounding materials. The level of misunderstanding in the literature on this subject[89] renders it prudent to reverse the order and review the contemporaneous historical and legal environment before turning to the text.

The misunderstandings in the literature begin with the meaning of the word *commerce*. Some have argued that the Founders intended commerce to encompass not only trade but all gainful economic activity,[90] or even any and all intercourse whatsoever.[91] Although such an expansive meaning seems out-of-place in a listing of enumerated powers—and, indeed, counter-intuitive generally—several recent studies have taken it seriously enough to examine how the word was employed in the lay and legal contexts before and during the Founding Era.[92] Those studies have found that, in the legal and constitutional context, "commerce" meant mercantile trade, and that the phrase "to regulate Commerce" meant to administer the *lex mercatoria* (law merchant) governing purchase and sale of goods, navigation, marine insurance, commercial paper, money, and banking.[93] Thus, "commerce" did not include manufacturing, agriculture, hunting, fishing, other land use, property

89. *See infra* Part IV. (discussing various common errors among commentators on the Indian Commerce Clause).

90. Natelson, *Commerce*, *supra* note 2, at 791-95 (collecting the sources).

91. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 107-08 (2005) (stating that commerce includes "all forms of intercourse in the affairs of life"). Professor Amar argues that certain provisions of the Indian Intercourse Act of 1790 suggest a broader understanding in the First Congress of the term "commerce." *But see infra* Part IV.B. (pointing out that the Indian Intercourse Act was adopted pursuant to the Treaty Power, not the Commerce Power).

92. *See generally* Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Natelson, *Commerce*, *supra* note 2.

93. Natelson, *Commerce*, *supra* note 2, at 845. On the coinage power as part of regulating commerce, *see* Robert G. Natelson, *Paper Money and Original Understanding*, 31 HARV. J.L. & PUB. POL'Y (forthcoming 2008).

ownership, religion, education, or domestic family life. This conclusion can be a surprise to no one who has read the representations of the Constitution's advocates during the ratification debates. They explicitly maintained that all of the latter activities would be outside the sphere of federal control.[94]

The sources further demonstrate that the meaning of commerce was no broader in the Indian context than in the context of foreign and interstate relations.[95] There would be a presumption against this in any event. Contemporaneous legal sources testify to a rule of construction holding that the same word normally had the same meaning when applied to different phrases in an instrument.[96] Varying the meaning of "Commerce" with varying phrases of modification ("with foreign Nations," "among the several States," and "with the Indian Tribes") would have violated that rule.

New technology enables one to examine the use of a given phrase throughout tens of thousands of eighteenth-century documents. Using the Thomson Gale database *Eighteenth Century Collections Online* and the Readex database *Early American Imprints, Series I: Evans, 1639-1800*, I undertook searches of such phrases as "commerce with the Indians" and "commerce with Indian tribes." The results showed those expressions almost invariably meant "trade with the Indians" and nothing more.[97] Other computer searches revealed that "regulation" of Indian

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94. *See generally* Natelson, *Enumerated*, *supra* note 2.

95. The question of whether "commerce" means the same thing in Indian commerce as in interstate commerce became a political football during the New Deal era. Commentators who supported the New Deal argued that Indian commerce had a very broad meaning, so interstate commerce must have one also. Stern, *supra* note 2, at 1137, 1342. Commentators who opposed the New Deal, or at least opposed the New Deal version of the Commerce Clause, argued that "commerce" in the interstate context was different than in the Indian context. Abel, *supra* note 2, at 465-68. Both parties' treatments of the issue display the defects of outcome-orientation and insufficient attention to the ratification record.

96. *Flower's Case* (K.B. 1598) 5 Co. Rep. 99a, 77 Eng. Rep. 208 ("[I]n good construction this branch shall have reference to the first, and shall be expounded by it, and so one part of the Act shall (a) expound the other."); *The Case of Chester Mill* (Privy Council 1609) 10 Co. Rep. 137b, 138b, 77 Eng. Rep. 1134, 1135 ("And always such construction ought to be made, that one part of the Act may agree with the other, and all to stand together."); 19 VINER, *supra* note 2, at 526 ("It is the most natural and genuine exposition of a statute to construe *one part* of the Statute *by another part of the same statute*, for that best expresses the meaning of the makers . . . ."); *Id.* at 527 ("*One part* of an act of parliament may *expound another*.").

See generally Clinton, *Supremacy*, *supra* note 2, at 131 (not identifying the contemporaneous rules of construction, but arguing that the same word should be presumed to mean the same thing for all three contexts); Prakash, *Uniformity*, *supra* note 2, at 1150 (making the same point).

97. *See, e.g.*, *Examination of Dr. Benjamin Franklin in the House of Commons* (1766) (on file with the *Denver University Law Review*) ("The *trade with the Indians*, though carried on in America, is not an American interest. The people of America are chiefly farmers and planters; scarce any thing that they raise or produce is an article of *commerce with the Indians*.") (emphasis added); *see also* STATE OF THE BRITISH AND FRENCH COLONIES IN NORTH AMERICA, WITH RESPECT TO NUMBER OF PEOPLE, FORCES, FORTS, INDIANS, TRADE AND OTHER ADVANTAGES 42 (London 1755) ("By means of this post they may be enabled to intercept, or least disturb the trade . . . and could they destroy the commerce of those *Indians* . . . ."); 5 THE WORLD DISPLAYED 65 (London 3d ed. 1769) (discussing commerce with Indians in Canada to mean trade); Letter from Governor Franklin

commerce or of Indian trade was generally understood to refer to legal structures by which lawmakers governed the conduct of the merchants engaged in the Indian trade, the nature of the goods they sold, the prices charged, and similar matters.[98] (Examples appear in the footnote.[99]) This is the same sort of subject-matter one encounters in other kinds of eighteenth-century commercial regulation, adjusted somewhat to address problems specific to the Indian trade.[100] I have been able to find virtually no clear[101] evidence from the Founding Era that users of English varied the meaning of "commerce" among the Indian, interstate, and foreign contexts.

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to Benjamin Franklin (Dec. 17, 1765), *reprinted in* 10 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 681-82 (speaking of "commercial Advantages" of traders having free access to Indian country); 1 EDWARD LONG, THE HISTORY OF JAMAICA 333-34 (London 1774) (discussing various trade advantages of the island of Ruatan [now Roatán], including the benefit to "profitable commerce with the Indian tribes"); A MERCHANT OF LONDON, THE TRUE INTEREST OF GREAT BRITAIN WITH RESPECT TO HER AMERICAN COLONIES STATED AND IMPARTIALLY CONSIDERED 26-27 (London 1766) (using "trade" and "commerce" in the Indian context and generally); 1 MALACHY POSTLETHWAYT, GREAT-BRITAIN'S COMMERCIAL INTEREST 504 (London 2d ed. 1759) (using the phrase "commerce with the Indians" to mean trade with the Indians); 5 T. SMOLLETT, CONTINUATION OF THE COMPLETE HISTORY OF ENGLAND 277 (London 1765) ("Lastly, every Indian trader was to take out a license from the respective governors for carrying on commerce with the Indians."); HENRY TIMBERLAKE, THE MEMOIRS OF LIEUT. HENRY TIMBERLAKE 62-63 (London 1765) (using, with respect to the Indians, "trade" and "commerce" interchangeably; M. DE VATTEL, THE LAW OF NATIONS 226 (Dublin 1787) (using, in an English translation, the phrase "commerce with the Indians" in a general discussion of trade); *see also* GRENVILLE, *supra* note 2, at 20 (discussing how licensing of traders is necessary to regulate "commerce" and the "Indian trade").

98. *See infra* Part II.B.2. (discussing such schemes).

99. *See* Letter from the Earl of Hillsborough to Superintendent Stuart (Jul. 3, 1771), *reprinted in* 14 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 316 (arguing that the colonial assemblies should regulate the "Indian Commerce"); Letter from Governor Franklin to the Earl of Hillsborough (Jan. 14, 1771), *reprinted in* 10 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 691 (using interchangeably the terms "trade" and "commerce" with the Indians in discussing claimed need for regulation); 5 VOTES AND PROCEEDINGS OF THE HOUSE OF REPRESENTATIVES OF THE PROVINCE OF PENNSYLVANIA 221 (Philadelphia 1775) (calling the "*Indian* Commerce of the Province" "a most important Branch of the [total] Trade thereof"); 2 THE POLITICAL AND COMMERCIAL WORKS OF CHARLES D'AVENANT 137 (London Charles Whitworth ed., 1771) ("[T]his [Indian] Trade cannot be preserved by an alliance and treaty of commerce with the Indians"). *Compare* Letter from Superintendent Stuart to the Earl of Hillsborough (Apr. 27, 1771), *reprinted in* 14 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 315-16 (complaining of the "want of Regulation among the Indian Traders" and "merchants engaged in the Indian Trade"), *with* Letter from Earl of Hillsborough to Superintendent Stuart (Jul. 3, 1771), *reprinted in* 14 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 316-17 (acknowledging, apparently in response, "the want of a proper regulation for the Indian Commerce").

100. For example, commercial regulations designed to prevent defrauding the Indians had to deal with the problem of alcohol to a greater extent than did regulations to prevent fraud against foreign nations. Regulation of trade with Europe would have to address the validity of commercial paper, which was not used widely among Indians. And so forth.

101. "Clear" because, as invariably occurs, some passages are ambiguous. For example, one historical work seemed to use "commerce" to mean "communication," although the passage referred also to obtaining plate of precious metal, which gave it an economic flavor. 1 WILLIAM DAMPIER, A NEW VOYAGE ROUND THE WORLD 272 (London 5th ed. 1703) (stating that a sea captain elected to remain in a particular location partly to "get a Commerce with the *Indians* there" so as to make a discovery; but also "by their Assistance to try for some of the Plate of *New Mexico*"). An additional problem with this passage is that it was published too early to be considered within the Founding Era. Still another is that the author writes in a historical rather than a political or official context, where "commerce with the Indians" virtually *always* referred to trade.

Thus, just a few months before the Constitution was drafted, a committee of the Confederation Congress employed the phrase "commerce with the Indians" to mean "trade with the Indians," when it approved instructions to its superintendents of Indian affairs.[102] (Among the members of the committee were James Madison and William Samuel Johnson,[103] both subsequently delegates to the federal convention and leading ratification figures.[104])

When eighteenth-century English speakers wished to describe interaction with the Indians of all kinds, they referred not to Indian commerce but to Indian "affairs." Contemporaneous dictionaries show how different were the meanings of "commerce" and "affairs." The first definition of "commerce" in Francis Allen's 1765 dictionary was "the exchange of commodities." The first definition of "affair" was "[s]omething done or to be done."[105] Samuel Johnson's dictionary defined "commerce" merely as "[e]xchange of one thing for another; trade; traffick."[106] It described "affair" as "[b]usiness; something to be managed or transacted."[107] The 1783 edition of Nathan Bailey's dictionary defined "commerce" as "trade or traffic; also converse, correspondence," but it defined "affair" as "business, concern, matter, thing."[108]

Pre-constitutional congressional documents accordingly treated "affairs" as a much broader category than trade or commerce. A 1786 congressional committee report proposed reorganization of the Department of Indian Affairs. The members of the committee were all leading Founders: Charles Pinckney, James Monroe, and Rufus King.[109] Their report showed the department's responsibilities as including military measures, diplomacy, and other aspects of foreign relations, as well as trade.[110]

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102. *Report of Committee on Indian Affairs*, 32 J. CONT'L CONG. 66, 68 (Feb. 20, 1787) (reciting that "the commerce with the Indians will be an object of importance," then immediately proceeding to discuss policy toward trade and traders). The form for these instructions can be found at WAR-OFFICE OF THE UNITED STATES, INSTRUCTIONS TO SUPERINTENDENT OF INDIAN AFFAIRS FOR THE DEPARTMENT (1787), *available at* Early American Imprints: Series I, 1639-1800 (Readex Sept. 14, 1995); s*ee* PRUCHA, *supra* note 2, at 46-47 (discussing the congressional ordinance and the instructions).

103. 32 J. CONT'L CONG. 66, 66 (Feb. 20, 1787).

104. *See infra* Part IV.E. (discussing Johnson).

105. ALLEN, DICTIONARY, *supra* note 2 (unpaginated) (defining "affair" as "[s]omething done or to be done. Employment; the concerns and transactions of a nation. Circumstances, or the condition of a person" and "commerce" as "the exchange of commodities, or the buying and selling merchandize both at home and abroad; intercourse of any kind"). The last definition ("intercourse of any kind") was rarely used in the legal context. Natelson, *Commerce*, *supra* note 2, at 806-30.

106. 1 JOHNSON, DICTIONARY, *supra* note 2 (unpaginated) (defining "commerce").

107. *Id.* (defining "affair").

108. BAILEY, DICTIONARY, *supra* note 2 (unpaginated) (defining "commerce" and "affair").

109. 30 J. CONT'L. CONG. 367, 368 (Jun. 28, 1786). King and Pinckney were federal constitutional convention delegates and leading ratification figures in Massachusetts and South Carolina, respectively. James Monroe, the future President, was a moderate Anti-Federalist and floor leader of the Anti-Federalist forces at the Virginia ratifying convention. *See, e.g.*, 3 ELLIOT'S DEBATES, *supra* note 2, at 207-22 (recording one of his speeches).

110. 30 J. CONT'L. CONG. 367, 368-72 (Jun. 28, 1786).

The congressional instructions to Superintendents of Indian Affairs referred to earlier[111] clearly distinguished "commerce with the Indians" from other, sometimes overlapping, responsibilities.[112] Another 1787 congressional committee report listed within the category of Indian affairs: "making war and peace, purchasing certain tracts of their lands, fixing the boundaries between them and our people, and preventing the latter settling on lands left in possession of the former."[113]

B. History Before the Articles of Confederation

1. The Jurisdictional Problem

A recurrent issue in early America was the proper division of power over Indian affairs among different levels of government. The governments involved were both central and local. The central governments were, initially, the British Crown; later the Continental and Confederation Congresses; and finally the federal government. The local governments were at first the colonies and later the states. Two types of issues were involved in allocating authority. The first was the level or levels of government that should control each aspect of Indian affairs. For example, should treaty negotiations be carried on solely by the central government, solely by the colonies/states, or by both? Which level of government should approve Indian land sales to whites? Which level of government should regulate the white traders? And so forth.

The other type of issue was the level or levels of government that should interact with each category of Indians. Indians, like other people, were different from each other. Some, even if members of tribes, were modestly integrated into the life of the colonies or states. Others were governed primarily by their tribes, but lived within colonial or state boundaries. Still others, governed primarily by their tribes, lived outside colonial or state boundaries. It was not always obvious which level of government was best suited to deal with each category.

Herein lay the difficulty: even purely local interactions might have wider consequences—negative externalities. Negative externalities suggested a need for central control. For example, during the British imperial period, the regional effects of colonial failure to properly regulate trade argued for central trade regulation by the British government.[114] On the other hand, the cost of central control sometimes exceeded the

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111. *See supra* note 102 and accompanying text.

112. 32 J. CONT'L. CONG. 66, 66-69 (Feb. 20, 1787).

113. 33 J. CONT'L. CONG. 454, 458 (Aug. 3, 1787). The membership of this committee included Melancton Smith, a moderate New York Anti-Federalist and a leading state convention spokesman. *Id.* at 455. As a result of a carefully brokered deal, Smith ultimately voted for ratification. 2 ELLIOT'S DEBATES, *supra* note 2, at 412.

114. PRUCHA, *supra* note 2, at 20-21, 27 (discussing cause and effect of failure adequately to regulate trade).

cost of negative externalities. For example, remote British colonial administration was encumbered by all sorts of practical problems,[115] which argued for regulating trade at the colonial level.[116] Consequently, the most appropriate level of government to handle a particular problem did not always appear obvious.

2. The Regulation of Commerce Before the Articles of Confederation

During the Colonial Era, the lines of jurisdiction between Crown and colonies over Indian affairs sometimes changed and often overlapped. As a general matter, regulation of commerce with the Indians was primarily a matter for the individual colonies,[117] while both Crown and colonies engaged in diplomacy with the tribes. In 1764 the Board of Trade[118] promulgated a plan to centralize in London the regulation of Indian commerce, but this plan lasted only four years.[119] In 1768 the Board of Trade formally divided authority so that London retained control over treaty talks and over issues of land titles outside any colony, while local colonial assemblies handled other governmental functions, including the regulation of commerce with the Indians.[120] Such was the division of authority when the Revolution began.

Before the Revolution, most of the colonies adopted regulations governing the Indian trade.[121] The perceived need for these regulations

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115. *See infra* Part II.B.2., particularly note 117.

116. Natelson, *Commerce*, *supra* note 2, at 841-45 (discussing the Founders' decision to leave to the states alone some powers, even while understanding that the exercise of those powers would have consequences beyond state boundaries).

117. PRUCHA, *supra* note 2, at 21 ("[M]anagement of the trade remained to a great extent in colonial hands.").

118. The Privy Council was the agency ultimately responsible for American affairs. Until 1768, it administered the colonies through the Secretary of State for the Southern Department. Thereafter it operated through a new official, the Secretary of State for American Affairs. The Earl of Hillsborough served as Secretary of State for American Affairs until 1772, when he was succeeded by Lord Dartmouth, who held the office until 1775.

At all times, the relevant secretary of state was advised by the Board of Trade and Plantations, consisting of sixteen members, eight active and eight honorary. At various times in the colonial period, the Board was relatively more or less powerful than other decision makers. Responsibility for colonial decision making was always fractured among these and other agencies, a fact that frequently aggravated British-colonial relations. *See* ESMOND WRIGHT, FABRIC OF FREEDOM 1763-1800, at 27-30 (rev. ed. 1978).

119. PRUCHA, *supra* note 2, at 26 (discussing the content and eventual fate of the Plan of 1764).

120. Letter from Earl of Hillsborough to Governor Tryon (Apr. 15, 1768), *reprinted in* 14 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 265-66 (outlining the division of authority); Letter from Governor Bull to the Earl of Hillsborough (Aug. 16, 1768), *reprinted in* 14 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 268-69 (stating that the issue of Indian trade regulation was postponed until the next session of the colonial legislature); Letter from Superintendent Stuart to Governor Tryon (Sept. 15, 1768), *reprinted in* 14 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 270-71 (explaining further the division of authority); *see also* PRUCHA, *supra* note 2, at 26-27 (discussing the plan's withdrawal).

121. Following are a few examples set forth by jurisdiction. Most states had multiple laws on the subject. Law to Regulate Trade with the Indians, GA. (1735), *reprinted in* 16 EARLY AMERICAN

arose primarily from abuses by merchants ("traders") dealing with the Indians. Abuses included fraud in the sales of goods, exorbitant prices for goods, use of liquor to acquire goods and land at unfairly low prices, extortion, trading in stolen goods, gun-running, and physical invasion of Indian territory.[122] Such conduct by white merchants sometimes provoked Indian retaliation.[123]

The most assiduous regulatory experimentation was conducted by South Carolina, which adopted, amended, and extended its Indian trade statutes many times.[124] By 1751, its code of regulations was the most extensive among North American colonies.[125]

South Carolina governed Indian commerce in several different ways. Some regulations were directed at the identity of those carrying

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INDIAN DOCUMENTS, *supra* note 2, at 363; Law to Regulate Trade With the Eastern Indians, MA. (1753), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 200; Law to Prevent Unlicensed Trade With Indians, N.H. (1713), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 232; Law to Regulate Trade in Liquor with Indians, N.J. (1682), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 666; Law to Regulate the Indian Trade, N.Y. (1742), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 618; Law to Regulate Trade with the Cherokees, N.C. (1778), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 74; Law to Regulate Trade, N.C. (1757), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 55 (reproducing a pre-1768 statute); Law to Regulate the Indian Trade, PA. (1758), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 764; Law to Regulate Indian Trade, VA. (1714), *reprinted in* 15 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 133; Law to Regulate Indian Trade, VA. (1765), *reprinted in* 15 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 216; Law to Appoint Commissions for the Indian Trade, VA. (1769) *reprinted in* 15 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 224 (reproducing law passed in response to British decision to devolve trade regulation to the colonies).

122. *See, e.g.*, PRUCHA, *supra* note 2, at 18-20; s*ee also* Letter from Earl of Hillsborough to Governor Tryon (Apr. 15, 1768), *reprinted in* 14 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 265-66 (complaining of "atrocious Frauds and Abuses" against the Indians); Letter from Cameron to Superintendent Stuart (Oct. 11, 1773), *reprinted in* 14 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 334-36 (complaining of merchants trading rum for stolen horses and stating need to "enforce the Old Regulations"); Letter from Superintendent Stuart to the Earl of Dartmouth (Jan. 3, 1775), *reprinted in* 14 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 359 (complaining of the practice of getting land titles for presents or liquor, and of the weakness of colonial regulation); Letter from William Johnson to Thomas Gage (Nov. 18, 1772), *reprinted in* 10 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 600-02 (complaining of traders' use of liquor).

123. PRUCHA, *supra* note 2, at 20; s*ee also* GRENVILLE, *supra* note 2, at 19 (referring to the tendency of abuses to raise animosity among the Indians).

124. The numerous South Carolina statutes on the subject are set forth in 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 112 (1691 statute); *id.* at 128 (1703 statute); *id.* at 133 (1706 statute); *id.* at 136 (1707 statute—a sweeping measure); *id.* at 153 (a 1711 statute regulating merchants from other colonies); *id.* at 193 (1716 statute); *id.* at 197 (a 1716 statute introducing rules preventing evasion through the use of agents and a seizure remedy); *id.* at 214 (a sweeping 1719 statute); *id.* at 230-33 (a 1721 statute punishing, *inter alia,* extortion of Indians); *id.* at 235 (1722 statute); *id.* at 252 (another 1722 statute); *id.* at 256 (a 1723 statute); *id.* at 263 (a 1731 statute); *id.* at 271 (a 1733 statute); *id.* at 276 (a 1734 statute); *id.* at 279 (a 1736 statute); *id.* at 287 (a 1739 statute); *id.* at 330 (a 1751 ordinance); and *id.* at 342 (a 1762 law regulating trade with the Cherokees); *see* PRUCHA, *supra* note 2, at 19 n.29 (commending and discussing the South Carolina scheme and its relatively effective enforcement).

125. *See* Ordinance to Regulate Indian Affairs, S.C. (1751), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 330-31.

on that commerce. A trader had to be licensed.[126] He had to be of good moral character and post a bond.[127] A potential applicant's name was posted publicly before applying, so anyone with objections would have an opportunity to raise them.[128] Traders were restricted as to whom they could employ as their agents.[129] The names of potential agents had to be disclosed.[130] Traders who violated these rules by, for instance, trading without a license, were subject to substantial penalties.[131]

In addition, South Carolina law specified where trade could be carried on. A trader's license stated where he was authorized to trade, and he could not work elsewhere.[132] It was illegal to bring natives into white settlements without prior permission.[133] It was illegal for whites to travel into Indian country without prior permission.[134]

South Carolina also laid down rules for the conduct of merchants engaged in Indian commerce. Fraud, duress, and other bad conduct was interdicted and punished.[135] Traders were expected to cooperate in enforcement of the law.[136] They were not to discuss politics with Indians.[137] Traders' goods sometimes were subject to price controls,[138] and usually could not be sold on credit.[139]

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126. Regulations for Indian Affairs, S.C. (1751), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 331.

127. *Id.* at 332.

128. *Id.*

129. *Id.* at 333-34.

130. *Id.* at 333.

131. *Id.* at 331 (providing for fine of £200), 334 (providing for forfeiture of bond).

132. *Id.* at 333 (limiting traders to locations they are licensed for), 334 (stating that the commissioner is to apportion traders among towns); Ordinance for Regulating the Cherokee Trade, S.C. (1751), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 335 (limiting traders to locations they are licensed for).

133. Regulations for Indian Affairs, S.C. (1751), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 334.

134. *See, e.g.*, Law to Preserve Peace and Promote Trade with Indians art. I, S.C. (1739), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 287 (banning unlicensed persons from Indian country).

135. Ordinance for Regulating the Cherokee Trade, S.C. (1751), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 335 (requiring traders to "behave justly and honestly toward the Indians" and banning seizure of Indian goods).

136. Regulations for Indian Affairs, S.C. (1751), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 332. In addition, merchants were required "to keep a Journal of all remarkable Occurrences which they are to deliver to the Commissioner to be laid before the General Assembly," *id.* at 333, and to notify the authorities of "any Matter or Thing in the Indian Country that may affect the Peace and Tranquility of this Government . . . ." *Id.* Merchants who witnessed liquor inventory in the hands of other merchants were expected to seize it. Ordinance for Regulating the Cherokee Trade, S.C. (1751), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 336.

137. Regulations for Indian Affairs, S.C. (1751), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 333.

138. *Id.* (stating traders must honor any price-control stipulations in a forthcoming Cherokee treaty).

139. *Id.* at 332. Merchants also were required to disclose to Indians that any debts Indians contracted were unenforceable. *Id.* at 333.

Other regulations focused on the inventory for trade. The items given to and received from the Indians had to be disclosed to the authorities.[140] Traffic in liquor—and sometimes in other goods[141]—was prohibited or strictly limited.[142] Goods had to meet quality standards.[143] Traders had to employ honest weights and measures.[144]

South Carolina law erected an administrative apparatus. Commissioners were appointed and empowered to enforce laws and to judge disputes between traders and between traders and Indians.[145] Commissioners were required to take an oath,[146] to keep adequate records,[147] and to refuse or surrender gifts.[148] The legislature authorized license fees to pay for this system.[149]

Apart from its thoroughness, the South Carolina scheme was not unusual. Most of the provisions listed above appeared in the laws of other jurisdictions.[150] They also appeared in treaties.[151] In other words, this was the sort of scheme the founding generation envisioned when it granted a federal power to "Regulate Commerce . . . with the Indian Tribes."[152]

Experience with commercial regulation at the colonial level (and, later, the state level) was fundamentally unsatisfactory.[153] Most jurisdictions did not have schemes as sweeping as those of South Carolina, and the laws that were enacted were not always enforced efficiently. During

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140. *Id.*

141. *E.g.*, Law to Regulate Trade with Indians, S.C. (1707), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 137 (barring sale of firearms to enemy Indians); *id.* at 137-38 (barring sale of free Indians as slaves); *see also* PRUCHA, *supra* note 2, at 20 (discussing restrictions on sale of rum).

142. *E.g.*, Ordinance for Regulating the Cherokee Trade, S.C. (1751), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 336 (authorizing seizure of liquor).

143. *Id.* at 335 (regulating quality of hides).

144. *Id*.

145. Regulations for Indian Affairs, S.C. (1751), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 332.

146. *Id.* at 331.

147. *Id.* at 331-32.

148. *Id.* at 332.

149. *E.g.*, *id.* (£4 license fee).

150. *See, e.g.*, Law to Regulate the Indian Trade, PA. (1758), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 765-66, 768-69 (appointing commissioners of Indian affairs, empowering them to appoint a place for trade, barring them from trading for their own account, authorizing price controls, barring sale of "spirituous liquors," and providing penalties for breach); *see also* PRUCHA, *supra* note 2, at 19-20 (generalizing about colonial regulatory schemes).

151. *E.g.*, Treaty with the Delawares art. V, Sept. 17, 1778, 7 Stat. 13, *reprinted in* KAPPLER, *supra* note 2, at 4:

> [A]s far as the United States may have it in their power, by a well-regulated trade, under the conduct of an intelligent, candid agent, with an adequate salary one more influenced by the love of his country and a constant attention to the duties of his department by promoting the common interest, than the sinister purposes of converting and binding all the duties of his office to his private emolument.

152. U.S. CONST. art. I, § 8, cl. 3.

153. PRUCHA, *supra* note 2, at 20-21 (discussing failure of colonial regulatory efforts).

the Colonial Era, the British superintendents of Indian affairs complained bitterly about abuses in Indian trade and about what they saw as the unwillingness of colonial officials to correct the problems.[154] Native leaders also frequently complained, urging British officials to further limit trading posts to fixed locations, to tighten trader licensing, and to invalidate land titles received without government authorization.[155]

3. Other Colonial and Early State Governance of Indian Affairs

Throughout the Colonial and Revolutionary period, colonies and states frequently entered into treaties with Indians within their territorial limits.[156] New York even appointed treaty commissioners after the Constitution had been issued and ratified.[157] Less well known[158] is the fact that colonies (and later states) regularly exercised, or attempted to exercise, police power over those Native Americans, tribal and non-tribal, who lived within their borders. This power was in accordance with English case authority, since in 1693, the Court of King's Bench had ruled in *Blankard v. Galdy*[159] that foreign peoples within British domains might initially keep their own laws, but that British law applied once it was "declared so by the conqueror or his successors."[160] During this period,

154. *See, e.g.*, Letter from Superintendent John Stuart to the Earl of Hillsborough (Apr. 27, 1771), *reprinted in* 14 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 315-16 (complaining of "the want of Regulation among the Indian Traders" and "merchants engaged in the Indian Trade"); Royal Instructions to Governor William Campbell of South Carolina (Aug. 5, 1774), *reprinted in* 14 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 345-46 (complaining of abuses and requiring a regulation of the Indian trade); Letter from Superintendent John Stuart to the Earl of Dartmouth (Jan. 3, 1775), *reprinted in* 14 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 359 (complaining of the practice of getting land titles for presents or liquor and of the weakness of colonial regulation); Letter from William Johnson to Thomas Gage (Nov. 18, 1772), *reprinted in* 10 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 600-01 (complaining of abuses and "total want of any regulations").

155. *E.g.*, Proceedings with the Six Nations (1773), *reprinted in* 10 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 605, 607 (recording Indian complaints of a range of abuses and proposals for fixed trading posts and proper regulation); Six Nations Congress (1774), *reprinted in* 10 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 618 (reporting Indian complaints about invasion of hunting grounds by traders and trafficking in liquor).

156. The numerous colonial and state treaties are scattered among the volumes of EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2. *See, e.g.*, Lancaster Treaty, 5 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 51 (reproducing negotiations and 1744 treaty between the colonies of Maryland and Virginia and the Six Nations).

157. *An Act for appointing Commissioners to hold Treaties with the Indians, within this state*, L. N.Y. c. XLVII (Mar. 1, 1788); *An Act to continue and amend an Act, entitled An Act for appointing Commissioners to hold Treaties with the Indians in this State*, L. N.Y. c. XXI (Feb. 12, 1789).

158. Most commentators seem to be unaware of this police power. *See, e.g.*, Savage, *supra* note 2, at 97 (claiming the states had no power over the Indians during the Confederation Era); Fletcher, *Same-Sex Marriage*, *supra* note 2, at 72 ("[T]he Founders wrote that [Indian Commerce] clause with the understanding that Indian tribes would remain outside the borders of the United States, with no serious discussion or expectation that the tribes would survive being surrounded by the states.").

159. (K.B. 1693) 2 Salk. 411, 91 Eng. Rep. 356.

160. *Id.* (*Blankard* arose in Jamaica, said by the court to have been "conquered from the Indians and Spaniards"); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *105 ("But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the antient [sic] laws of the country remain, unless such

the colonies and states had "declared so" in numerous statutes. Many of these statutes remained on the books right through the Ratification Era.

The best known of these measures were laws and state constitutional provisions curbing land sales from Indians to whites.[161] These measures were directed mostly at whites, but had obvious effects on Indians as well. For example, such measures could result in the voiding of perfectly reasonable deed transfers by individual Indians or by tribes.[162] In addition, numerous statutes were directed specifically at conduct by Indians. Some were criminal, others civil, governing matters as harmful as theft or as beneficial as conveyancing.[163] Further, colonial govern-

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as are against the law of God, as in the case of an infidel country. Our American plantations are principally of this latter sort."). Calvin's Case (K.B. 1608) 7 Co. Rep. 1a, 77 Eng. Rep. 377, on which Blackstone relied, actually suggested that for non-Christian countries (such as those seized from the Indians), it was not even necessary for the conqueror to declare abrogation of former laws. 7 Co. Rep. at 17b, 77 Eng. Rep. at 398. A case, unreported and not decided by a regular court, is sometimes cited for the contrary position. It is discussed *infra* Part IV.E.

161. *See, e.g.*, An Act Concerning Purchasers of Native Rights to Land, CONN. ACTS AND LAWS (1786) (adopted 1717); An Act for empowering certain Persons to examine the Sales that have been made by the *Moheaunnuk* Tribe of Indians, and for regulating the future Sales and Leases of all lands from the said Tribe of Indians, 1 PERPETUAL LAWS OF MASS. 124 (1784); An Act for regulating the purchasing of land from the Indians, L. N.J. 1 (1703); An Act to punish Infractions of that Article of the Constitution of this State, prohibiting Purchases of Lands from the Indians, without the Authority and Consent of the Legislature; and more effectually to provide against Infractions on the unappropriated Lands of this State, L. N.Y. 366 c. LXXXV (1788); An Act to restrain and prevent the purchasing Lands from Indians, PUB. L. S.C., 160-61 (1790) (adopted 1739); Law to Regulate the Purchases of Indian Lands, VA. (1779), *reprinted in* 15 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 233. *See also* GRENVILLE, *supra* note 2, at 19 (discussing the need for such measures).

162. *See, e.g.*, Law to Regulate the Purchases of Indian Lands, VA. (1779), *reprinted in* 15 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 233 (providing that Indian deeds to certain lands are "utterly void and of no effect").

163. Here are a few additional examples of colony and state police power laws over Indians: An Act for the well-ordering and governing the Indians in this State; and securing their Interest, CONN. ACTS AND LAWS 101-02 (1784) (adopted 1702) (regulating various crimes and land transactions by Indians); A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 57 (1968) (stating that in Maryland, Nanticoke Indians agreed by treaty in 1687 "that if any Indian commits an offence [sic] against the English he should be tryed [sic] by the English law"); Law to Confine Free Indians to Three Towns, MA. (1681), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 140; An Act for the better regulating of the Indian, Mulatto and Negro Proprietors and Inhabitants of the Plantation called Marshpee, 2 PERPETUAL LAWS OF MASS. 63 (1789) (adopted 1790) (setting up a board of overseers to govern all affairs of the settlement, and establishing various other regulations); Law to Regulate Indian Affairs, N.J. (1757), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 707-09 (regulating contracts by, and debts of, Indians and methods of land conveyancing); Law to Reward the Killing of Wolves and Panthers, N.Y. (1742), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 619 (extending reward system to Indians, free blacks, and slaves); Law to Punish Indians for Drunkenness, PLYMOUTH L. (1662), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 27; Law to Punish Indians for Stealing Hogs, PLYMOUTH L. 218, 218 (1666), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 29; Law to Allow Indians to be Witnesses in Court, PLYMOUTH L. (1674), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 41; Law to Punish Idleness and Stealing by Indians, PLYMOUTH L. (1674), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 41; Laws to Govern Indians, PLYMOUTH L. (1685), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 56-60; An Act to prevent the Stealing and Taking away of Boats and Canoes, PUB. L. S.C., 2 (1790) (adopted 1695) (regulating theft by Indians); *id.* at 166 (specifying how testimony by Indians is to be received), 167 (regulating various thefts or damage by Indians, among others); Law to Punish Slaves and Regulate Free Indians, VA. (1748), *reprinted in* 15 EARLY

ments sometimes imposed fines or tort liability on Native chieftains for injury caused by themselves or by other Indians at their direction.[164] Today, many people might believe that some or most of these assertions of police power were unjust, unenforceable, or both. Perhaps they were. But they demonstrate that the colonies and states did exercise authority over Native Americans within their borders. At least two significant Founders, Thomas Jefferson[165] and William Samuel Johnson,[166] are on record as alluding specifically to this authority.

4. The Drafting of the Articles of Confederation

When Americans began to consider a common government other than the Crown, they had to weigh the same issues of how to divide central and local control over Indian affairs. These were not easy questions. The Indian tribes were (then as now[167]) *sui generis*—neither wholly foreign nor wholly part of the body politic, so foreign and domestic affairs precedents offered no obvious rule for dividing jurisdiction. There certainly was not, as some writers have claimed, any emerging consensus in favor of central over local control.[168]

AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 180 (specifying procedures and punishments in response to a variety of crimes by Indians as well as slaves and mulattos); Law to Allow Nottoways to Lease Their Lands, VA. (1772), *reprinted in* 15 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 226.

164. United Colonies Fine Narragansetts for Abusing Southertown Settlers (1662), *reprinted in* 19 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 374.

165. 6 J. CONT'L CONG. 1077, 1077-78 (July 26, 1776) (referring to the fact that Indians within states were subject to state laws "in some degree").

166. *See infra* Part IV.E. (discussing Johnson). Johnson alluded to colonial laws applying to Indians, "which subject them to Punishment for Immoralities, and crimes, and enact various regulations with respect to them." SMITH, *supra* note 2, at 434 n.109.

167. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) (discussing the unique nature of Indian tribes).

168. The claim appears in Clinton, *Dormant*, *supra* note 2, at 1082; PRUCHA, *supra* note 2, at 37. However, each of these authors is honest enough to admit the evidence to the contrary, so each has to struggle mightily to preserve the claim of an emerging consensus in favor of central over local control. For example, Professor Clinton reports copious evidence that there was no such consensus. *See, e.g.*, Clinton, *Dormant*, *supra* note 2, at 1082-84, 1086 (describing how colonial governors of Massachusetts, New York, and Pennsylvania resisted efforts at central control); *id.* at 1088-89, 1094-95 (showing how British efforts at centralized control helped bring on the Revolutionary War); *id.* at 1094-95 (admitting that the Board of Trade's plans for more centralized control were abandoned partly because of colonial opposition); *id.* at 1102 (describing how those who favored centralized control through the Articles of Confederation had to compromise by conceding broad authority over Indian affairs to the states); *id.* at 1105 ("During the confederation period, the Continental Congress continually struggled with some of the states over the scope of each government's respective power under the Indian affairs clause of the Articles of Confederation."). For examples of Clinton's struggle to preserve the claim of consensus, *see, e.g.*, *id.* at 1110 (characterizing a defeat for centralizing proposal sponsored in Congress by Rhode Island as "significant support"); *id.* at 1112-13 (characterizing similarly another defeated proposal); *id.* at 1123 (claiming that a compromise requiring the congressional superintendents to "act in conjunction with the Authority" of the states was a victory for centralization).

Professor Prucha similarly reports events that show clearly the absence of a consensus in favor of centralization. *See, e.g.*, PRUCHA, *supra* note 2, at 37-38 (describing the debate over federal versus state control during the drafting of the Articles of Confederation); *id.* at 44-45 (describing New York's challenge to the authority of the Confederation Congress); *id.* at 47 (describing Georgia's

In 1754, Benjamin Franklin drafted a proposed Albany Plan of Union. It was similar to all succeeding proposals for American unity in that it divided responsibility over Indian affairs between central and local authorities, but it reflected Franklin's view that central governance should predominate. The Albany Plan would have granted to the central authority control over those Indian treaties "in which the general interest of the Colonies may be concerned,"[169] leaving, presumably, Indian affairs with only local impact in the hands of individual colonies. The central colonial government also would be empowered to make "peace or declare war with Indian nations,"[170] and to promulgate "such laws as [it] judge[s] necessary for regulating all Indian trade."[171] The central government would have been empowered to acquire Indian lands, but only outside the boundaries of the colonies.[172] Colonial police power apparently would have remained largely intact, but subject to being overridden by central trade regulation.

On July 21, 1775, after the Revolutionary War had begun but before Independence had been declared, Franklin renewed his plea for American unity. That day, he presented to the Continental Congress his own "articles of confederation."[173] This draft also embodied his view that central control over Indian affairs should predominate over local control. It specified that colonies could wage offensive war against the Indians only with the consent of Congress,[174] and would have empowered Congress to appoint commissioners to regulate the Indian trade.[175] It would

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challenge); *id.* at 49 (recording a challenge, apparently successful, by North Carolina)—all of which contradict his generalization. In the teeth of such evidence, though, Professor Prucha inserted generalizations such as, "In the end, the overall necessities of [central Indian control] prevailed," *id.* at 37, and "[t]he centrifugal force of state sovereignty and state pride was never strong enough to destroy the centralization of Indian control," *id.* at 49. He does this even when countervailing material appears in close proximity on his own pages. *See, e.g.*, *id.* at 37-38 (claiming that "the overall necessities of [central Indian control] prevailed," while describing on the very next page the large reservation of control to the states under the Articles of Confederation).

169. ALBANY PLAN OF UNION, art. X (1754).

170. *Id.* at art. XI.

171. *Id.*

172. *Id.* at art. XII.

173. 2 J. CONT'L CONG. 194, 195 (July 21, 1775).

174. *Id.* at 197 (ART. X. "No Colony shall engage in an offensive War with any Nation of Indians without the Consent of the Congress, or great Council above mentioned, who are first to consider the Justice and Necessity of such War.").

175. *Id.* at 198:

> ART. XI. A perpetual Alliance offensive and defensive, is to be enter'd into as soon as may be with the Six Nations; their Limits to be ascertain'd and secur'd to them; their Land not to be encroach'd on, nor any private or Colony Purchases made of them hereafter to be held good; nor any Contract for Lands to be made but between the Great Council of the Indians at Onondaga and the General Congress. The Boundaries and Lands of all the other Indians shall also be ascertain'd and secur'd to them in the same manner; and Persons appointed to reside among them in proper Districts, who shall take care to prevent Injustice in the Trade with them, and be enabled at our general Expence by occasional small Supplies, to relieve their personal Wants and Distresses. And all Purchases from them shall be by the ~~General~~ Congress for the General Advantage and Benefit of the United Colonies.

have made Congress the sole agent for purchase of Indian lands, whether within or outside the boundaries of individual colonies.[176]

Franklin's proposal was not acted on, but the following November Congress did empower a committee to draft regulations for the Indian trade.[177] In June of the succeeding year, when Congress adopted a resolution calling for independence, it also authorized preparation of a plan of "confederation."[178]

The committee that prepared the first official draft of the Articles was chaired by John Dickinson, and the draft is in his handwriting.[179] This draft was reported to Congress on July 12, 1776.[180] Its Indian affairs provisions were in some ways more nationalist[181] than the Franklin draft and in some ways less. As in the Franklin proposal, states were not to wage offensive war against the Indians except with congressional authorization.[182] Dickinson's version granted Congress the exclusive power to acquire land from the Indians, but—unlike Franklin's proposal—only outside state boundaries, once those boundaries had been established.[183] The Dickinson version added a clause empowering Congress to "have the sole and exclusive Right and Power of . . . Regulating the Trade, and managing all Affairs with the Indians."[184] Despite the breadth of this language, Dickinson himself did not think it necessarily

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176. *Id.*

177. 3 J. CONT'L CONG. 364, 366 (Nov. 23, 1775).

178. 5 J. CONT'L CONG. 432, 433 (June 12, 1776).

179. 5 J. CONT'L CONG. 545, 546 n.1 (July 12, 1776).

180. *Id.* at 546.

181. Historians writing of the Founding Era generally adopt the term "nationalist" to refer to ideas and persons favoring a strong central government.

182.

> ART. XIII. No Colony or Colonies shall engage in any War without the previous Consent of the United States assembled, unless such Colony or Colonies be actually invaded by Enemies, or shall have received certain Advice of a Resolution being formed by some Nations of Indians to invade such Colony or Colonies, and the Danger is so imminent, as not to admit of a Delay, till the other Colonies can be consulted.

Id. at 549.

183.

> Art. XIV. A perpetual Alliance, offensive and defensive, is to be entered into by the United States assembled as soon as may be, with the Six Nations, and all other neighbouring Nations of Indians; their Limits to be ascertained, their Lands to be secured to them, and not encroached on; no Purchases of Lands, hereafter to be made of the Indians by Colonies or private Persons before the Limits of the Colonies are ascertained, to be valid: *All Purchases of Lands not included within those Limits, where ascertained, to be made by Contracts between the United States assembled, or by Persons for that Purpose authorized by them,* and the great Councils of the Indians, for the general Benefit of all the United Colonies (emphasis added and footnotes omitted).

Id.

184. *Id.* at 550 ("Art. XVIII. The United States assembled shall have the sole and exclusive Right and Power of . . . Regulating the ~~Indian~~ Trade, and managing all ~~Indian~~ Affairs with the Indians.").

granted Congress truly exclusive power, for he inserted a marginal note querying, "How far a Colony may interfere in Indian Affairs?"[185]

In a committee of the whole, Congress recurrently debated and refined the Articles until November 15, 1777, when Congress finally approved the Articles and sent them to the states for ratification.[186] Unfortunately, most of the congressional debates on the subject during 1776 and 1777 have not been preserved. We do know that jurisdiction over Native affairs remained a controversial point.[187] John Adams' notes tell us that in July 1776 James Wilson of Pennsylvania, among others, argued eloquently for exclusive congressional jurisdiction over all Indian affairs, but that Wilson and his allies lost this point on the floor.[188] Edward Rutledge and Thomas Lynch, Jr., whose state of South Carolina had, as we have seen, made a heavy investment in regulating the Indian trade,[189] "oppose[d] giving the power of regulating the trade and managing all affairs of the Indians to Congress."[190] Thomas Jefferson of Virginia pointed out that Indians who lived within state boundaries already were "subject to [state] laws in some degree."[191] He proposed that Congress control only Indian land sales outside state boundaries.[192] Thus, Congress was wrestling with both kinds of jurisdictional questions:[193] How should the subject matter of Indian affairs be divided between states and Confederation? And, assuming Congress controlled affairs with Indians outside state boundaries, which levels of government should regulate affairs with Indians within state boundaries?

On August 20, 1776, the committee of the whole presented to Congress a revised draft of the Articles. This draft continued the ban on states engaging in offensive war against the Natives[194] and dropped the specific reference to land sales. It provided that Congress would have "the sole and exclusive right and power of . . . regulating the trade, and

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185. *Id.* at 549 n.2.

186. *E.g.*, 5 J. CONT'L CONG. 598, 600, 603-04, 608-09, 612, 615 (July 22-29, 1787) (referring to congressional debate over the Articles of Confederation; there are many other references).

187. PRUCHA, *supra* note 2, at 37 ("Congressional control of Indian affairs, however, was not accepted by all, and the debate on July 26 [1776] indicated a decided divergence of views."); *id.* at 38 (noting of a draft of the Articles limiting congressional control to matters involving "Indians, not members of any of the States" and that "[e]ven this did not satisfy the advocates of state control").

188. 6 J. CONT'L CONG. 1077, 1077-79 (July 26, 1776).

189. *See supra* notes 124-150 and accompanying text. *See also id.* at 1078 (quoting Rutledge and Lynch on South Carolina's investment in Indian affairs).

190. *Id.* at 1077.

191. *Id.* at 1077-78.

192. 6 J. CONT'L CONG. 1076, 1076 (Jul. 25, 1776).

193. *See supra* Part II.B.1.

194. 5 J. CONT'L CONG 672, 679 (Aug. 20, 1776):

> ART. XI. No State shall engage in any war without the consent of the United States in Congress Assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent, as not to admit of a delay, till the other States can be consulted.

managing all affairs with the Indians, not members of any of the States."[195] As contemporaneous dictionaries make clear, the requirement that an Indian be a "member" of a state meant that he had to be integrated into the body-politic as a citizen—or at least a taxpayer—of the state.[196] Congress was to regulate all affairs with Indians outside of state boundaries. It also was to regulate affairs with Indians within state boundaries if they lived subject to their tribes, rather than as taxpayers or citizens. "Indians not paying taxes," whom another part of the Articles excluded for purposes of determining state financial contributions to Congress,[197] were presumed not to be "members" of their states. Member-Indians would remain subject to exclusive state jurisdiction under a clause providing that "[e]ach State reserves to itself the sole and exclusive regulation and government of its internal police, in all matters that shall not interfere with the articles of this Confederation."[198]

The division of power in the draft of August 20, 1776, was unsatisfactory to many because it permitted Congress to interfere with long-established state jurisdiction over affairs with tribal Natives residing within state boundaries. Accordingly, some congressional delegates offered amendments to broaden the Member-Indian exception to the Indian affairs power. One of these amendments, offered on October 27, 1777, would have restricted congressional power to affairs with Indians "not residing within the limits of any of the United States."[199] Relations with all Native Americans within state lines would have been subject to state government only. Another delegate moved that Congress be restricted to "managing all affairs relative to war and peace with all Indians not members of any particular State, and regulating the trade with such nations and tribes as are not resident within such limits wherein a particular State claims, and actually exercises jurisdiction."[200] This would have limited congressional power to diplomacy with tribal Indians (wherever located) and to commerce with Indians in those parts of the West where state land claims had not been renounced.

Neither of these proposals passed, but they showed that some delegates were unhappy with the idea of Congress regulating relations with the Natives within state boundaries. On October 28, the delegates hit upon a formula the majority could agree to. It retained the "Member-Indian" exception to federal jurisdiction, and added another: "provided,

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195. *Id.* at 681-82.

196. ALLEN, DICTIONARY, *supra* note 2 (unpaginated) (providing as the second definition of member: "a single person belonging to a society or community"); BAILEY, DICTIONARY, *supra* note 2 (unpaginated) (stating as one definition: "a part of a body-politic, as a Member of Parliament"); JOHNSON, DICTIONARY, *supra* note 2 (unpaginated) (stating as the fourth definition: "one of a community").

197. 5 J. CONT'L CONG. 672, 677-78 (Aug. 20, 1776) (reproducing ART. IX).

198. *Id.* at 675 (reproducing ART. III).

199. 9 J. CONT'L CONG. 841, 844 (Oct. 27, 1777).

200. *Id.*

that the legislative right of any State, within its own limits be not infringed or violated."[201] This was the final change. The result was a clause that included both a sweeping grant of power to Congress—"[t]he United States, in Congress assembled, shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians" [202]—and two sweeping exceptions: "all affairs with the Indians not members of any of the States; provided that the legislative right of any State within its own limits be not infringed or violated."[203]

The exceptions were backed up by a strengthened reservation of state sovereignty in Article II: "Each state retains its sovereignty . . . and every power, jurisdiction, and right which is not by this Confederation expressly delegated to the United States."[204] The result was a clear victory for the advocates of state power. States would retain authority over "Member-Indians"—those who had been completely subject to state laws. States also could continue to exercise authority over tribal Indians within their boundaries, those whom Jefferson had described as "subject to [state] laws in some degree."[205] Congress could negotiate with tribes within state lines but would need to coordinate efforts with state officials or otherwise ensure against infringing on state "legislative right."

This jurisdictional division may be summarized as follows:

* Congress was to enjoy exclusive jurisdiction over all transactions (whether or not commercial)[206] with Indians located outside the organized limits of states—that is, either outside United States boundaries or within federal territories to be formed when states ceded their western land claims to Congress;

* The states were to retain exclusive jurisdiction over relations with Member-Indians (those who paid taxes or were citizens) within their boundaries; and

* Congress and the states were to exercise concurrent jurisdiction over transactions with tribal Indians within state boundaries, but congressional decisions would have to be in compliance with local law.[207]

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201. 9 J. CONT'L CONG. 844, 845 (Oct. 28, 1777).

202. ARTS. OF CONFED. art. IX; *see also* 9 J. CONT'L CONG. 906, 907-25 (Nov. 15, 1777) (setting forth penultimate and final versions of the Articles of Confederation. The Indian affairs language is located at 919).

203. ARTS. OF CONFED. art. IX.

204. *Id.* at art. II.

205. 6 J. CONT'L CONG. 1077, 1077-78 (July 26, 1776).

206. For the contemporaneous definition of "affairs," *see supra* notes 105-110 and accompanying text.

207. Thus, there would be some congressional power within state boundaries. *But see* PRUCHA, *supra* note 2, at 38-39 (averring that congressional laws had effect only outside state boundaries – an uncharacteristic understatement by this author of the scope of central authority).

5. Life Under the Confederation

Congress approved the Articles on November 15, 1777,[208] and the final state ratification came in March 1781.[209] Because of the Articles' odd split of state and congressional authority over Indian affairs, the potential for jurisdictional conflicts always loomed over congressional conduct in that realm. This was particularly true in western territories claimed by states and not yet ceded to the United States. For example, Congress wished to ensure that Indian land conveyances in territories ceded to the United States were valid only if approved by the relevant authority. Congress had to determine whether this meant only state authority or whether congressional ratification would suffice.[210] Eventually, Congress issued a proclamation for territory "without the limits or jurisdiction of any particular State" that barred settlers from lands claimed by the Indians and prohibited Indian land conveyances without congressional permission.[211]

Jurisdiction over the regulation of commerce was a recurrent issue. In 1778, Congress ratified a treaty with the Delawares that required that the tribe "be supplied with such articles from time to time, as far as the United States may have it in their power, by a well-regulated trade."[212] In early 1785, a treaty with the Wyandot and other northern tribes reserved for the United States trading posts and ownership of land surrounding them.[213] Later that year and in early 1786, Congress entered into the three Hopewell[214] treaties with southern tribes—the Cherokee, Choctaw and Chickasaw—and all three provided that Congress would have the sole and exclusive power of regulating trade with the Indians.[215]

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208. 9 J. CONT'L CONG. 906, 907 (Nov. 15, 1777).

209. 19 J. CONT'L CONG. 208, 213-14 (Mar. 1, 1781).

210. 18 J. CONT'L CONG. 914, 915-16 (Oct. 10, 1780) (providing in a committee report, later defeated, that Indian land titles to private parties in areas ceded by states to the general government are not valid unless approved by the state legislature, which provision was altered to "ratified by lawful authority").

211. 25 J. CONT'L CONG. 597, 602 (Sept. 22, 1783).

212. Treaty with the Delawares art. V, Sept. 17, 1778, 7 Stat. 13, *reprinted in* KAPPLER, *supra* note 2, at 4.

213. Treaty with the Wyandot art. IV, Jan. 21, 1785, 7 Stat. 16, *reprinted in* KAPPLER, *supra* note 2, at 7:

> The United States allot all the lands contained within the said lines to the Wyandot and Delaware nations, to live and to hunt on, and to such of the Ottawa nation as now live thereon; saving and reserving for the establishment of trading posts, six miles square [and several other plots] . . . which posts and the lands annexed to them, shall be to the use and under the government of the United States.

214. So called because they were signed at a plantation called Hopewell in South Carolina.

215. Treaty with the Cherokee art. IX, Nov. 28, 1785, 7 Stat. 18, *reprinted in* KAPPLER, *supra* note 2, at 10:

> For the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper.

Meanwhile, Congress was moving toward adoption of an ordinance for the regulation of the Indian trade. In 1783, one of its committees suggested that such regulations were necessary,[216] and a second committee was appointed to draft them.[217] It was not until June 1786 that the second committee proposed an ordinance for trade regulation.[218]

By that time most of the state land claims north of the Ohio River had been ceded to Congress, thereby minimizing jurisdictional disputes with states over regulation of trade with the northern tribes. However, the Cherokee, Choctaw, Chickasaw, and Creek tribes lived on land still claimed by Georgia and the Carolinas.[219] During debate on the trade ordinance, William Few of Georgia and Timothy Bloodworth of North Carolina sought to include in the ordinance a provision that it "shall not be construed to operate so as that the legislative right of any state within its own limits be infringed or violated."[220] Charles Pinckney of South Carolina (a state that was about to cede its small and dubious Western claim) and William Grayson of Virginia (which already had ceded most of its claim) managed to secure an amendment to the ordinance's preamble that emphasized congressional power rather than congressional limitations.[221] A few days later—the very date of the third reading—Few, now in team with Edward Carrington of Virginia, proposed the following addition to the measure:

> And be it further Ordained, that in all cases where transactions with any nation or tribe of Indians, shall become necessary to the purposes of this Ordinance, which cannot be done without interfering with the legislative rights of a state, the Superintendant [sic] in whose district

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Treaty with the Choctaw art. VIII, Jan. 3, 1786, 7 Stat. 21, *reprinted in* KAPPLER, *supra* note 2, at 13 (similar provision); Treaty with the Chickasaw art. VIII, Jan. 10, 1786, 7 Stat. 24, *reprinted in* KAPPLER, *supra* note 2, at 15-16 (similar provision).

216. 25 J. CONT'L CONG. 680, 690 (Oct. 15, 1783).

217. *Id.* at 693.

218. 30 J. CONT'L CONG. 367, 368 (June 28, 1786).

219. *See* THOMAS A. BAILEY, THE AMERICAN PAGEANT: A HISTORY OF THE REPUBLIC 138, 284 (5th ed. 1975) (showing the boundaries of land occupied by the Cherokees, Creeks, Chickasaw, Choctaw, and Seminoles, and the western land claims). The fifth edition was the last authored alone by the great Stanford historian. As of 1783, the boundaries of Georgia proper, which were more constricted than they are today, did not include Indian country. However, Georgia's western land claims included territory occupied by the Cherokee, Creek, Chickasaw, and Choctaw. South Carolina claimed some of Cherokee and Chickasaw lands. Within North Carolina proper and partly within North Carolina's western land claim (later Tennessee) lay the remaining Cherokee lands. North Carolina's western land claim also included a sliver of Chickasaw land.

220. 30 J. CONT. CONG. 423, 424 (July 24, 1786).

221. *Id.* at 424-25:

> And whereas the United States in Congress assembled, under the 9th of the Articles of Confederation and perpetual Union, have the sole and exclusive right and power of regulating the trade, and managing all affairs with the Indians not members of any of the States, provided that the legislative right of any State, within its own limits, be not infringed or violated.

> the same shall happen, shall act in conjunction with the Authority of such State.[222]

This amendment passed, nine states to two, and the main motion was carried.[223]

The resulting congressional trade ordinance featured terms typical of previous colonial and state schemes: it authorized appointment of superintendents for the northern and southern districts; it specified that those who wished to reside among or trade with the Indians had to receive a license and post a bond; and it required passports for travel in Indian country.[224] In February 1787, Congress approved detailed instructions for the Superintendents of Indian Affairs, outlining their responsibilities both for Indian commerce and for other matters.[225]

North Carolina officials were unhappy with the congressional treaties with Indian tribes located within its claimed territory. A 1787 set of instructions from that state's house of commons to its congressional delegation complained that the Hopewell treaties had "allotted to the [Cherokees and Chickasaws] certain Lands as their hunting Grounds which are obviously within the Jurisdiction of this State . . . and a great part of which is for a valuable Consideration sold to our Citizens, some of whom are now actually living thereon."[226] The effect was to "suppose a right in the United States to interfere with our Legislative Rights which is inadmissible."[227] An effort by North Carolina delegates John Ash and William Blount to have Congress partially repudiate the Hopewell treaties apparently got nowhere.[228]

Yet the local troubles did not go away. In July 1787—just as the federal convention was holding its closed sessions—Henry Knox, the Secretary of War, issued a thoughtful report to Congress on recurrent Indian conflicts within the Georgia and North Carolina territorial claims.[229] Knox favored congressional intervention to prevent a general war, but acknowledged that the Articles' limited Indian affairs power resulted in Congress being "attended with peculiar embarrassments" (i.e., obstacles).[230] He added, "[t]he Creeks are an independent tribe, and cannot with propriety be said to be members of the State of Georgia, yet the said State exercises legislative jurisdiction over the territory in dispute."[231] He proposed three separate paths by which Congress could

222. 31 J. CONT'L CONG. 488, 488-89 (Aug. 7, 1786).
223. *Id.* at 488-93.
224. *Id.* at 491-92.
225. 32 J. CONT'L CONG. 66, 66-69 (Feb. 20, 1787).
226. 32 J. CONT'L CONG. 237, 237 (Apr. 25, 1787).
227. *Id.*
228. *Id.* at 238.
229. 32 J. CONT'L CONG. 365, 365-66. (July 18, 1787).
230. *Id.* at 366.
231. *Id.*

intervene to resolve the conflict.[232] The first was for Congress to reinterpret the Articles to permit action by the Confederation. The second was for another state to interfere, thereby triggering congressional adjudication power under the Articles. The third was for Georgia and North Carolina to cede the affected territory to the United States, so as to place it under congressional jurisdiction.[233] Of the three, he recommended the last.[234]

Knox's first idea—reinterpreting the Articles—had been tried before. James Madison, an advocate of broad federal authority over Indian relations,[235] thought (as he later said) that the Articles' exceptions to congressional jurisdiction were "obscure and contradictory."[236] In 1784 he had suggested interpreting those exceptions to reserve to the states only the power to make pre-emptive land purchases within state boundaries.[237] Madison's narrow construction was not really tenable, for the exceptions in the final version of the Articles reserved more to the states than would have been reserved by the Franklin and Dickinson drafts.[238] Further, narrow interpretation of state power clashed with the powerful "state sovereignty" rule of Article II.[239]

Few and Blount responded to Knox's report by putting forward their own plan for dealing with unrest in Georgia. This was a proposal for a meeting of Creek and state officials, together with the Confederation Superintendent of Indian Affairs for the Southern Department, to try to resolve the dispute.[240] Nathan Dane of Massachusetts and Richard Henry Lee of Virginia clearly thought this idea inadequate, and moved to postpone the Few-Blount motion in favor of a hearing on a pending committee report that argued, not very convincingly, for a broader rein-

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232. *Id.*

233. *Id.*

234. *Id.* at 366-67.

235. Madison apparently favored lodging all power over Indian trade in the central government, and seems even to have claimed at the federal convention that the confederation Congress's jurisdiction over Indian affairs was exclusive. 1 FARRAND, *supra* note 2, at 313, 316 (Madison) (June 19, 1787) ("By the federal articles, transactions with the Indians appertain to Congs. Yet in several instances, the States have entered into treaties & wars with them."); *see also* James Madison, *Vices of the Political System of the United States*, Apr. 1787, *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 2, at 167 (listing as "Encroachments by the States on the federal authority," "the wars and treaties of Georgia with the Indians").

236. THE FEDERALIST (No. 42, James Madison), *supra* note 2, at 219.

237. At one point, Madison argued that the state legislative rights protected in the proviso were no more than pre-emptive rights to buy land from the Indians. Letter from James Madison to James Monroe, Nov. 27, 1784, *reprinted in* 2 THE FOUNDERS' CONSTITUTION, *supra* note 2, at 529. Modern writers of the same predisposition have tended to imitate him. *See* 1 PRUCHA, *supra* note 2, at 38, 49 (citing Madison and characterizing the proviso as "cast[ing] a heavy blur over the article" and "hazy"); *see also* Clinton, *Review*, *supra* note 2, at 855 (citing Madison's comment).

238. *See supra* note 203 and accompanying text. Moreover, a proposal from Jefferson to give Congress more specific authority over land purchases apparently had been rejected. 6 J. CONT'L CONG. 1076, 1076-77 (July 25, 1776).

239. ARTS. OF CONFED. art. II ("Each state retains its sovereignty . . . and every power, jurisdiction, and right which is not by this Confederation expressly delegated to the United States.").

240. 33 J. CONT'L CONG. 454, 454 (Aug. 3, 1787).

terpretation of the Articles,[241] and was highly critical of the policies of North Carolina and Georgia.[242] Perhaps recognizing that its interpretive position was weak, the committee had followed Knox's advice and recommended that Georgia and North Carolina cede their western territories to the United States.[243] Congress voted seven states to two for the Dane-Lee motion to postpone the Georgia-North Carolina proposal, but the committee report does not seem to have been taken up.[244]

On October 26, 1787, the Confederation Congress appointed commissioners for signing another treaty with the southern Indians, but it finally surrendered completely on the interpretive question. Its resolution appointed as one of three treaty commissioners the Superintendent of Indian Affairs for the Southern Department, but handed over the other two positions to North Carolina and Georgia authorities.[245] Significantly, the resolution provided that in the Superintendent's absence, the state appointees could conclude the treaty themselves.[246]

I have recited this detailed history to show that the state-congressional jurisdictional conflict during the Confederation period was very much a back-and-forth affair. There was no clear trend in the direction of either local or central control. As far as the delegates to the federal convention were concerned, there was no obvious precedent for them to follow.

C. The Constitutional Convention

The Constitutional Convention convened in May 1787. The delegates, like others before them, would have to grapple with the twin jurisdictional issues of (1) which levels of government regulated which substantive areas and (2) which level of government should treat with which categories of Indians.[247]

During the first two months of the proceedings, however, the convention approved no provision directed specifically toward management of Indian affairs. On July 24, the convention elected a drafting committee—the "Committee of Detail"—laden with legal talent.[248] The chair-

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241. *Id.* at 455, 458-59. The committee's argument was obscure, but apparently it was that the state's "legislative right" would not be infringed if Congress treated with Indians within state lines, because *non-Indians* in the region would still be subject to state law.

242. *Id.* at 455-62.

243. *Id.* at 459-60 ("But whatever may be the true construction of the recited clause, the committee are [sic] persuaded that it must be impracticable to manage Affairs with the Indians within the limits of the two States, so long as they adhere to the opinions and measures they seem to have adopted.").

244. *Id.* at 463.

245. 33 J. CONT'L CONG. 707, 708 (Oct. 26, 1787).

246. *Id.*

247. *See supra* Part II.B.1.

248. The members were John Rutledge, Edmund Randolph, Nathaniel Gorham, Oliver Ellsworth, and James Wilson. 2 FARRAND, *supra* note 2, at 106 (Madison) (July 24, 1787). Each of

man was John Rutledge of South Carolina.[249] The convention charged this committee to consider the proceedings already had and "to report a Constitution conformable to the Resolutions passed by the Convention."[250] In addition to its prior resolutions, the convention sent to the Committee of Detail the New Jersey Plan[251] and a proposal prepared by Charles Pinckney.[252] The Committee likely also had access to a plan drafted by John Dickinson.[253]

The New Jersey and Dickinson plans included commerce powers but no specific mention of Indian affairs.[254] The Pinckney Plan would have granted Congress "exclusive Power . . . of regulating the Trade of the several States as well with foreign Nations" and "exclusive Power . . . of regulating Indian Affairs."[255] During committee deliberations, Rutledge suggested incorporating an Indian affairs power.[256]

On August 6, Rutledge announced to the full convention that the Committee of Detail was ready to report its draft constitution.[257] On the subjects of commerce and Indian affairs, the draft followed the New Jersey and Dickinson, rather than the Pinckney, approach. In its list of enumerated federal powers,[258] the document provided authority for the Senate "to make Treaties" and for Congress "[t]o regulate commerce with foreign nations, and among the several States."[259] But there was no specific Indian affairs clause. The panel's failure to include one may have been an oversight, although this seems unlikely because of the Rutledge proposal. Perhaps the committee thought Indian affairs were best handled at the state level unless the federal government saw a need to act through diplomatic channels—i.e., through the treaty power.

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them (other than Gorham, who was a merchant) had good claim to be the leading lawyer in his respective state.

249. Thus, Rutledge made the reports on behalf of the committee. *E.g.*, *id.* at 176 (Journal), 177 (Madison) (Aug. 6, 1787).

250. *Id.* at 106 (Madison) (July 24, 1787).

251. *Id.* at 98 (Journal) (reporting the referral of the Paterson [New Jersey] Plan to the convention).

252. *Id.* at 98 (Journal), 106 (Madison) (reporting the referral of the Pinckney Plan to the committee). Excerpts from the Pinckney Plan are in two locations: *id.* at 134-37, 157-59 (Committee of Detail, III, VII).

253. *See* HUTSON, *supra* note 2, at 84-91 (reproducing two versions of the plan).

254. 1 FARRAND, *supra* note 2, at 242-45 (Madison) (June 15, 1787) (reproducing the New Jersey Plan); HUTSON, *supra* note 2, at 84-91 (reproducing Dickinson's plans).

255. 2 FARRAND, *supra* note 2, at 157 n.15, 158-59 (Committee of Detail, VII) (reproducing an extract in James Wilson's handwriting that was apparently copied from the Pinckney Plan, reading in part, "The Legislature of U.S. shall have the exclusive Power . . . of regulating the Trade of the several States as well with foreign Nations as with each other . . . of regulating Indian Affairs.").

256. *Id.* at 143 (Committee of Detail, IV) (setting forth a marginal note in Rutledge's handwriting to Edmund Randolph's first draft that would have added words "Indian Affairs" to the enumerated power, "[t]o provide tribunals and punishment for mere offences [sic] against the law of nations").

257. *Id.* at 176 (Journal), 177 (Madison) (Aug. 6, 1787).

258. *Id.* at 163-75 (Committee of Detail, IX), 167-69 (enumerating congressional powers).

259. *Id.* at 181, 183 (Madison) (Aug. 6, 1787).

During the weeks after August 6, the full convention intensively discussed and amended the recommendations of the Committee of Detail. Several delegates proposed adding more congressional powers. On August 18, Madison—then firmly of a "nationalist" turn of mind—moved to include nine additional ones.[260] One item was "[t]o regulate affairs with the Indians as well within as without the limits of the U. States."[261] Unlike the next power on his list—granting Congress authority to establish a capital district[262]—Madison did not designate his suggested Indian affairs power as exclusive.[263] This was a notable omission, since he thereby departed from the language both of the Articles of Confederation[264] and of the Pinckney Plan.[265] The convention submitted Madison's suggestions, along with some from other delegates,[266] back to the Committee of Detail.[267]

On August 22, Rutledge announced the Committee of Detail's second report.[268] The panel had rejected some of the suggested powers and accepted others, with or without modification. Madison's Indian affairs clause was among those adopted, but in radically-altered form. The Committee proposed to add to Congress' power "[t]o regulate commerce with foreign nations, and among the several States" the words, "and with Indians, within the Limits of any State, not subject to the laws thereof."[269] As was true of both Madison's proposal and the commerce

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260. *Id.* at 324-25 (Madison) (Aug. 18, 1787):

> To dispose of the unappropriated lands of the U. States
> To institute temporary Governments for New States arising therein
> To regulate affairs with the Indians as well within as without the limits of the U. States
> To exercise exclusively Legislative authority at the seat of the General Government, and over a district around the same not, exceeding ___ square miles; the Consent of the Legislature of the State or States comprising the same, being first obtained
> To grant charters of incorporation in cases where the Public good may require them, and the authority of a single State may be incompetent
> To secure to literary authors their copyrights for a limited time
> To establish an University
> To encourage by premiums & provisions, the advancement of useful knowledge and discoveries
> To authorize the Executive to procure and hold for the use of the U — S. landed property for the erection of Forts, Magazines, and other necessary buildings

(blank space in original).

261. *Id.* at 324.

262. *Id.* at 325 (setting forth a proposed power of exclusive legislative jurisdiction over a capital district).

263. *Id.* at 324 (setting forth Madison's proposed Indian affairs power).

264. *See supra* notes 202-203 and accompanying text.

265. 2 FARRAND, *supra* note 2, at 158-59 (Committee of Detail, VII) (copying from the Pinckney Plan the wording, "[t]he Legislature of the U.S. shall have the exclusive Power . . . of regulating Indian Affairs").

266. *See, e.g.*, *id.* at 325-26 (Madison) (Aug. 18, 1787) (reporting on the referral of additional proposals by Charles Pinckney to the committee); *see also id.* at 326-27 (reporting that a Rutledge proposal to ban diversion of funds appropriated to public creditors was referred to the committee); *id.* at 328 (reporting the referral of other proposals by Rutledge and Elbridge Gerry).

267. *Id.* at 325-28.

268. *Id.* at 366 (Journal) (Aug. 22, 1787).

269. *Id.* at 367.

power in the Committee's original draft, this new version contained no language of exclusivity.

While the language from the Committee of Detail would add somewhat to congressional authority over relationships with the Natives, it was far narrower than Madison's suggestion. The committee version would have limited congressional power to relations only with those Indians *not subject to state laws.*[270] The congressional power would not extend to certain—or perhaps any—Indians living within state boundaries. Furthermore, a congressional power "[t]o regulate commerce" was much narrower than a power "[t]o regulate affairs."[271] As we have seen, the two words carried very different meanings, both in general and specifically in an Indian context.[272] An "affair" could include a commercial transaction, but it also could include a war, a treaty, or a family picnic. Thus, the committee's change would deny Congress competence over diplomacy, boundary adjustment, and other forms of intercourse, all of which would be handled by treaty instead.[273] *A fortiori*, the new language denied Congress any form of police power over the tribes. Instead, Congress would receive only a portion of a single Indian affairs power that, in the days before Independence, the British had set aside for the colonial assemblies.

On August 31, the revised draft was submitted to a Committee of Eleven (one delegate from each of the states then in attendance) for further action.[274] This panel was chaired by Judge David Brearley of New Jersey.[275] It issued its report over several days.[276] The Brearley committee recommended the addition to the Commerce Clause of the phrase, "and with the Indian tribes."[277] This latest version increased federal authority by granting to Congress the ability to regulate commerce with tribes over which states might claim police power jurisdiction.

The convention records show clearly that in the delegates' view the states would enjoy concurrent, although subordinate, jurisdiction with

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270. *Id.*

271. Prakash, *Fungibility*, *supra* note 2, at 1090 ("In other words, though asked to approve broad authority, the Convention chose to grant Congress power only over commerce with Indian tribes"); *accord* Savage, *supra* note 2, at 74 (pointing out that the new provision was limited by the fact that "it extended only to 'commerce,' not to all 'affairs'"). Savage also argues that the net result was a *reduction* of federal power over the Indians from what it had been under the Articles, but by overlooking the significant proviso in favor of the states in the Indian affairs powers of the Articles, he overestimates congressional power under the Articles. *See id.* at 80-81.

272. *See supra* notes 105-110 and accompanying text.

273. *See* Law to Regulate Indian Affairs, N.J. (1757), *reprinted in* 17 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 707-09 (including within the heading of "affairs" such items as attachment for debt and methods of land conveyancing).

274. 2 FARRAND, *supra* note 2, at 473 (Journal), 481 (Madison) (Aug. 31, 1787). This was the second "Committee of Eleven" appointed.

275. *Id.* at 483 (Journal) (Sept. 1, 1787) (stating that Brearley gave the committee report).

276. *Id.* at 483-84, 493-96, 505-06 (setting forth reports of September 1st, 4th, and 5th).

277. *Id.* at 493.

Congress over Indian commerce. We have seen that the congressional Indian powers recommended by Madison, by the Committee of Detail, and by the Brearley Committee of Eleven all omitted earlier-suggested language of exclusivity. Indeed, in their discussions of the commerce power in general, delegates repeatedly acknowledged that, subject to some exceptions, states would retain the ability to enact regulatory laws of their own.

To understand this, a good place to begin is with the Committee of Detail's August 6 draft. Article VII, Section 1 of that draft granted the "Legislature of the United States" power to regulate "commerce with foreign nations, and among the several States."[278] Section 4 of the same article prohibited Congress from taxing or interfering with state decisions on one particular branch of foreign commerce, the slave trade.[279] The document also included several absolute and conditional bans on state actions of the sort associated with commercial regulation: Article XII barred states from coining money or entering into treaties,[280] and Article XIII required congressional consent for states to emit bills of credit, adopt certain legal tender laws, tax imports, or enter into compacts with other states or with foreign powers.[281] These exceptions by no means covered the field; on the contrary, they implicitly acknowledged that there were commercial regulations states *could* adopt, even without prior congressional consent.

The concurrent nature of commercial jurisdiction became explicit in the ensuing colloquy. The entire discussion over the extent to which Congress could regulate the slave trade presupposed that, in the absence of constitutionally authorized congressional action to the contrary, the states would continue to have plenary power over that subject.[282] Similarly, on August 21, John Langdon of New Hampshire noted that, while the committee draft banned federal taxation of exports,[283] "the States are left at liberty to tax exports."[284] He objected to this because New Hampshire relied on harbors in other states and therefore "will be subject to be taxed by the States exporting its produce."[285] Oliver Ellsworth of Connecticut, who represented another state that relied mostly on other states' harbors, was more sanguine. He observed that the federal legislature

278. *Id.* at 181 (Madison) (Aug. 6, 1787).
279. *See id.* at 183.
280. *Id.* at 187.
281. *Id.*
282. *See id.* at 370-74. This discussion occurred principally on August 22, and resulted in the Committee of Detail's ban on federal interference being submitted to a Committee of Eleven headed by William Livingston of New Jersey. *Id.* at 374 (Madison), 396 (Journal) (Aug. 24, 1787). The resultant compromise was amended further on the floor. *Id.* at 409 (Journal) (Aug. 25, 1787).
283. *Id.* at 183 (Madison) (Aug. 6, 1787) (reproducing Article VII, Section 4 of the committee draft).
284. *Id.* at 359 (Aug. 21, 1787).
285. *Id.*

could curb any abuses that might arise.[286] Unpersuaded, Langdon proposed a specific ban on "the States from taxing the produce of other States exported from their harbours."[287]

Siding with his Connecticut colleague, Roger Sherman countered that "[t]he States will never give up all power over trade."[288] Ultimately, though, the convention agreed with Langdon, voting a week later to permit the states to tax exports only with prior congressional approval. The convention also specified that any revenue arising from state duties be dedicated to the national treasury.[289]

On August 28—the same day Langdon won his vote—Madison offered two more of his nationalist proposals. One would have prohibited states from using their commercial powers to impose embargoes.[290] Sherman opposed this, arguing that "the States ought to retain this power in order to prevent suffering & injury to their poor."[291] Presumably Sherman wanted state legislatures to be able to proscribe local exports so goods would be sold cheaply at home rather than seeking higher prices abroad. George Mason of Virginia defended state embargoes because a state might need to declare an embargo if hostilities arose suddenly and the national legislature were not in session.[292] Gouverneur Morris, a nationalist normally allied with Madison, argued that Madison's motion was unnecessary, for the overall supervisory power of Congress was sufficient.[293] Madison's motion garnered the votes of only three states,[294] thereby leaving states with the ability to impose embargoes. Madison's other nationalist motion—to strip completely from the states any power to impose *import* duties—also was defeated, seven states to four.[295]

In September, the delegates adopted motions that both increased and decreased state reserved power over commerce. On September 13, George Mason convinced the delegates to ease the conditional ban on state export duties used to finance state inspection laws.[296] Two days later, Gouverneur Morris pointed out that the states remained free to impose tonnage duties for financing harbor improvements,[297] and Madison suggested that this might be inconsistent with the federal commerce power. Sherman responded that because of the supremacy of federal

286. *Id.* at 359-60.
287. *Id.* at 361.
288. *Id.*
289. *Id.* at 437 (Journal) (Aug. 28, 1787); *see also id*. at 442 (Madison).
290. *Id.* at 440 (Madison).
291. *Id.*
292. *Id.* at 441.
293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.* at 607 (Sept. 13, 1787).
297. *Id.* at 625 (Sept. 15, 1787).

laws "there is no danger to be apprehended from a concurrent jurisdiction."[298] Ultimately, Langdon convinced the delegates to insert another specific exclusion from state commercial regulation.[299]

In sum, the convention's deliberations show that states would retain concurrent, although subordinate, authority in the realms of Indian, foreign, and interstate commerce. States could restrict or ban imports and exports over their borders, including but not limited to imports of slaves. They could require inspections of goods in commerce. They could regulate merchants and prices. They could exercise the entire panoply of traditional commercial regulation, subject to some enumerated exceptions and subject to congressional power, to the extent congressional power was constitutionally authorized.

D. The Resulting Constitutional Text

The preceding historical review provides the background for construction of the constitutional text: "The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes."[300] When the contemporaneous meaning of "commerce" is applied to that Clause, it meant that Congress received power to govern in detail the trade carried on between citizens and tribal Natives and those persons involved in that trade. The term "commerce" did not include authority over the tribes' internal affairs.[301]

We have seen that the history of the Clause strongly suggests that this congressional power was not exclusive,[302] and this understanding was represented in the text. Whenever the Constitution granted the federal government exclusive powers, it did so in one of two ways. The first was to employ the word "exclusive," as when the Constitution granted Congress "exclusive Legislation" over the capital district and federal enclaves.[303] Of course, the Commerce Clause did not include the word

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298. *Id.*

299. *Id.* at 625-26.

300. U.S. CONST. art. I, § 8, cl. 3.

301. *Id.* at 1084; *see supra* notes 196-211 and accompanying text. *Accord* Clinton, *Review*, *supra* note 2, at 851 (holding that power over "commerce" did not give the federal government jurisdiction over the internal governance of tribes); Savage, *supra* note 2, at 74; Prakash, *Fungibility*, *supra* note 2, at 1081 ("One cannot read the power to regulate commerce with Indian tribes as a power to regulate the Indian tribes themselves.").

302. *See supra* Part II.C.

303. U.S. CONST. art. I, § 8, cl. 17 ("The Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . ."); *cf.* U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the *exclusive* Right to their respective Writings and Discoveries . . . .") (emphasis added).

"exclusive." The other way was to prohibit states from a like exercise. For example, the Constitution bestowed on Congress power to issue letters of marque and reprisal,[304] and forbade the states from doing so.[305] Although the Constitution granted the federal government power to regulate foreign, interstate, and Indian commerce by legislation (the Commerce Clause) and some power to regulate *all* commerce (by treaty),[306] the instrument banned only *some* commercial regulations by states. States could not enter into commercial treaties[307] and they could not coin money[308] or impair "the Obligation of Contracts."[309] But, in absence of congressional or treaty direction to the contrary,[310] states otherwise retained broad authority to regulate foreign, interstate, and Indian commerce.

State concurrent jurisdiction over foreign, interstate, and Indian commerce was not left to mere inference. The text took notice of continuing state jurisdiction over the slave trade.[311] It acknowledged the continuing authority of states to impose tariffs on imports and exports, although it added congressional consent as a precondition.[312] It treated in like manner the pre-existing state power to impose tonnage duties[313] and enter into compacts with other states and with foreign nations.[314] It further acknowledged that states could adopt, even without prior congressional consent, laws governing the inspection of imports and exports, although such laws were subject to congressional revision.[315] The text contained no suggestion that this list of state commercial regulations was complete. We know from the history of the drafting convention that it was not.[316]

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304. *See* U.S. CONST. art. I, § 8, cl. 11 ("The Congress shall have Power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water . . . .").

305. *See id.* at §10, cl. 1 ("No State shall . . . grant Letters of Marque and Reprisal . . . .").

306. *See id.* at art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ."); *see also* KAPPLER, *supra* note 2, at 3-18 (setting forth the text of treaties entered into between the United States and various Indian tribes before 1789, almost all of which included terms of commerce).

307. *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall enter into any Treaty . . . .").

308. *Id.* ("No State shall . . . coin money . . . .").

309. *Id.* ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .").

310. *See id.* at art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

311. *See id.* at art. I, § 9, cl. 1.

312. *Id.* at § 10, cl. 2.

313. *Id.* at cl. 3.

314. *Id.*

315. *Id.* at cl. 2.

316. *See, e.g.*, *supra* notes 290-294 and accompanying text (detailing the convention's decision not to prohibit states from imposing embargoes).

E. Summary: The Original Public Meaning

The "original public meaning" of the Indian Commerce Clause was a power both narrower and broader than that enjoyed by the Confederation Congress. It was narrower in that it did not purport to be exclusive, and it covered only *commercial* transactions with Indian *tribes* rather than all affairs with all Indians. It was broader in that this commercial regulation was not subject to state obstruction, even when it infringed the state's police power over persons within state boundaries. The Tenth Amendment clarified that the states retained whatever was not granted. Among the authority retained was police power over all persons within state boundaries, subject to being overridden by constitutional federal laws and treaties.[317]

If we include the rest of the Constitution in the mix, the original public meaning of the federal government's Indian affairs powers was as follows:

* The government would be able to treat with the Indians through the Commerce Clause, the Treaty Clause, or the Property Clause.

* If Indians were living in a federal territory or on federal land, Congress could govern them through the Property Clause. Federal powers would be very near plenary, especially in the territories.

* If the Indians were located within a state and not on federal land, then federal power depended on whether those Indians were members of tribes. If so, then Congress could regulate trade with them (but only trade) through the Commerce Clause. Or the President and Senate, with approval of the tribe, could authorize broad federal jurisdiction through the Treaty Power. The Treaty Power was broader than the Commerce Clause, but the mechanism for adopting treaties protected states through the requirement that two-thirds of the Senate concur,[318] and it protected the tribes by the requirement that the tribes concur. The states could not interfere with the exercise of any of these powers.

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317. Even during the early days of the republic, the United States made treaties with the Indians that purported to allow the government to manage all their affairs, to the exclusion of other sovereignties. *See, e.g.*, Treaty with the Chickasaws art. VIII, Jan. 10, 1786, 7 Stat. 24, *reprinted in* KAPPLER, *supra* note 2, at 15-16 ("United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper."); *see also id.* at art. II, at 14 ("Article II. The Commissioners Plenipotentiary of the Chickasaws, do hereby acknowledge the tribes and the towns of the Chickasaw nation, to be under the protection of the United States of America, and of no other sovereign whosoever."); *see also* Treaty with the Shawnee art. II, Jan. 31, 1786, 7 Stat. 26, *reprinted in id.* at 17 ("The Shawanoe nation do acknowledge the United States to be the sole and absolute sovereigns of all the territory ceded to them by a treaty of peace, made between them and the King of Great Britain, the fourteenth day of January, one thousand seven hundred and eighty-four.").

318. *See* Roger Sherman, *A Citizen of New-Haven I*, THE NEW HAVEN GAZETTE, Dec. 4, 1788, *reprinted in* FORD, *supra* note 2, at 233, 235 (averring that the requirement of two-thirds senatorial consent to a treaty protects the rights of states).

* If the Indians were located within a state, on non-federal land, and were not members of tribes, then federal power applied to them in the same way it applied to other persons.

* If the Indians were located within a state—irrespective of whether they were tribal—they were subject to the state police power (if it could be enforced). They were not subject to any federal police power. If the Indians were tribal, federal actions taken within the scope of constitutional authority could limit the exercise of state police power.

III. THE ORIGINAL UNDERSTANDING

A. The Founders' Touchstone for Constitutional Interpretation

When one seeks the original force of a constitutional provision, it makes sense to interpret the document by the same principles the Founders themselves would have applied. The touchstone of documentary interpretation was, as it was called before and during the Founding Era, the "intent of the makers."[319] This principle applied to documents of both private and public law.[320] English courts had refined it over a period of more than two centuries, and American courts and jurists had adopted it.[321]

The principal determinant of the "intent of the makers" was not the intent of the drafters nor even, as some legal writers have claimed, the objective public meaning of the document.[322] It was the subjective understanding of those who had converted the measure into law. This was the legislature in the case of a statute and the ratifiers in the case of a constitution.[323] When (as was very often the case in England), the original subjective intent was not available, the "intent of the makers" had to be deduced from the public meaning of the instrument at the time it became law, based solely on its language and such contemporaneous materials, legal or non-legal, as were available.[324] When the historical record did show a particular subjective understanding, that understanding prevailed.[325] Fortunately, in most instruments the public meaning and the intended meaning are much the same.

Ascertaining, as Part II did, the original public meaning of the Indian Commerce Clause does not therefore end our inquiry. We must now turn to the ratification record to determine if the ratifiers refined or

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319. *See generally* Natelson, *Founders*, *supra* note 2 (forthcoming) and sources collected therein.
320. Private law conveyances represented a partial exception to this rule. *See id.*
321. *Id.*
322. *Id.*
323. *Id.*
324. *Id.*
325. *Id.*

contradicted the public meaning of this Clause with a particular understanding, as they did with respect to a few other provisions of the Constitution. [326]

B. The Ratification Process in General[327]

The federal constitutional convention met in Philadelphia from May until September, 1787. Upon adjourning, the convention sent its proposed Constitution to Congress for transmittal to state legislatures and, ultimately, to popularly-elected state ratifying conventions.[328]

In an early propaganda victory, proponents of the Constitution convinced the public to label them "Federalists" and their adversaries "Anti-Federalists."[329] By early January 1788, Federalists had convinced conventions in five states—Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut—to ratify by substantial margins.[330] Thereafter, the opposition stiffened. Anti-Federalists interposed many objections, most derived ultimately from the belief that the Constitution would give far too much power to the central government. Anti-Federalists predicted that the central government would abuse that power and effectively obliterate the states and oppress the people. They argued against approval of the Constitution until a new national convention had met and adopted substantial changes. Federalists recognized that such a course involved great practical difficulties for the Constitution.[331] Faced with the unpleasant alternatives of quick defeat or protracted defeat, they made a pact with political moderates — the fence-straddlers and tepid Anti-Federalists.

Under the terms of this pact, the Federalists made important concessions, and in exchange, the moderates agreed to support the Constitution. These concessions were of three principal kinds. First, the Federalists

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326. *See, e.g.*, Robert G. Natelson, *Statutory Retroactivity: The Founders' View*, 39 IDAHO L. REV. 489, 493–94 (2003) (describing how the ambiguous term *ex post facto* was defined during the ratification to apply only to retroactive criminal, rather than civil, laws).

327. This section is excerpted in large part from Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS J. 73, 81-83 (2005).

328. *See* 13 DOCUMENTARY HISTORY, *supra* note 2, at xl–xli.

329. Naturally, Anti-Federalists were piqued at this labeling. *See, e.g.*, 1 ANNALS OF CONGRESS 759 (Joseph Gales ed., 1834) (quoting Representative Elbridge Gerry, a former anti-federalist, who complained of this labeling and stated that "[t]heir names then ought not to have been distinguished by federalists and antifederalists, but rats and antirats").

330. *See* 13 DOCUMENTARY HISTORY, *supra* note 2, at xli (providing the chronology and votes).

331. *See, e.g.*, 3 ELLIOT'S DEBATES, *supra* note 2, at 618 (recording the following comments made by Madison at the Virginia ratifying convention: "Suppose eight states only should ratify, and Virginia should propose certain alterations, as the previous condition of her accession. If they [i.e., other states] should be disposed to accede to her proposition, which is the most favorable conclusion, the difficulty attending it will be immense. Every state which has decided it, must take up the subject again. They must not only have the mortification of acknowledging that they had done wrong, but the difficulty of having a reconsideration of it among the people, and appointing new conventions to deliberate upon it.").

offered authoritative and reassuring interpretations of worrisome parts of the document. For example, the Anti-Federalists had been arguing that once the Constitution was in place, the General Welfare Clause[332] might be construed as an independent and indefinite grant of national power. Federalists represented that, on the contrary, the General Welfare Clause was a limitation rather than a grant of power.[333]

Second, the Federalists reassured moderates that the states would retain wide jurisdiction exclusive of the central government. Anti-Federalists had been arguing that the Constitution would sweep all but the most trivial concerns into the national sphere. Federalist speakers and authors, therefore, issued lists enumerating specific functions that would remain the exclusive province of state governments. To the extent we know their identity, these Federalist speakers and authors were leading rather than peripheral figures in the Constitution's cause: James Madison; Alexander Hamilton; James Wilson; Edmund Pendleton, chancellor of Virginia; James Iredell, North Carolina attorney general and judge and later United States Supreme Court Justice; John Marshall; Alexander Contee Hanson, a Congressman from Maryland; Nathaniel Peaslee Sargeant, a Justice (and shortly thereafter, Chief Justice) of the Massachusetts Supreme Judicial Court; Alexander White, a distinguished Virginia lawyer, delegate to his state's ratifying convention, and later a United States Senator; and Tench Coxe, later our first Assistant Secretary of the Treasury.[334]

Third, insofar as the foregoing representations were deemed insufficient, the parties agreed that the Constitution, once ratified, would be amended. At ratifying conventions in Massachusetts, South Carolina, New Hampshire, Virginia, and New York, moderates voted for ratification, and Federalists voted to recommend amendments. After ratification, both sides would work together to secure the needed changes. Two states—North Carolina and Rhode Island—actually postponed ratification until Congress had approved amendments.[335]

Without this political pact, the Constitution probably would not have come into effect.[336] Even with it, the convention majorities for ratification in Massachusetts, Virginia, New Hampshire, and New York

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332. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .").

333. *See generally* Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1 (2003).

334. *See* Natelson, *Enumerated*, *supra* note 2, at 479-89 (identifying the contributions of each of these individuals).

335. 13 DOCUMENTARY HISTORY, *supra* note 2, at xlii.

336. *See supra* note 330 and *infra* notes 337-338 and accompanying text.

were quite narrow.[337] North Carolina and Rhode Island did not ratify until the promises in the pact had been honored.[338]

The surviving records of the ratification process and the public bargain that led to ratification are sufficient to enable us to discern, as to many constitutional provisions, the subjective "intent of the makers."

C. The Indian Commerce Clause in the Ratification Process

Commerce with the Indians was a matter of considerable interest during the ratification controversy. Participants in the debates discussed how important it was and how adoption of the Constitution would affect it.[339] Yet there is little, if any, evidence that the ratifiers understood the Indian Commerce Clause differently from the objective public meaning outlined in Part II. On the contrary, surviving records depict ratification figures identifying "Commerce . . . with the Indian tribes" simply with Indian trade and acknowledging that states would retain concurrent, although subordinate, regulation of commerce.

Accordingly, even though James Madison had favored a very broad congressional power over Indian affairs at the federal convention,[340] when arguing for ratification he referred to the new congressional power in a way that equated it to trade regulation only:

> [Under the Constitution] [t]he regulation of *commerce with the Indian tribes* is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory. . . . [H]ow the *trade with Indians*, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible.[341]

Robert Yates, a New York Anti-Federalist who had served as a delegate to the federal convention, argued against ratification. He opposed the Indian Commerce Clause in particular, so if there had been any rea-

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337. The Constitution was approved in Massachusetts by a vote of 187–168, in Virginia by 89–79, in New York by 30–27, and in New Hampshire by 57–47. 13 DOCUMENTARY HISTORY, *supra* note 2, at xli–xlii.

338. *See supra* note 335 and accompanying text.

339. *See, e.g.*, *An American*, PA. GAZETTE, May 28, 1788, *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 2, at 889-90; 3 ELLIOT'S DEBATES, *supra* note 2, at 580 (Adam Stephen, at the Virginia ratifying convention) (reporting that Stephen "then went into a description of the Mississippi and its waters, Cook's River, the Indian tribes residing in that country, and the variety of articles which might be obtained to advantage by trading with these people"); *see, e.g.*, Brutus, *Letter X*, N.Y.J., Jan. 24, 1788, *reprinted in* 25 DOCUMENTARY HISTORY, *supra* note 2, at 462, 465 (admitting, against inclination, that there must be a sufficient standing army for some purposes, including "trade with the Indians"); *see, e.g.*, THE FEDERALIST, *supra* note 2, at 121 (No. 24, Alexander Hamilton) ("[W]e should find it expedient to increase our frontier garrisons . . . . It may be added that some of those posts will be keys to the trade with the Indian nations.").

340. *Supra* notes 260-261 and accompanying text.

341. THE FEDERALIST, *supra* note 2, at 219 (No. 42, James Madison) (emphasis added).

sonable interpretation of that provision that included plenary authority over Indian affairs, he certainly would have pointed it out. Yet he also equated the Indian commerce power to no more than a power over trade. If New York were to ratify the Constitution, Yates wrote that New York would thereby totally surrender into the hands of Congress the management and regulation of the Indian trade to an improper government, and the traders to be fleeced by iniquitous impositions, operating at one and the same time as a monopoly and a poll tax:

> The deputy by the above [Confederation] ordinance, has a right to exact yearly fifty dollars from every trader, which Congress may increase to any amount, and give it all the operation of a monopoly; fifty dollars on a cargo of 10,000 dollars' value will be inconsiderable, on a cargo of 1000 dollars burthensome [*sic*], but on a cargo of 100 dollars will be intolerable, and amount to a total prohibition, as to small adventurers.[342]

Anti-Federalists spent a great deal of time and ink objecting to constitutional provisions, such as the General Welfare and Necessary and Proper Clauses, that they thought would give Congress too much power. Amid all this fervor, Yates was almost the only writer who objected to any part the Commerce Clause[343]—a clear indication that its scope was understood to be fairly narrow. Moreover, the Federalist representations listed above[344] were inconsistent with a broad construction of that Clause. Among the matters they defined as outside the scope of congressional regulation were crimes *malum in se* (except treason, piracy, and counterfeiting), family law, real property titles and conveyances, inheritance, promotion of useful arts in ways other than granting patents and copyrights, control of personal property outside of commerce, torts and

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342. *Address by Sydney*, N.Y.J., Jun. 13-14, 1788, *reprinted in* 6 STORING, *supra* note 2, at 112. *Compare* Federal Farmer, Letters to the Republican, Letter I, Nov. 8, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 2, at 14, 24 (arguing that a central government should have control over "Indian affairs," without necessarily saying the proposed Constitution provided for that); *see also id.*, Letter III, October 10, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 2, at 30, 35 (claiming that among external objects of government under the Constitution would be "Indian affairs," but clearly including the treaty power and other powers, not merely the Commerce Clause).

343. *See, e.g.*, 2 ELLIOT'S DEBATES, *supra* note 2, at 124 (reporting Sam Adams, then an Anti-Federalist, praising the Commerce Clause at the Massachusetts ratifying convention); *see, e.g.*, RICHARD HENRY LEE, LETTERS FROM THE FEDERAL FARMER, *reprinted in* EMPIRE AND NATION 117 (2d ed. 1999) (stating that the commerce power and the power to regulate imposts together would give the union sufficient power); *see, e.g.*, *Albany Anti-Federal Committee Circular,* April 10, 1788, *reprinted in* 21 DOCUMENTARY HISTORY, *supra* note 2, at 1379, 1383 (listing numerous objections to the proposed Constitution, but stating that "[w]ith respect to *the Regulation of Trade*, this may be vested in Congress under the present Confederation") (emphasis in original). *See generally* 21 DOCUMENTARY HISTORY, *supra* note 2 (revealing lack of controversy over the Commerce Clause).

Besides Yates, the only other critic of the Commerce Clause I have found was John Winthrop of Massachusetts, writing as "Agrippa," and his argument was merely that Congress should not have so much power over *commerce*. Letters of Agrippa, *Letter XII*, MASS. GAZETTE, Jan. 14, 1788, *reprinted in* 4 STORING, *supra* note 2, at 97 (objecting to plenary commerce power).

344. *Supra* note 334 and accompanying text.

contracts among citizens of the same state, education, services for the poor and unfortunate, licensing of public houses, roads other than post roads, ferries and bridges, and fisheries, farms, and other business enterprises.[345] The placement of land titles on this list[346] is particularly incompatible with a plenary congressional Indian affairs power. Yet insofar as the record shows, no one suggested that Congress was barred from exercising such powers "except in the case of the Indians." Some did concede that the treaty power might affect land titles, but they affirmed that any treaties would be subject to general limitations of public trust.[347]

The moderates who provided the Constitution's margin of victory in the ratification conventions of several key states were not satisfied solely with Federalist representations of meaning. The moderates also sought, and obtained, a gentlemen's agreement from the Federalists whereby after the Constitution was approved, both sides would work together to obtain a bill of rights. A common proposal for that Bill of Rights was a provision specifying that the states retained any powers not delegated by the Constitution to the central government[348]—the eventual Tenth Amendment.[349] Its purpose was to reassure Anti-Federalists that the new government really would be limited to enumerated powers, without additional authority arising from notions of "sovereignty"[350] or from any other source. By its terms, the Tenth Amendment preserved to the states much of the competence they enjoyed under the Articles of Confederation, including any powers that might have been ceded to Congress under

345. *See* Natelson, *Enumerated, supra* note 2, at 481-88. *See also* Letter from Roger Sherman to Unknown Recipient (Dec. 8, 1787) *reprinted in* HUTSON, *supra* note 2, at 288 (stating that state courts will have exclusive jurisdiction over "all causes between citizens of the same State, except where they claim lands under grants of different states").

346. *See* 2 ELLIOT'S DEBATES, *supra* note 2, at 40 (reporting Edmund Pendleton, a leading federalist spokesman at the Virginia ratifying convention, asking rhetorically: "Can Congress legislate for the state of Virginia? Can they make a law altering the form of transferring property, or the rule of descents, in Virginia?").

347. Natelson, *Public Trust*, *supra* note 2, at 1151-52.

348. Prototypes for the Tenth Amendment were proposed by the ratifying conventions of seven states: Massachusetts, South Carolina, New Hampshire, Virginia, New York, North Carolina, and Rhode Island. 2 ELLIOT'S DEBATES, *supra* note 2, at 177; *Ratification of the Constitution by the State of South Carolina,* THE AVALON PROJECT AT YALE LAW SCHOOL, http://www.yale.edu/lawweb/avalon/const/ratsc.htm (last visited October 31, 2007); *Ratification of the Constitution by the State of New Hampshire*, THE AVALON PROJECT AT YALE LAW SCHOOL, http://www.yale.edu/lawweb/avalon/const/ratnh.htm (last visited October 31, 2007); *Ratification of the Constitution by the State of Virginia*, THE AVALON PROJECT AT YALE LAW SCHOOL, http://www.yale.edu/lawweb/avalon/const/ratva.htm (last visited October 31, 2007); *Ratification of the Constitution by the State of New York*, THE AVALON PROJECT AT YALE LAW SCHOOL, http://www.yale.edu/lawweb/avalon/const/ratny.htm (last visited October 31, 2007); *Ratification of the Constitution by the State of North Carolina*, THE AVALON PROJECT AT YALE LAW SCHOOL, http://www.yale.edu/lawweb/avalon/const/ratnc.htm (last visited October 31, 2007); *Ratification of the Constitution by the State of Rhode Island,* THE AVALON PROJECT AT YALE LAW SCHOOL, http://www.yale.edu/lawweb/avalon/const/ratri.htm (last visited October 31, 2007).

349. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

350. *See supra* note 36.

the Articles but that, for one reason or another, were not included in the Constitution's enumeration.[351]

Finally, there appears to be no suggestion in the ratification record that anyone thought any part of the Commerce Clause to be exclusive of concurrent state jurisdiction. On the contrary, during his discussion of foreign commerce in *The Federalist*, Madison acknowledged that, in the absence of congressional action after 1808, states could opt either to permit or ban the slave trade.[352] In another paper he asserted that, outside the restraints of Article I, Section 10, the states would enjoy "a reasonable discretion in providing for the conveniency of their imports and exports" while the federal government would hold "a reasonable check against the abuse of this discretion."[353]

IV. DEALING WITH HISTORICAL ERROR

A. Introduction

This Part examines some of the more important historical mistakes and defects in historical method that characterize the legal commentary on the Indian Commerce Clause. This examination has been deferred until now so as to prevent interruptions in the foregoing narrative.

B. The Indian Intercourse Act of 1790

In contending for an expansive view of the commerce power, some have argued that a portion of the Indian Intercourse Act of 1790[354] shows

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351. Savage, *supra* note 2, at 85 (noting that "[t]he [T]enth [A]mendment, of course, does not vest new powers in the states; the reservoir of authority in the states cannot exceed its original bounds"). However, the constitutional text does not suggest, as Mr. Savage did, that the scope of state powers is limited entirely to those retained under the Articles. *See* U.S. CONST. amend. X.

352. THE FEDERALIST, *supra* note 2 (No. 42, James Madison):

> The regulation of foreign commerce, having fallen within several views which have been taken of this subject, has been too fully discussed to need additional proofs here of its being properly submitted to the federal administration.
>
> It were doubtless to be wished, that the power of prohibiting the importation of slaves had not been postponed until the year 1808, or rather that it had been suffered to have immediate operation . . . . [W]ithin that period, it will receive a considerable discouragement from the federal government, and may be totally abolished, by a concurrence of the few states which continue the unnatural traffic, in the prohibitory example which has been given by so great a majority of the union.

Id. at 217.

353. THE FEDERALIST, *supra* note 2, at 233 (No. 44, James Madison). In a comment earlier in *The Federalist*, Madison seems to contradict his later statement by saying that under the Constitution states would not be "at liberty to regulate the trade between state and state." THE FEDERALIST, *supra* note 2, at 218 (No. 42, James Madison). However, it is clear from the context that in No. 42 he was speaking only of state imposition of import and export duties, forbidden without congressional consent by U.S. CONST. art. I, § 10, cl. 2. THE FEDERALIST, *supra* note 2, at 218-19 (No. 42, James Madison).

354. 1 Stat. 137-38 (1790).

an intended meaning for Indian "commerce" that goes beyond mere trade.[355]

As an initial matter, however, the date of the law gives pause. The best evidence of the content of the ratification bargain is matter arising previous to or contemporaneously with that bargain. Later material—if probative at all—is subject to a discount. When the Indian Intercourse Act became law in mid-1790, the Constitution already had been approved by all thirteen states, and the Bill of Rights ratified by nine of the necessary ten.[356] In fact, the Constitution had been approved by the necessary nine states for over two years and the government had been in operation for over a year. More than a year had elapsed since New York and Virginia formally applied for a new federal convention, and no other state had followed suit.[357] By this time, constitutional interpretation had become vulnerable to political "spin" without regard to whether that "spin" actually reflected the ratifiers' understanding, because it was unlikely the Constitution was going to be repealed or massively overhauled. By this time also, the political alignment that had characterized the Ratification Era and the first session of the First Congress had shifted markedly.[358] Adding to those considerations is the obvious fact that "legislators [here, Congress] have very different incentives and operate under

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355. *See, e.g.*, Akhil Reed Amar, *America's Constitution and the Yale School of Constitutional Interpretation*, 115 YALE L.J. 1997, 2004 n.25 (2006):

> It also bears note that none of the leading clausebound advocates of a narrow economic reading of 'commerce' has come to grips with the basic inadequacy of their reading as applied to Indian tribes, or has squarely confronted the originalist implications of the Indian Intercourse Act of 1790, in which the First Congress plainly regulated noneconomic intercourse with Indian tribes.

Id.

See also Fletcher, *Federal Indian Policy*, *supra* note 2, at 137 (implying that early Trade and Intercourse Acts were enacted pursuant to the Indian Commerce Clause). *Cf.* AMERICAN INDIAN LAW DESKBOOK 13, 15 (Julie Wrend & Clay Smith eds., 2d ed. 1998) (claiming that the Act reflected congressional "intent, which has never changed, to occupy the area of Indian affairs with federal law" as seen by the early "Trade and Intercourse Acts" which revealed "Congress's unmistakable objective of exercising plenary control over Indian affairs").

To be sure, congressional intent, even the intent of the First Congress, should not be confused with ratifier understanding.

356. 13 DOCUMENTARY HISTORY, *supra* note 2, at xl-xlii (outlining chronology for adoption of Constitution); 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1193-1201 (1971) (showing ratification of the Bill of Rights by nine states before adoption of the Indian Intercourse Act on July 22, 1790). In theory, the Indian Intercourse Act could be used as evidence of how the Virginia or Vermont legislature interpreted the Bill of Rights, since neither state ratified until late 1791.

357. For the Virginia and New York applications, *see* 1 HOUSE J. 28-30 (May 5-6, 1789); *see also* Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677, 764-89 (1993) (listing all convention calls from the Founding until 1993).

358. CHARLES C. THATCH, JR., THE CREATION OF THE PRESIDENCY, 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY 125-26, 150 (2007 reprint) (1923) (discussing why the First congressional session only should be considered part of the constitution-making process).

very different institutional restraints than do constitutional drafters or ratifiers."[359]

Thus, uncorroborated inferences deduced from the Indian Intercourse Act about what the ratifiers understood two or three years earlier would be uncertain evidence as to the meaning of the Commerce Clause even if Congress had adopted the measure pursuant to that Clause. As explained below, however, Congress actually adopted the Indian Intercourse Act pursuant to the Treaty Power.

The full title of the law in question was an "Act to Regulate Trade and Intercourse With the Indian Tribes." The first three sections provided for federal licenses for trading among Native Americans, for recall of licenses for violation of federal trade restrictions, and for prohibition of trading without a license[360]—all standard regulations of commerce with the Indians.[361] Section 4 banned Native land conveyances, unless "made and duly executed at some public treaty."[362] Section 5 provided that if a citizen or inhabitant of the United States committed a crime in Indian country, that citizen would be tried and punished according to the law of his home state or territory in the same manner as if he had committed the crime against a non-Indian.[363] On its face, therefore, Section 5 was a criminal rather than a commercial regulation, and it is this feature

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359. Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1045 (2007).

For an example of how constitutional interpretations before and after ratification can change, *see, e.g.*, Alexander Hamilton, *Report on Manufactures* (Dec. 5, 1791), *reprinted in* 1 AMERICAN STATE PAPERS 123, 136 (interpreting the Constitution to justify federal interference in manufacturing). *But see* THE FEDERALIST, *supra* note 2, at 165 (No. 34, Alexander Hamilton) (claiming the federal government would have no role in manufacturing and agriculture); *see also* THE FEDERALIST, *supra* note 2, at 81 (No. 17, Alexander Hamilton) (arguing that "the supervision of agriculture, and of other concerns of a similar nature . . . can never be desirable cares of a general jurisdiction").

360. 1 Stat. 137-38, §§ 1-3 (1790).

361. *Supra* notes 126-150 and accompanying text (detailing typical Indian trade regulations of the time).

362. 1 Stat. 138, § 4 (1790) ("[N]o sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.").

363.

> [I]f any citizen or inhabitant of the United States or of either of the territorial districts of the United States, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit any crime upon, or trespass against, the person or property of any peaceable and friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen or white inhabitant thereof, would be punishable by the laws of such state or district, such offender or offenders shall be subject to the same punishment, and shall be proceeded against in the same manner as if the offence [sic] had been committed within the jurisdiction of the state or district to which he or they may belong, against a citizen or white inhabitant thereof.

Id. at § 5.

that is cited as evidence that the Founders intended the Commerce Clause to encompass more than mere trade.[364]

As least one Supreme Court Justice has addressed the question of whether this sort of regulation can be characterized as a regulation of commerce. In his concurring opinion in *Worcester v. Georgia*,[365] Justice McLean contended that this section's successor[366] was, despite its criminal content, a merely routine trade regulation.[367] He emphasized that the law regulated the conduct of *United States citizens and residents only*. It did not regulate the conduct of Indians and certainly was not an assertion of "political jurisdiction" over Indian country.[368] Measures such as these, he said, were typical of those requiring a nation's own citizens to honor the terms of embargos and other trade restrictions.[369]

To be sure, McLean's unsupported statement is not really probative of original understanding, for he was writing long after the Founding Era and did not cite sources from that time. Wyndham Beaves' leading 1771

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364. *Supra* notes 91, 355 and accompanying text.

365. 31 U.S. (6 Pet.) 515 (1832).

366. An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers § 6, 2 Stat. 142 (1802) (providing for the death penalty for citizens and residents who commit murder in Indian country).

367. Justice McLean noted:

> Under this clause of the constitution [the Indian Commerce Clause], no political jurisdiction over the Indians, has been claimed or exercised. The restrictions imposed by the law of 1802, come strictly within the power to regulate trade; not as an incident, but as a part of the principal power. It is the same power, and is conferred in the same words, that has often been exercised in regulating trade with foreign countries. Embargoes have been imposed, laws of non-intercourse have been passed, and numerous acts, restrictive of trade, under the power to regulate commerce with foreign nations.
>
> In the regulation of commerce with the Indians, congress have [sic] exercised a more limited power than has been exercised in reference to foreign countries. The law acts upon our own citizens, and not upon the Indians, the same as the laws referred to act upon our own citizens in their foreign commercial intercourse.

Worcester, 31 U.S. (6 Pet.) at 592 (McLean, J., concurring).

368. McLean also observed: "[N]o political jurisdiction over the Indians, has been claimed or exercised . . . . The law acts upon our own citizens, and not upon the Indians, the same as the laws referred to act upon our own citizens in their foreign commercial intercourse." *Id. See also* Clinton, *Supremacy*, *supra* note 2, at 134 (pointing out that restrictions on persons in early treatises generally were "aimed at non-Indians who dealt with Indians").

McLean added that such laws were "not as an incident [to the commerce power], but as a part of the principal power." *Worcester*, 31 U.S. (6 Pet.) at 592 (McLean, J., concurring). This is certainly an overstatement, since a law creating non-commercial crimes is not a law regulating "commerce." But it certainly could have served as a law incidental to the regulation of commerce – that is, a law authorized by the Necessary and Proper Clause, pursuant to the Founding Era incidental powers doctrine. *See* Natelson, *Tempering*, *supra* note 2, at 102-13 (outlining that doctrine). Under the incidental powers doctrine, a power was incidental to a principal power if it was less "worthy" than the principal power and either (1) a customary means of exercising it (as McLean indicated this was) or (2) reasonably necessary for exercising it. *Id.* at 110. Here, it could be argued that crimes committed by whites in Indian country raised resentments that rendered federal-tribal commercial relationships difficult and that the provision's limited scope rendered it less "worthy" than the principal power. Nonetheless, a general federal control over crimes in Indian country would be disqualified as an incident because it is a distinct subject matter and rivals the purported principal in importance. *Id.* at 106.

369. *See supra* note 367.

navigation law treatise does confirm, though, that during the Founding Era governments commonly exerted extra-territorial jurisdiction to enforce trade embargos.[370]

Whatever the merits of Justice McLean's conclusion, the fundamental problem with arguing that the Indian Intercourse Act sheds light on the Commerce Clause is this: the Indian Intercourse Act was not adopted pursuant to the Commerce Clause. It was adopted pursuant to the Treaty Power.[371]

In 1785 and 1786 Congress entered into the three "Hopewell" treaties with the Cherokees, Chickasaws, and Choctaws.[372] By the terms of all these treaties, the United States had promised to regulate trade between the United States and the Natives "[f]or the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians."[373] The tribes, President Washington, and Secretary of War Henry Knox all were unhappy over white abuses that continued in defiance of the treaties, and became convinced that enforcement legislation was needed.[374]

On August 22, 1789, the President entered the chamber of the Senate and consulted its members on Indian affairs.[375] After reciting the tribes' dissatisfaction, he noted that the Cherokees lived primarily in North Carolina, which had not yet joined the union, and added:

> The commissioners for negotiating with the Southern Indians may be instructed to transmit a message to the Cherokees, stating to them, as far as may be proper, the difficulties arising from the local claims of North Carolina, and to assure them that the United States are not unmindful of the treaty at Hopewell . . . .
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> . . . .
>
> The Commissioners may be instructed to transmit messages to the said tribes, containing our assurances of the continuance of the friendship of the United States, and that *measures will soon by taken*

370. WYNDHAM BEAWES, LEX MERCATORIA REDIVIVA OR, THE MERCHANT'S DIRECTORY 242 (London 3d ed. 1771) (describing the actions that governments could take during embargoes).

371. PRUCHA, *supra* note 2, at 89-90 (stating that the various Indian intercourse laws were "originally designed to implement the treaties and enforce them against obstreperous whites").

372. Treaty With the Cherokee, Nov. 28, 1785, 7 Stat. 18, *reprinted in* 2 KAPPLER, *supra* note 2, at 8; Treaty With the Choctaw, Jan. 3, 1786, 7 Stat. 21, *reprinted in* 2 KAPPLER, *supra* note 2, at 11; Treaty With the Chickasaw, Jan. 10, 1786, 7 Stat. 24, *reprinted in* KAPPLER, *supra* note 2, at 14.

373. *See, e.g.*, Treaty with the Chickasaw art. VIII, Jan. 10, 1786, 7 Stat. 24, *reprinted in* 2 KAPPLER, *supra* note 2, at 15-16 ("ARTICLE 8. For the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper.").

374. PRUCHA, *supra* note 2, at 89.

375. 1 ANNALS OF CONG. 66 (Joseph Gales ed., 1789).

> *for extending a trade to them agreeably to the treaties of Hopewell.*[376]

The President then proceeded to impress upon his listeners the importance of an early agreement with the Creeks.[377] He returned two days later for further consultation.[378] Congress responded the following summer by enacting the Indian Intercourse Act.

Hence, the first three sections of the Act were designed to fulfill the promise of the United States to regulate trade for the benefit of the Indians. Section 4 was, by its terms, designed to effectuate Indian treaties.[379] Section 5—the substantive criminal provision—loosely tracked the language in another provision of the Hopewell pacts, which required that United States citizens who committed crimes in Indian country be tried and punished as if they had committed those crimes against fellow citizens.[380] Provisions in treaties that defined and provided for punishment of crimes were well precedented.[381]

The trade and criminal portions of the Indian Intercourse Act applied to all Native Americans, not merely the Hopewell tribes. But that was because none of the treaties limited their primary benefits to members of the signatory tribes. The trade provisions in the treaties referred generally to "the Indians,"[382] and the criminal sections referred to "any Indian."[383] Further, the broad statutory language was appropriate be-

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376. *Id.* at 67 (emphasis added).

377. *Id.*

378. *Id.* at 69-70.

379. *See supra* note 362 and accompanying text.

380. For example, the 1786 Treaty With the Choctaw provided:

> If any citizen of the United States of America, or person under their protection, shall commit a robbery or murder, or other capital crime, on any Indian, such offender or offenders shall be punished in the same manner as if the robbery or murder, or other capital crime, had been committed on a citizen of the United States of America; and the punishment shall be in presence of some of the Choctaws, if any will attend at the time and place; and that they may have an opportunity so to do, due notice, if practicable, of the time of such intended punishment, shall be sent to some one of the tribes.

Treaty with the Choctaw art. VI, Jan. 3, 1786, 7 Stat. 21, *reprinted in* 2 KAPPLER, *supra* note 2, at 13. It is likely that the substantive criminal provision of the treaties, and therefore the analogous provision in the Indian Intercourse Act, were suggested by existing statutes in Virginia and South Carolina. The Virginia enactment was not a trade measure at all. Law to Punish Crimes Committed in Indian Territory, VA. (1784), *reprinted in* 15 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 241-42 (reproducing a criminal and extradition statute). The South Carolina law was a mixed statute, containing both trade and non-trade features. Law to Preserve Peace and Promote Trade with Indians arts. I, IX, S.C. (1739), *reprinted in* 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 2, at 287, 290.

381. *E.g.*, A Treaty Marine, Neth.-U.K., Dec. 1, 1674, *reprinted in* GILES JACOB, LEX MERCATORIA OR, THE MERCHANT'S COMPANION 203, 212 (London 2d ed. 1729) (providing for punishment for torture).

382. *See, e.g.*, *supra* note 373 (reproducing Article VIII of the Chickasaw treaty).

383. *E.g.*, Treaty with the Choctaw arts. V-VI, Jan. 3, 1786, 7 Stat. 21, *reprinted in* 2 KAPPLER, *supra* note 2, at 12-13 ("If *any Indian or Indians*, or persons, residing among them, or who shall take refuge in their nation, shall commit a robbery or murder or other capital crime on any citizen of the United States of America, or person under their protection, the tribe to which such offender may belong, or the nation, shall be bound to deliver him or them up to be punished according to the

cause the government apparently planned to apply the Hopewell language as a template for future agreements: very similar terms were contained in a fourth treaty, signed only a few days later with the Creeks,[384] and in a fifth, concluded the following year with the Cherokees.[385]

A law enacted to execute the Treaty Power cannot be said to represent an interpretation of the Commerce Clause.

C. Unfamiliarity With the Record of the Federal Convention

Another sort of mistake in the commentary arises from insufficient knowledge of proceedings at the federal constitutional convention. Justice Johnson's famous concurring opinion in *Gibbons v. Ogden*,[386] in which he argued that the Commerce Clause was inherently exclusive of state jurisdiction, was an error of this kind.[387] We have seen that most of the convention delegates would have disagreed with Justice Johnson, for they voted specifically to leave substantial commercial powers, including the power to impose trade embargoes, with the states.[388] Although the structure of the constitutional text leaves little excuse for Johnson's error,[389] he can be forgiven his ignorance of the convention proceedings. He wrote sixteen years before publication of Madison's notes;[390] and while there are alternative sources of information for much of the convention, Madison's record is virtually the only detailed exposition for the time during which the convention discussed state commerce powers.

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ordinances of the United States in Congress assembled . . . . If any citizen of the United States of America, or person under their protection, shall commit a robbery or murder, or other capital crime, on *any Indian*, such offender or offenders shall be punished in the same manner as if the robbery or murder, or other capital crime, had been committed on a citizen of the United States of America . . . .") (emphasis added).

384. Treaty With the Creeks art. IX, Aug. 7, 1790, 7 Stat. 35, *reprinted in* 2 KAPPLER, *supra* note 2, at 27.

385. Treaty With the Cherokee art. XI, July 2, 1791, 7 Stat. 39, *reprinted in* 2 KAPPLER, *supra* note 2, at 31.

386. 22 U.S. (Wheat.) 1 (1824).

387. *Id.* at 89-90 (Johnson, J., concurring).

388. *Supra* note 294 and accompanying text.

389. *See supra* Part II.D.

390. The notes were first published in 1840. 1 FARRAND, *supra* note 2, at xv (editor's note).

This lack of availability may also explain the dicta in the same case by Chief Justice Marshall suggesting that congressional power over commerce might be exclusive of the states. Marshall contended that the powers excepted from state jurisdiction in U.S. CONST. art. I, § 10 did not demonstrate that states had concurrent jurisdiction outside the exceptions because the activities denominated in the exceptions were not really commerce. *Gibbons*, 22 U.S. (Wheat.) at 200-03.

Even without the notes, Marshall's error is surprising. The question of when duties are regulations of commerce and when they were primarily taxes was a major point of contention during the pre-Revolutionary era – most eloquently argued by John Dickinson in his *Farmer Letter*s of 1767-1768. *See, e.g.*, Robert G. Natelson, *The Constitutional Contributions of John Dickinson*, 108 PENN ST. L. REV. 415, 436-38 (2003). Had Marshall forgotten in the intervening decades? Perhaps he remembered at some point, because later in his opinion he conceded that "duties may often be, and in fact often are, imposed on tonnage, with a view to the regulation of commerce . . . ." *Gibbons*, 22 U.S. (Wheat.) at 202.

The episode illustrates for judges the perils of random dicta and for all lawyers and historians the risks of relying on nineteenth century material as evidence of original understanding.

More recently, it has been asserted that the "spirit of the [convention] proceedings"[391] showed that the finished Indian Commerce Clause was to be a very broad federal power.[392] In fact, the "spirit" of the convention in August 1787—when the Clause was proposed, mooted, amended, and inserted—was very different from the mood of nationalism that had reigned there during the convention's initial period. Earlier, the delegates seemed ready to propose a government in which the states would survive only as subordinate entities. After July 17, the "spirit of the proceedings" shifted markedly in the direction of decentralization.[393] A majority of the delegates—and in particular the Committee of Detail—began reining in nationalist aspirations.[394] Previously-adopted resolutions authorizing broad and indefinite federal powers were jettisoned in favor of relatively precise enumeration.[395] The changes in Madison's Indian affairs proposal are indicative of what happened to many nationalist amendments introduced during the last two months.[396] So also is the defeat of his motions to circumscribe state commercial powers.[397] We do not know the reason for the convention's change in attitude. It may have been the realization that a strongly nationalist plan would never win public approval.

A related mistake has been to identify James Madison's preferred constitutional arrangement with what the convention actually produced.[398] This is an error because, as we have seen, Madison was somewhat more nationalist than most of the other delegates, especially during the convention's final two months;[399] and he was *far* more nationalist

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391. Stern, *supra* note 2, at 1342.

392. *E.g.*, *id.* (claiming that the "whole spirit of the proceedings" supports a very broad power).

393. Natelson, *Enumerated*, *supra* note 2, at 472-73.

394. John C. Hueston, *Altering the Course of the Constitutional Convention: The Role of the Committee of Detail in Establishing the Balance of State and Federal Powers*, 100 YALE L.J. 765, 766 (1990) (focusing on, and arguably over-emphasizing, the committee's role in altering the convention's nationalist course).

395. Natelson, *Enumerated*, *supra* note 2, at 472-73.

396. For example, several of Madison's other enumerations had even less success than his Indian affairs clause, including his proposed powers "[t]o grant charters of incorporation;" "[t]o establish an University;" and "[t]o encourage, by proper premiums & provisions, the advancement of useful knowledge and discoveries." 2 FARRAND, *supra* note 2, at 325 (Aug. 18, 1787) (Madison).

397. *See supra* text accompanying notes 290-295.

398. *E.g.*, Clinton, *Supremacy*, *supra* note 2, at 132-33 (inferring the meaning of the Indian Commerce Clause from Madison's views); WILKINSON, *supra* note 2, at 12 n.27 (relying on a loose paraphrase of Madison's views).

399. *See supra* Part II.C. (discussing the Convention and Madison's role). Misunderstanding this, one writer has claimed that "the debates do not show that the Convention regarded the change from [Madison's proposed language of] 'affairs' to 'commerce' as in any way narrowing the proposed power to deal with the Indians." Stern, *supra* note 2, at 1342. This, of course, is incorrect, given the very different eighteenth-century meanings of "commerce" and "affairs." *See supra* notes 105-110 and accompanying text. Another objection to Stern's comment is that it places the burden of proof on the wrong party, for a change in wording generally denotes a change in intent. *E.g.*, Cazzanigi v. Gen. Elec. Credit Corp., 938 P.2d 819, 825 (Wash. 1997) ("[A] difference in language indicates a difference in legislative intent."); *see also* Am. Airlines, Inc. v. County of San Mateo, 912 P.2d 1198, 1217 (Cal. 1996) (declining to import same meaning to different terms).

than the ratifying public. The convention's final draft granted the new federal government less authority than Madison had desired.[400] The ratification bargain granted still less. And, of course, not even Madison suggested granting Congress plenary dominion over the Indians. His proposal was for Congress to "regulate affairs *with* the Indians"—to govern transactions between tribes and citizens. Yet this still was more than the convention or the public was willing to accept.

A more accurate bellwether of convention sentiment was a delegate such as John Rutledge of South Carolina. A leading moderate, Rutledge had enjoyed a distinguished career as South Carolina's premier lawyer, then as governor and chancellor.[401] He served on the Committee of Detail that altered the convention's resolutions of broad federal power into an enumeration.[402] He represented a state that had been the leader in developing Indian trade laws.[403] It was Rutledge who initially suggested within the Committee of Detail a federal power regarding the Indians.[404] While serving as committee spokesman, it was he who delivered the report to the convention that stripped down Madison's proposal to a mere commerce power.[405] He likely favored Madison's motion to ban state embargoes, but probably voted against Madison's effort to absolutely prohibit state import duties.[406]

D. Errors of Historical Anachronism

1. Errors of Language

Constitutional scholars must be careful not to equate eighteenth-century English with modern English. Eighteenth-century English differed in various ways, particularly in its closer affinity to Latin roots and usages.[407] Before one relies on the presumed meaning of an eighteenth-

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Stern's article, like so much else written in this area, was agenda-driven. He was writing in 1934, and his goal was to justify an expanded construction of the Commerce Clause that would facilitate the New Deal economic program. *See* Stern, *supra* note 2, at 1335 (suggesting that only federal action could cure the Depression).

400. MCDONALD, *supra* note 2, at 205-09 (showing that the finished Constitution was far different from, and less nationalist than, Madison's proposals).

401. For Rutledge's career, see JAMES HAW, JOHN AND EDWARD RUTLEDGE OF SOUTH CAROLINA (1997). The only full-length biography devoted exclusively to John Rutledge, RICHARD BARRY, MR. RUTLEDGE OF SOUTH CAROLINA (1942), is unreliable.

402. 2 FARRAND, *supra* note 2, at 97 (Jul. 24, 1787) (Journal).

403. *See supra* text accompanying notes 268-269.

404. 2 FARRAND, *supra* note 2, at 143 (Jun. 19 – Jul. 23, 1787) (Committee of Detail).

405. *Id.* at 366-67 (Aug. 22, 1787) (Journal).

406. This is an inference based on how the South Carolina delegation, of which he was the leader, voted on these issues. *Id.* at 441 (Aug. 28, 1787) (Madison) (showing a positive vote on Madison's embargo proposal and negative vote on his impost motion).

407. GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 93 (1979) (discussing the Latinate English of the founding generation); MCDONALD, *supra* note 2, at xi (stating that in understanding the Founding Era, "a rudimentary knowledge of Latin is highly useful; after all, every educated Englishman and American knew Latin, English words were generally closer

century usage, it is advisable to consult contemporaneous dictionaries and literary sources.[408]

The fact that members of the founding generation often spoke of the tribes as "nations" has induced some to conclude that the Founders "regarded Indian tribes as sovereign nations, with the ability to make war, treaties, and laws for their own people."[409] From this it has been inferred that American governments had no political jurisdiction over tribes within their borders.[410] Yet as noted earlier, colonial and state governments *did* exercise police powers over Indians within their borders, including tribal Indians.

Referring to tribes as "nations" was consistent with exercising political jurisdiction over them because at the time the word "nation" did not necessarily evoke the association with political sovereignty it evokes today. The more common meaning of "nation" followed its Latin root, *natio*, in referring merely to a people or ethnic group or the inhabitants of a general territory.[411] In his famous *Dictionary* of 1756, Samuel Johnson defined "nation" as, "[a] people distinguished from another people."[412] Similarly, Nicholas Bailey's 1783 *Dictionary* defined "nation" as "[t]he *people* of any particular country" and only secondarily as "the country itself."[413] Hence, a North Carolina legislator might simultaneously think of the Cherokees as a "nation" yet vote to apply North Carolina law to Cherokees living within state borders.

To be sure, the contemporaneous definition of "nation" did not *exclude* the possibility that some tribes were thought of as sovereign. A member of the founding generation might well think of some tribes as sovereign entities. But one cannot generalize from the use of the word "nation" to a conclusion that the Founders thought all tribes were sovereign.

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in meaning to their Latin originals than they are today, and sometimes . . . it is apparent than an author is accustomed to formulating his thoughts in Latin").

408. *Cf. supra* text accompanying notes 105-110 (comparing the contemporaneous meanings of "commerce" and "affairs").

409. Prakash, *Fungibility*, *supra* note 2, at 1082.

410. *Id.* at 1082-86 (arguing that the Founders saw the Indian tribes as sovereign nations, outside governmental jurisdiction in the United States).

411. In prior writings, *e.g.*, Natelson, *Commerce*, *supra* note 2, at 830-31, I have mentioned that knowledge of Latin may be a prerequisite to competent constitutional scholarship, in part because of such linguistic considerations as those mentioned in the text and in part because contemporaneous education consisted largely of Latin and other classical studies. The instance in the text is a good example: I might not have thought to check the eighteenth-century definition of "nation" had I not known that its Latin equivalent, *natio*, means a race or people, and has little or nothing to do with sovereignty.

412. 1 JOHNSON, DICTIONARY, *supra* note 2 (unpaginated) (defining "nation").

413. BAILEY, DICTIONARY, *supra* note 2 (unpaginated) (defining "nation"). *But see* ALLEN, DICTIONARY, *supra* note 2 (unpaginated) (defining "nation" as "a number of people inhabiting a certain extent of ground, and under the same government; a government or kingdom").

2. Unfamiliarity with Founding-Era Values

The Constitution excludes "Indians not taxed" from representation of states in the House of Representatives.[414] This has led some writers to assume that all Indians not taxed were necessarily outside state or federal political jurisdiction.[415] The error lies in overlooking the fact that during the Founding Era, representation was not nearly as congruent with political jurisdiction as it is today.

An important reason for excluding a group from representation was the perception that members of the excluded group were too dependent on others to exercise independent political judgment—that giving them the power to elect representatives would have the mere effect of granting extra votes to those upon whom they depended. This was a principal justification for excluding paupers, children, slaves, and (in most states[416]) women from the franchise.[417]

By the time the Constitution was drafted, some tribes already had entered into dependent relationships with the state or national government.[418] Irrespective of whether those tribes were within the political jurisdiction of the federal or state governments, the Founders would not have thought tribal members sufficiently independent to make political decisions in a free republic. But paying taxes was an obvious sign of independence. Hence the Constitution requires representation in a state's congressional delegation for Indians who do pay taxes.

3. Employment of Sources Out-of-Time: *Worcester v. Georgia*

Chief Justice Marshall's decision in *Worcester v. Georgia*[419] is sometimes cited for the proposition that federal jurisdiction over Indian affairs is exclusive.[420] *Worcester* might have had some probative value

414. U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, *and excluding Indians not taxed*, three-fifths of all other Persons.") (emphasis added).

415. *See, e.g.*, DELORIA & LYTLE, *supra* note 2, at 3 (claiming that "Indians not taxed" were "outside the reach of American sovereignty and its taxing power). Unfortunately, Professor Prakash, in an otherwise excellent article, falls into the same error. *See* Prakash, *Fungibility*, *supra* note 2, at 1083 (relying on Elk v. Wilkins, 112 U.S. 94, 99 (1884), a case obviously arising long after the Founding).

416. Women who were freeholders and heads of families could vote in New Jersey. Judith Apter Klinghoffer & Lois Elks, *"The Petticoat Electors": Women's Suffrage in New Jersey, 1776-1807*, 12 J. EARLY REPUBLIC 159, 164 (1992).

417. *See generally* Robert G. Natelson, *A Reminder: The Constitutional Values of Sympathy and Independence*, 91 KY. L.J. 353, 382-90 (2003) (discussing the Founders' view of the role of citizen independence in a republic).

418. For example, by the Hopewell treaties. *See supra* text accompanying notes 372-374.

419. 31 U.S. (6 Pet.) 515 (1832).

420. *E.g.*, Clinton, *Review*, *supra* note 2, at 858 (stating of *Worcester* that "Chief Justice Marshall correctly reflected the decision of the framers of the Constitution to vest sole and exclusive

of the original understanding if Marshall (a leading ratifier himself) had discussed what that understanding was. But he did not. The decision tells us nothing about what the ratifiers understood forty-three years earlier.

This is hardly surprising, since there was no need to investigate the constitutional question: the Court's holding was mandated by two treaties governing the case, treaties Marshall recited at length.[421] They provided that (1) Congress would "have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper,"[422] while (2) the Cherokees would deal only with the federal government, and not with any other sovereigns.[423]

Marshall thus justified his conclusion primarily by reciting applicable "laws and treaties" as well as the Constitution."[424] Only at one point did he seem to indicate that the exclusive power of Congress arose from the Constitution alone;[425] but that statement was dictum, and unsupported by citation or argument.

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power of managing the bilateral relations with the Indians – 'Commerce . . . with the Indian Tribes' – in the federal government").

421. *Worcester*, 31 U.S. (6 Pet.) at 551-56.

422. *See* Treaty with the Cherokee art. III, Nov. 28, 1785, 7 Stat. 18, *reprinted in* KAPPLER, *supra* note 2, at 9 ("The said Indians for themselves and their respective tribes and towns do acknowledge all the Cherokees to be under the protection of the United States of America, and of no other sovereign whosoever."); *id.* at art. IX, *reprinted in* KAPPLER, *supra* note 2, at 10 ("Article IX . . . the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper."). *See also* Treaty with the Cherokee art. II, July 2, 1791, 7 Stat. 39, *reprinted in* KAPPLER, *supra* note 2, at 29 ("The undersigned Chiefs and Warriors . . . do acknowledge themselves and the said Cherokee nation, to be under the protection of the said United States of America, and of no other sovereign whosoever; and they also stipulate that the said Cherokee nation will not hold any treaty with any foreign power, individual state, or with individuals of any state."); *see also id.* at art. VI, *reprinted in* KAPPLER, *supra* note 2, at 30 ("It is agreed on the part of the Cherokees, that the United States shall have the sole and exclusive right of regulating their trade.").

423. Treaty with the Cherokee art. III, Nov. 28, 1785, 7 Stat. 18, *reprinted in* KAPPLER, *supra* note 2, at 9; Treaty with the Cherokee art. II, July 2, 1791, 7 Stat. 39, *reprinted in id.* at 29 (agreeing that the Cherokees would be "under the protection of the said United States of America, and of no other sovereign whosoever").

424. *Worcester*, 31 U.S. (6 Pet.) at 562-63 (holding the Georgia law to be "repugnant to the *constitution, laws, and treaties* of the United States") (emphasis added). *See also id.* at 557 (referring to exclusivity created "*by treaties and laws*") (emphasis added). Marshall's opinion also referred to the rule of international law that gave Americans the rights to negotiate with local Indians exclusive of the rights of foreign powers. *Id.* at 543-44.

425. *Id.* at 561 (stating that the Georgia statutes "interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union"). Justice McLean's concurring opinion is clearer:

> By the constitution, the regulation of commerce among the Indian tribes is given to congress. This power must be considered as exclusively vested in congress, as the power to regulate commerce with foreign nations, to coin money, to establish post offices, and to declare war. It is enumerated in the same section, and belongs to the same class of powers.

Id. at 580-81 (McLean, J., concurring).

E. Mohegan Indians v. Connecticut

Most of the Founders were lawyers,[426] and even among non-lawyers legal knowledge was widespread.[427] Some understanding of eighteenth-century jurisprudence is therefore useful in constitutional interpretation. For example, I previously have referenced the case of *Blankard v. Galdy*,[428] which defined when a conquered people was, and was not, subject to English law.[429]

It has been argued that an interlocutory jurisdictional ruling in *Mohegan Indians v. Connecticut*[430] "represented the start of increased centralization of oversight and control of colonial Indian regulation by the British government."[431] That ruling is offered as one piece of evidence the framers intended federal jurisdiction over Indian affairs to be exclusive.[432]

Mohegan was a very long-running controversy over land titles between Connecticut, the Mohegan Indian tribe, and individual claimants. The Privy Council appointed a series of commissions to resolve the dispute, directing them to judge "according to justice and equity" rather than according to the common law.[433] This raised consternation in Connecticut, because the prescribed procedure would result in litigation of land titles without the right to trial by jury.[434]

In 1743, private title holders demurred to the jurisdiction of the then-sitting commission. They contended that the commission's authorization did not include the power to "call tenants of any lands within this colony into question in a course of equity . . . concerning the right or title

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The defendants also had argued that congressional jurisdiction was exclusive by reason of the Constitution alone. *Id.* at 540 (reporting the Chief Justice as summarizing the defendant's argument).

426. CLINTON ROSSITER, 1787: THE GRAND CONVENTION 79-137 (Eric F. Goldman ed., The Macmillan Company 1966) (providing short biographies of the delegates to the federal convention).

427. DANIEL J. BOORSTEIN, THE AMERICANS: THE COLONIAL EXPERIENCE 110-36 (Vintage Books 1958) (describing various indicia of the prevalence of legal activity among laymen). *Id.* at 197-202, 205. *See also* LOUIS B. WRIGHT, THE CULTURAL LIFE OF THE AMERICAN COLONIES 1607-1763, at 15 (Harper & Brothers 1957) ("The Maryland planters prided themselves on their familiarity with the principles and practice of law, for legal knowledge was regarded as a necessary accomplishment of a gentleman."). *See also id.* at 128 (stating that "every man had to be his own lawyer").

428. (K.B. 1693) 2 Salk. 411, 91 Eng. Rep. 356.

429. *See supra* note 160 and accompanying text.

430. The case is unreported. *See* SMITH, *supra* note 2, at 422-42 (containing an extensive summary).

431. Clinton, *Dormant*, *supra* note 2, at 1068.

432. *Id.* at 1058. Stating as to the part of his article in which his discussion of *Mohegan* appears:

> Part III will discuss the colonial and confederation period history surrounding the adoption of the Indian Commerce Clause to demonstrate that . . . the primary purpose of that clause was to assure that the federal government had exclusive power to deal with Indian tribes and that states could no longer pretend to exercise any authority in Indian country.

Id.

433. SMITH, *supra* note 2, at 425.

434. *Id.* at 427.

of the said tenants to any lands" or to determine their legal rights.[435] They further contended that if the authorization did include equitable power to adjudicate land titles, then it was illegal, for it violated both the laws of England and the Connecticut charter. Both English and Connecticut authority required that land titles and possession be adjudicated according to the common law, with its guarantee of trial by jury.[436] This the landholders claimed as their "undoubted birthright and inheritance."[437]

In their ruling on the demurrer, the three commissioners split. Two ruled for the Mohegans on the ground that "[t]he Indians, though living amongst the king's subjects . . . are a *separate and distinct people from them*, and they are treated as such, *they have a polity of their own,* they make peace and war with any nation of Indians when they think fit, *without controul* [*sic*] from the English."[438] Thus, any dispute between them and English subjects "cannot be determined by the laws of our land, but by a law *equal to both parties,* which is the law of *nature and nations*."[439] The commissioners might have noted, although they did not, that Connecticut itself had treated the Mohegans as sovereign insofar as the colony had concluded treaties with the tribe.[440]

There was a sharp dissent from the president of the commission. "I can in no matter consider the Mohegan Indians as a *separate or sovereign state*," he wrote.[441] "[S]uch a position in this country, where the state and condition of Indians are known to every body, would be exposing majesty and sovereignty to ridicule. . . ."[442] The Mohegans before the court were but British subjects, "enjoying both the benefit and protection of the English law, and all the privileges of British subjects. . . . When *special powers* out of the course of the common law are given to commissioners for particular purposes, those powers are strictly to be pursued, and can in no manner be inlarged [*sic*] by implication . . . [443]

It is difficult to find evidence that the ruling in *Mohegan* represented any sort of shift from local to central control over Indian affairs. As noted earlier, the individual colonies retained substantial jurisdiction over local Indian affairs, especially over Indian commerce, throughout the entire period of British rule.[444] Moreover, while the ruling had incidental consequences for the jurisdiction of one commission, it was not

435. MOHEGAN PROCEEDINGS, *supra* note 2, at 124.
436. SMITH, *supra* note 2, at 434.
437. MOHEGAN PROCEEDINGS, *supra* note 2, at 124.
438. *Id.* at 126.
439. *Id.* at 127; SMITH, *supra* note 2, at 434. Smith's quotations from the commission's proceedings are more in the nature of paraphrase than quotation.
440. SMITH, *supra* note 2, at 424, 427-28.
441. MOHEGAN PROCEEDINGS, *supra* note 2, at 128.
442. *Id.*
443. *Id.*
444. *See supra* Parts II.B.2-3.

really about which level of government should control Indian affairs. It was about what body of jurisprudence—law or equity—any tribunal adjudicating Indian title claims should employ. Such disputes had been common throughout the history of the English court system.[445] However, individual colonies could and often did deal with the tribes under international law, as Connecticut itself had done by signing treaties with this very tribe.[446]

As a purely legal matter, the jurisdictional ruling had little significance. The *Mohegan* commission was not a court, nor was it staffed by judges. It was an *ad hoc* colonial commission appointed by the Privy Council. Joseph Henry Smith, the most thorough historian of the controversy, has pointed out that the Privy Council (and *a fortiori* its subordinate commissions) lay outside the regularly-constituted court system, and most of its decisions had only limited precedential force.[447] Even the Council never reviewed the ruling on appeal, for the Indians lost on the merits.[448]

No court reporter found *Mohegan* worthy of reproduction. It was an unreported decision in a legal environment in which "lawyers habitually clung to English printed precedents."[449] My own survey of English and American legal databases confirms that *Mohegan* remained not only unreported, but was utterly unreferenced in any case reports before or during the Founding Era.[450]

If the *Mohegan* ruling has any probative force on the constitutional scope of federal Indian powers, that force arises from the influence of the case, if any, on the outlook of those who approved the Constitution. At least one significant Founder, William Samuel Johnson of Connecticut, had formed an opinion on the ruling, and that opinion was a negative one. During the 1760s, Johnson represented his colony in later *Mohegan* proceedings, and while not involved in the jurisdictional issue as an advocate, he let it be known he found the jurisdictional ruling ludicrous. He wrote that "the Mohegans were neither free, Independent, nor numerous"[451] and that Connecticut had for some time governed them with laws "which subject them to Punishment for Immoralities and crimes, and

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445. *E.g.*, PLUCKNETT, *supra* note 2, at 193-98 (describing the conflict under the Stuart kings).

446. *See supra* note 440 and accompanying text.

447. SMITH, *supra* note 2, at 464. One might argue that the decision was "constitutional" and therefore should have had some force, but there is no particular evidence that it did. *See also* PLUCKNETT, *supra* note 2, at 206 (stating that the Council "was constantly reduced to impotence by the sturdy provincialism of courts which declined to recognise [sic] its authority").

448. SMITH, *supra* note 2, at 435-36.

449. *Id.* at 464. Professor Clinton, who relies on the case, duly acknowledges that it was unpublished. Clinton, *Dormant*, *supra* note 2, at 1067 n.23.

450. A search in HeinOnline for "ENGLISH REPORTS (FULL REPRINT (1220-1865))" reveals no report of or reference to the case before 1800. A search in Westlaw of the "ALLSTATES-OLD" and "ALLFEDS-OLD" databases yielded the same result.

451. SMITH, *supra* note 2, at 434 n.109.

enact various regulations with respect to them."[452] "This Notion of their being free States," he said, "is perfectly ridiculous and absurd."[453]

Thus, it can be inferred that Johnson would not have wanted such a ruling enshrined in the Constitution. As evidence of constitutional meaning, his views are entitled to at least some weight. A widely-respected figure, he served in the Stamp Act Congress and the Confederation Congress, and was a key delegate both to the 1787 federal convention[454] and to the Connecticut ratifying convention.[455] That there were others who thought like him can be deduced indirectly from the esteem in which he was held and directly from the wording of the Declaration of Independence. For the Declaration lists as a principal grievance against the Crown precisely the ground for landholders' challenge to the *Mohegan* commission: deprivation "of the benefits of trial by jury."[456]

V. CONCLUSION

This Article has examined the original meaning and original understanding of the Indian Commerce Clause, employing the best historical tools available for that purpose. In this instance, the original meaning and original understanding were identical. The Indian Commerce Clause was adopted to grant Congress power to regulate Indian trade between people under state or federal jurisdiction and the tribes, whether or not under state or federal jurisdiction. Within its sphere, the Clause provided Congress with authority to override state laws. It did not otherwise abolish or alter the pre-existing state commercial and police power over Indians within state borders. It did not grant to Congress a police power over the Indians, nor a general power to otherwise intervene in tribal affairs.

Other provisions in the Constitution granted the federal government considerable competence in the field of Indian affairs. The Article IV Territories and Property Clause conferred on Congress significant power

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452. *Id.*

453. *Id.* at 435 n.109.

454. Dr. Johnson was one of three in the pivotal Connecticut delegation, and played a moderate, constructive part throughout the convention. He also was one of five on the Committee of Style, which put the document in final form. The respect with which he was held can be gauged by the copious talent of those elected to serve with him on that committee: Madison, Hamilton, Rufus King, and Gouverneur Morris. 2 FARRAND, *supra* note 2, at 553 (Sept. 8, 1787) (Madison).

455. 1 FARRAND, *supra* note 2, at 76 (Jun. 2, 1787) (Journal) (noting Johnson's attendance at the federal convention); *Connecticut's Ratification*, THE U.S. CONSTITUTION ONLINE, http://www.usconstitution.net/rat_ct.html (last visited November 3, 2007) (listing Johnson as a ratification convention delegate). Subsequently, he served in the United States Senate, and as president of Columbia University. For general biographies, see Robert M. Calhoon, *Johnson, William Samuel*, *in* THE OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004-07); ELIZABETH P. MCCAUGHEY, FROM LOYALIST TO FOUNDING FATHER: THE POLITICAL ODYSSEY OF WILLIAM SAMUEL JOHNSON (1980); GEORGE C. GROCE, JR., WILLIAM SAMUEL JOHNSON: A MAKER OF THE CONSTITUTION (1937).

456. THE DECLARATION OF INDEPENDENCE para. 20 (1776) ("For depriving us, in many cases, of the benefit of Trial by Jury.").

over Indians residing in a federal territory or on federal land within state boundaries. Under the Treaty Power, agencies of the federal government could exercise authority over a tribe if the tribe so agreed. By treaty, states could be entirely or partially divested of their jurisdiction over a tribe. The treaty mechanism protected tribes from arbitrary assumption of federal power, for a tribe had to agree to a treaty. The treaty mechanism also protected the states from inappropriate divesting of their authority, for two-thirds of their delegates in the United States Senate had to concur. Finally, the results of textual and historical analysis militate overwhelmingly against the federal government having any "inherent sovereign power" over Indians or their tribes.

No doubt people who work in the area of Indian law will have mixed feelings about these conclusions. Some will embrace my conclusion that the tribes are entitled to a wide scope of autonomy from federal control, while others may fear that I have put federal Indian welfare programs under a constitutional cloud.[457] Few will be pleased with the finding that the Founders intended the states to retain their broad residual police power, although there are reasons for re-thinking that position.[458] Some may, or may not, appreciate the implied suggestion that federal Indian policy should be made less through congressional legislation and more through tribe-by-tribe treaty negotiations.

Scholarly investigations should not be held hostage to political views, and I have not allowed them to skew the findings of this investigation. If the investigation be factually sound, then I hope readers will acknowledge that, and pursue their goals within that context.

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457. Fletcher, *Federal Indian Policy*, *supra* note 2, at 165 ("The plenary power of Congress in Indian affairs has generated an enormous amount of vociferous scholarly debate in the federal Indian law academic community, with the argument that Congress has no business regulating at least the internal affairs of Indian tribes being most popular.").

458. Strategically, Indian activists might be better positioned to achieve their goals after a devolution of power over Native affairs to the states. As of 1990, Indians, Eskimos, and Aleuts together comprised only 0.8 percent of the national population subject to congressional jurisdiction. But the states in which most Indians live, and the states with significant reservations, have populations in which Native representation is far higher. Chart 129, *Population, by State, Geographic Region, and Race/Ethnicity, 1990*, *in* STATISTICAL RECORD OF NATIVE NORTH AMERICANS, *supra* note 2, at 224-25 (showing that in 1990, only 0.8 percent of the national population was Indian, Eskimo, or Aleut, but that in significant reservation states, the percentages were higher – *e.g.*, 6.0 percent in Montana, 8.9 percent in New Mexico, and 8.0 percent in Oklahoma). Whatever the history of state legislatures when Indians were substantially without representation, today the incentives for favorable treatment of such large in-state minorities are likely to be significant.