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Mark Savage

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NATIVE AMERICANS AND THE CONSTITUTION: THE ORIGINAL UNDERSTANDING

*Mark Savage**

It has been said that truth is stranger than fiction; but let us begin with fiction.

There had been changes in the land. The great cat stalked the new slate tombstone through the snow. Around the field of whiteness, in magnificent oblivious audience, stood a thin border of naked birch and maple, without shadows. Anna watched the sweep of the catamount across the drifts of soft, frozen tears. The field was sacred—her husband was buried here. She had buried him at home in the land of Vermont, not in a matrix of military white tombstones.

Two hundred thirty-six thousand, nine hundred eighteen American soldiers had died in Namibia during the war in 1994. In ships the dead came across the Atlantic Ocean and settled, like colonists, upon land that no one, in innocence, had expected them to take.

All of the heartache burst into rage. The Congress which had voted and the President who had commanded, they worried. Their words quickened with sympathy for the nameless veils of black. They decided to receive evidence about the practical effects of the war, to determine a program which would order and minimize them, and to budget the necessary monies.

The government suffered the universal ailment of governments, a disease of the heart: It had never been there. It had not seen. It is distinctly a politician's point of view that the wrath of Achilles belongs on the battlefields, and so Congress was not prepared for the anger it refused to face. It is a distinctly masculine point of view that Athena was born from the head of Zeus, that wisdom and justice derive from power;

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* Attorney, Public Advocates, Inc., San Francisco, Calif. J.D., Stanford Law School, 1988; B.A., University of California, Berkeley, 1982.

I dedicate this article to the Native Americans in the past, present, and future who suffered and continue to suffer injustice, disrespect, and even barbarity in their home, the Mother Earth.

Congress relied upon its power to determine the justice it would mete.

The United States Treasury did not have any money for the veterans and their families. War had both mirrored and set the budgetary priorities for years to come. Congress pondered an alternative source of wealth, land, and decided to allocate land to the veterans, to the heirs of the dead, and to the disabled.

The bill was simple: The United States would exercise its power as sovereign to appropriate Vermont, in fee simple absolute, and would remove the citizens of Vermont to portions of Oklahoma, Kansas, Montana, Idaho, Colorado, and South Dakota, which the United States would also take. It would then divide Vermont into 1,000,000 parcels and would convey title to each veteran or heir.

The former Vermonters would become wards of the United States for two decades. Congress would ensure its power as guardian by retaining the fee to their new lands; each displaced Vermonter would have a right of occupancy superior to any other claim, but Congress could terminate this subordinate right of occupancy at will, without consent. Thus the United States would also have the power to make the most productive and efficient use of the land in forming new communities for the benefit of the former Vermonters. They, in turn, could not sell their new homesteads, disrupt the economies and politics of the several states, and thereby defeat the federal effort to contain the situation.

Robed in its plenary power, Congress would first choose the new state citizenship and community for each Vermonter and form the constitutions of their local governments. In order to hasten the transition and protect the interests of its wards, Congress would necessarily legislate all matters. The dictates of federal policy and national priorities would supplant the otherwise inevitable and intolerable disputes among private individuals.

The complaints sounded forth across America, with the roots of protest in the seven states directly affected. A rather bizarre congregation of liberals, conservatives, and libertarians brought suit in federal court, carefully enumerating the contraventions of the Con-

stitution and the Bill of Rights. Anna suffered the irony: her sacred land to be taken by sacrilege.

Perhaps readers have searched this tale for more than it is—have compared it with reality and found it absurd. On the contrary, a resplendent multitude of federal statutes and an august line of opinions by the Supreme Court of the United States declare that the Constitution bestows upon the United States exactly these powers over Native Americans. Congress has plenary power to legislate the form of government of Native Americans.¹ Congress has plenary power to determine whether a “tribe” does or does not exist and whether a Native American is or is not a citizen of it.² The United States has plenary power to control the property rights and relations of Native Americans.³

1. *E.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-57 (1978) (“Congress has plenary authority to limit, modify or eliminate the powers of local self-government”); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 306-07 (1902); *Talton v. Mayes*, 163 U.S. 376, 384 (1896); *cf.* *Roff v. Burney*, 168 U.S. 218, 222 (1897) (“The only restriction on the power of the Chickasaw Nation to legislate in respect of its internal affairs is that such legislation shall not conflict with the Constitution or laws of the United States . . .”).

2. *E.g.*, *United States v. Sandoval*, 231 U.S. 28, 46, 47 (1913) (“Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.”); *see* *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 85-86 (1977); *Chippewa Indians v. United States*, 307 U.S. 1, 4-5 (1939) (by implication); *Wallace v. Adams*, 204 U.S. 415, 423 (1907); *Blue Jacket v. Board of Comm’rs [The Kansas Indians]*, 72 U.S. (5 Wall.) 737, 755-57 (1867). Congress can even define “Indian.” *See* *United States v. John*, 437 U.S. 634, 649-50 (1978).

3. *E.g.*, *United States v. Wheeler*, 435 U.S. 313, 326 (1978) (dictum) (“Indian tribes can no longer freely alienate to non-Indians the land they occupy”); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 288-89 (1955) (Congress has plenary authority to manage and control all Native American lands of aboriginal title, including termination of title, and no right of compensation exists unless a treaty or statute authorizes it); *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 106 n.28 (1949); *id.* at 103 (dictum) (reservation created by executive order entails no “right of use or occupancy” and the United States may terminate the interest without compensation); *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 331 (1942) (President or Congress may terminate at will without compensation any proprietary interest of Native Americans in reservations created by executive order—23 million acres, 67 CONG. REC. 10,913 (1926) (statement of Senator Bratton)); *United States v. Rogers*, 45 U.S. (4 How.) 567, 572 (1846) (Native American tribes “hold and occupy [the reservations] with the consent of the United States, and under their authority”); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (“They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases.”); *Johnson & Graham’s Lessee v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823).

The power of Congress can reach all social, cultural, economic, political, and personal facets of Native Americans' lives.⁴ Even when the United States conferred citizenship upon Native Americans by statute, such citizenship did not defeat these powers. Native Americans are not citizens in a constitutional sense.⁵ Their statutory citizenship is not inconsistent or incompatible with federal guardianship and protection of Native Americans and their property, nor with tribal self-government.⁶ Congress may choose whether to relinquish its guardianship and control of Native Americans, in whole or in part, granting them all rights and responsibilities or effecting only partial emancipation.⁷

The truth, however, is stranger than fiction: The Constitution never conferred such power over Native Americans. Two hundred years of decisions by the Supreme Court and legislation by Congress and the President lack constitutional authority. The article below details the research and reasons for this thesis. It offers the legal historian a much different analysis of the status of Native Americans under state and federal law, and it provides the advocate with new arguments and evidence to challenge exercises of state and federal power over Native Americans and Native American lands.

I. Introduction

The alchemy of American history has yielded several legal principles about Native Americans: Ours is not a federal system comprising only state and national governments, but a tripartite order. Native American tribes constitute a unique, third category within our federal system, "domestic dependent nations . . . in

4. *E.g.*, *United States v. Wheeler*, 435 U.S. 313, 319 (1978) ("undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government"); *United States v. Kagama*, 118 U.S. 375, 379 (1886) ("the power of regulating their internal and social relations").

5. *Elk v. Wilkins*, 112 U.S. 94 (1884) (amend. XIV, § 1 does not confer citizenship upon Native Americans); *see* *Scott v. Sandford*, 60 U.S. (19 How.) 393, 403-04 (1857) (dictum); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559-62 (1832) (Native Americans were "a people distinct from" those of the states and the United States, with a right of self-government); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17-18 (1831) (Cherokees were not "foreign nations" nor "citizens" within meaning of art. III and were distinguished from "our own citizens").

6. *United States v. John*, 437 U.S. 634, 653-54 (1978); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172-73 (1973); *Board of County Comm'rs v. Seber*, 318 U.S. 705, 718 (1943); *United States v. Sandoval*, 231 U.S. 28, 47-48 (1913); *Tiger v. Western Inv. Co.*, 221 U.S. 286, 315-16 (1911).

7. *E.g.*, *United States v. Waller*, 243 U.S. 452, 459-60 (1917); *United States v. Nice*, 241 U.S. 591, 598 (1916).

a state of pupillage," not foreign nations nor states of the United States.⁸ (Unfortunately, standard texts on constitutional law omit to treat this tertiary status of Native Americans under the Constitution.⁹) Within this tripartite order, Congress enjoys a plenary power over Native Americans, a power originally without substantive check by the Constitution or judicial review in the Supreme Court.¹⁰ (While Congress' power remains "plenary," the Court has grafted some constitutional limits upon it.¹¹) The resultant law of the United States has been fickle in its concession of rights to Native Americans, alternating between assimilation, paternalism, and exclusion.¹²

It is well demonstrated that the Constitution did not embrace the ideal of liberty. Instead, the Framers effected a compromise of ideal liberty and actual property and expressly preserved a property right in slaves.¹³ The adulteration was not unique, in

8. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16-17, 19-20 (1831).

9. None of the cited casebooks on constitutional law treats the rights or the status of Native Americans under the Constitution. See E. BARRETT & W. COHEN, *CONSTITUTIONAL LAW* (6th ed. 1981) (not treating the status of Native Americans under the Constitution); P. BREST & S. LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* (2d ed. 1983) (same); P. FREUND, A. SUTHERLAND, M. HOWE & E. BROWN, *CONSTITUTIONAL LAW* (4th ed. 1977) (same); G. GUNTHER, *CONSTITUTIONAL LAW* 25, 39 (11th ed. 1985) (same); W. LOCKHART, Y. KAMISAR & J. CHOPER, *CONSTITUTIONAL LAW* (5th ed. 1980) (same); G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSENET, *CONSTITUTIONAL LAW* (1986) (same); cf. P. KAUPER, *CONSTITUTIONAL LAW* 479-80, 493, 539 n.c., 1346 (4th ed. 1972) (treating the status of Native Americans under the Constitution in a few brief notes).

10. See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *United States v. Wheeler*, 435 U.S. 313, 319 (1978) ("undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government"); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) ("[The Constitution] confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions; the shackles imposed on this [legislative] power, in the confederation [under the Articles of Confederation], are discarded.").

11. See generally F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 217-29 (R. Strickland ed. 1982) (discussing the Constitution and the doctrine of trust responsibility as limits upon the federal power to reach the affairs of Native Americans).

12. See generally 1-2 F. PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* (1984).

13. Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 4-5 (1985); W. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848*, at 62-63 (1977); Finkelman, *Slavery and the*

quality or degree. We have also arrogated the liberty and property of Native Americans, under color of the Constitution.¹⁴ This arrogation, however, was no part of the original understanding. Perhaps “[i]t was not that the Indian cause meant less, but that the Union meant more.”¹⁵

If the United States—the Congress, the President, the Supreme Court—has any authority with respect to Native Americans, the Constitution must confer it. Any such provision at one and the same time establishes and limits the scope of the power. Notwithstanding assignments of a plenary power to the United States, it remains competent to inquire whether the Constitution confers it or whether subsequent legislative or judicial glosses on the Constitution have, because “the Union meant more,” concocted the power.

Inquiry into the original understanding about Native Americans takes three forms. What does the text of the Constitution state and mean (with due respect for historical variations in meanings of words)? What did the Framers intend—to what motives did they give effect through the text? What powers does the structure of the Constitution necessarily imply, and did the Framers necessarily intend, without declaring them?¹⁶

Analysis of the text of the Constitution and the recorded debates at the Federal Convention in Part II indicates that, in the original understanding, the Constitution never conferred upon the United States a plenary power over Native Americans. Because the Constitution and those debates omit any discussion of Native American lands in the Western Territory—lands which the colonists coveted and often claimed for their own—this

Constitutional Convention: Making a Covenant with Death, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 188 (R. Beeman, S. Botein & E. Carter II eds. 1987); see, e.g., U.S. CONST. art. I, § 9, cl. 1; *id.* art. IV, § 2, cl. 3 (1789, repealed by amend. XIII (1865)); 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 594 (M. Farrand rev. ed. 1937) (July 12, 1787) (statement of Charles Cotesworth Pinckney, South Carolina, that “property in slaves should not be exposed to danger under a Govt. instituted for the protection of property.”) [hereinafter *RECORDS*].

14. See generally 1-2 F. PRUCHA, *supra* note 12.

15. Strickland, *The Absurd Ballet of American Indian Policy or American Indian Struggling with Ape on Tropical Landscape: An Afterword*, 31 *ME. L. REV.* 213, 220-21 (1979) (describing the contemporary attitude towards *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)).

16. See generally Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U.L. REV.* 204 (1980). This inquiry does not resolve the prior question, how should the original understanding inform subsequent interpretation of the Constitution?

article also considers in Part III whether any unstated understandings existed about federal sovereignty over Native American lands and thus whether any powers over Native Americans were implicit in, without being expressly conferred by, the Constitution.

II. The Text and the Framers' Intent

When the chosen statesmen assembled in Philadelphia in 1787, the slate was not clean. The Declaration of Independence had already complained about Native Americans: "He [King George III] has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions."¹⁷ The Articles of Confederation had conferred authority with respect to Native Americans:

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 United States, in Congress assembled, can be consulted¹⁸

The 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 not members of any of the States; provided that the legislative right of any State within its own limits be not infringed or violated¹⁹

Lastly, certain states were encroaching upon this exclusive federal power to regulate the trade and manage all affairs with the Native Americans who were not members of the states—one of the problems which caused the states to convene the Federal Convention in order to revise the Articles of Confederation.²⁰

17. The Declaration of Independence para. 29 (U.S. 1776), reprinted in 5 J. CONTINENTAL CONG. 510, 513 (W. Ford ed. 1906) (July 4, 1776).

18. The Articles of Confederation art. VI, para. 5 (U.S. 1781), reprinted in 9 J. CONTINENTAL CONG. 907, 912 col. 2 (W. Ford ed. 1907) (Nov. 15, 1777).

19. The Articles of Confederation art. IX, para. 4, reprinted in 9 J. CONTINENTAL CONG. at 919, col. 2.

20. *E.g.*, 1 RECORDS, *supra* note 13, at 316 (June 19, 1787) (statement of James Madison, Virginia).

The Framers steeped themselves for four months in arguments from historical example, political theory, American character, and regional economics. They eventually treated Native Americans in two constitutional provisions, the three-fifths clause and the Indian commerce clause:

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.²¹

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]²²

A. *The Three-Fifths Clause*

The Virginia Plan for a constitution, presented by Edmund Randolph to the Federal Convention on May 29, 1787, did not mention Native Americans among its resolutions.²³ On June 11, the Committee of the Whole House To Consider of the State of the American Union debated anew the second resolution of the plan concerning the “rights of suffrage in the National Legislature.”²⁴ A motion was made to resolve “that the right of suffrage in [the first branch of] the national Legislature ought not to be according the [sic] rule established in the articles of Confederation, but according to some equitable ratio of representation.”²⁵ A subsequent motion proposed to define “equitable ratio of representation” by subjoining

21. U.S. CONST. art. I, § 2, cl. 3.

22. *Id.* art. I, § 8, cl. 3.

23. See The Virginia Plan (May 29, 1787), reprinted in 1 RECORDS, *supra* note 13, at 20-23.

24. The Virginia Plan, *supra* note 23, para. 2 (“Resd. therefore that the rights of suffrage in the National Legislature ought to be proportioned to the Quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases.”).

25. 1 RECORDS, *supra* note 13, at 196, 200 (June 11, 1787) (motion of Rufus King, Massachusetts, and James Wilson, Pennsylvania). The Articles of Confederation had provided that, “In determining questions in the United States, in Congress assembled, each State shall have one vote.” The Articles of Confederation art. V, para. 4 (U.S. 1781), reprinted in 9 J. CONTINENTAL CONG. 907, 910 col. 2 (W. Ford ed. 1907) (Nov. 15, 1777).

in proportion to the whole number of white & other free Citizens & inhabitants of every age sex & condition including those bound to servitude for a term of years and three fifths of all other persons not comprehended in the foregoing description, except Indians[,] not paying taxes[] in each State.²⁶

This definition and its reference to “Indians” repeated a principle of apportionment included in the first and second drafts of the Articles of Confederation (which the final version had deleted) and subsequently proposed as an amendment to the Articles of Confederation in 1783.²⁷

26. 1 RECORDS, *supra* note 13, at 201 (June 11, 1787) (motion of James Wilson, Pennsylvania, and Charles Pinckney, South Carolina). Mr. Madison originally described the substance of the motion, but subsequently inserted the motion (but not verbatim) from *Journal, Acts and Proceedings, of the Convention, Assembled at Philadelphia, Monday, May 14, and Dissolved Monday, September 17, 1787, which formed the Constitution of the United States* 111-12 (1819) (“In proportion to the whole number of white and other free citizens and inhabitants of every age, sex, and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, except Indians, not paying taxes, in each state.”). 1 RECORDS, *supra* note 13, at 201 n.10 (editor’s note). *The Records of the Federal Convention of 1787* reprints the motion as published in the minutes of the secretary, William Jackson, with the comma after “Indians,” not after “taxes.” *Id.* at 193. Therefore its reprint of Mr. Madison’s revision is amended with brackets so to reflect. This punctuation in the secretary’s minutes and the revision of Mr. Madison’s quotation are both consistent with the Report of the Committee of the Whole House To Consider of the State of the American Union, which reported to the Federal Convention for its consideration the amended and adopted resolutions of the Virginia Plan. *See infra* note 29.

27. The Articles of Confederation (first draft), art. XI, *reprinted in* 5 J. CONTINENTAL CONG. 546, 548 (W. Ford ed. 1906) (July 12, 1776) (“which shall be supplied by the several Colonies in Proportion to the Numbers of Inhabitants of every Age, Sex and Quality, except Indians not paying Taxes, in each Colony, . . .”) [hereinafter Articles of Confederation—First Draft]; The Articles of Confederation (second draft), art. XI, *reprinted in* 5 J. CONTINENTAL CONG. 674, 677-78 col. 2 (W. Ford ed. 1906) (Aug. 20, 1776) (“which shall be supplied by the several States in proportion to the number of inhabitants of every age, sex and quality except Indians not paying taxes, in each State, . . .”) [hereinafter Articles of Confederation—Second Draft]; Resolution of Apr. 18, 1783, *reprinted in* 24 J. CONTINENTAL CONG. 256, 260 (G. Hunt ed. 1922).

The amendment proposed in 1783 would have employed the principle to apportion among the thirteen states requisitions for the federal treasury,

which shall be supplied by the several states in proportion to the whole number of white and other free citizens and inhabitants, of every age, sex and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, except Indians, not paying taxes, in each State; . . .

Id. During the formulation of the proposed amendment to the Articles of Confederation, no discussion of the term “Indians” was had. *See* 24 J. CONTINENTAL CONG. 256-61

The Committee of the Whole House adopted this same ratio of representation among the states for the second branch of the national legislature.²⁸ Its final report to the Federal Convention, on June 13, 1787, confirmed this reference to Native Americans.²⁹ (The second and third resolutions of the Virginia Plan were renumbered the seventh and eighth resolutions of the report.)

In opposition to the Virginia Plan, William Paterson of New Jersey proposed the New Jersey Plan to the Federal Convention on June 15, 1787. The New Jersey Plan included a similar clause, which likewise mentioned "Indians," but the clause defined the ratio of requisitions from the states by the general government, not the ratio of representation among the states.³⁰ The Committee of the Whole House decided not to refer the New Jersey Plan to the Federal Convention.³¹

(G. Hunt ed. 1922) (Apr. 18, 1783); Address to the States, by the United States in Congress Assembled, *reprinted in* 24 J. CONTINENTAL CONG. 277-83 (G. Hunt ed. 1922) (Apr. 26, 1783).

Messrs. Randolph and Wilson subsequently referred to this resolution and definition when discussing the one then before the Federal Convention. 1 RECORDS, *supra* note 13, at 594, 595 (July 12, 1787).

28. 1 RECORDS, *supra* note 13, at 202 (June 11, 1787) (motion of James Wilson, Pennsylvania, and Alexander Hamilton, New York).

29. Some punctuation differed, but the pertinent phrase remained "and three fifths of all other persons not comprehended in the foregoing description, except Indians, not paying taxes in each State." State of the Resolutions Submitted to the Consideration of the House by the Honorable Mr.[.] Randolph, as Altered, Amended, and Agreed to in a Committee of the Whole House [To Consider of the State of the American Union] para. 7 (June 13, 1787), *reprinted in* 1 RECORDS, *supra* note 13, at 228, 229; *see also* [Preliminary] State of the Resolutions Submitted to the Consideration of the House by the Honorable Mr.[.] Randolph, as Agreed to in a Committee of the Whole House [To Consider of the State of the American Union] (June 11, 1787), *reprinted in* 1 RECORDS, *supra* note 13, at 224, 227. Mr. Madison quoted the phrase in the "Report of the Committee of Whole on Mr. Randolphs propositions" as "& three fifths of all other persons, not comprehended in the foregoing description, except Indians not paying taxes in each State." *Id.* at 236.

30. The New Jersey Plan para. 3 (June 15, 1787) ("Resd. that whenever requisitions shall be necessary, instead of the rule making requisitions mentioned in the articles of Confederation, the United States in Congs. be authorized to make such requisitions in proportion to the whole number of white & other free citizens & inhabitants of every age sex and condition including those bound to servitude for a term of years & three fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes; . . ."), *reprinted in* 1 RECORDS, *supra* note 13, at 242, 243 (June 15, 1787). Thus the New Jersey Plan incorporated the proposed amendment of article VIII of the Articles of Confederation, which would have employed this principle to apportion requisitions among the states. *See* note 27 *supra* and accompanying text.

31. 1 RECORDS, *supra* note 13, at 322 (June 19, 1787) (motion of Rufus King, Massachusetts).

This clause became part of the basic debate about representation in the Congress, the debate that ultimately yielded to the "Great Compromise." Throughout these deliberations about the nature of representation in Congress and whether to adopt the seventh resolution (which excepted "Indians"), however, Native Americans were not mentioned once as people to be represented.³²

Having bandied the proper ratio of representation without resolution, the Federal Convention formed and referred the seventh resolution to a committee comprising one delegate from each state.³³ This committee adopted the clause, for its report to the Federal Convention specified representation in terms of "inhabitants of the description reported in the 7th Resolution of the Come. of the whole House."³⁴ After further deliberation, the Federal Convention installed and referred the clause to another committee.³⁵ This committee reformulated the ratio of

32. See *id.* at 436-38 (June 27, 1787) (delegates did not discuss Native Americans at all and, a fortiori, did not mention them as subjects of representation); *id.* at 444-52 (June 28, 1787) (same); *id.* at 461-70 (June 29, 1787) (same); *id.* at 481-93 (June 30, 1787) (same); *id.* at 510-16 (July 2, 1787) (same); *id.* at 522-23 (July 3, 1787) (same); *id.* at 526-34 (July 5, 1787) (same); *id.* at 540-47 (July 6, 1787) (same); *id.* at 549-53 (July 7, 1787) (same); *id.* at 559-62 (July 9, 1787) (same); *id.* at 566-71 (July 10, 1787) (same); *id.* at 578-88 (July 11, 1787) (same); *id.* at 591-97 (July 12, 1787) (same); *id.* at 600-06 (July 13, 1787) (same); 2 *id.* at 2-11 (July 14, 1787) (same); *id.* at 15-20 (July 16, 1787) (same). See also *infra* note 45 & text accompanying note 47.

33. 1 RECORDS, *supra* note 13, at 511, 516 (July 2, 1787) (motion of Charles Cotesworth Pinckney, South Carolina, and Caleb Strong, Massachusetts, to refer the clause to the Committee of the Federal Convention to Whom Were Referred the Eighth Resolution and Such Part of the Seventh Resolution As Had Not Already Been Decided On); *id.* at 517, 519-20 (July 2, 1787) (same).

34. Report of the Committee of the Federal Convention to Whom Were Referred the Eighth Resolution and Such Part of the Seventh Resolution As Had Not Already Been Decided On by the Committee of the Whole House (July 3, 1787), *reprinted in* 1 RECORDS, *supra* note 13, at 526 (July 3, 1787); *id.* at 523 (July 3, 1787). The seventh resolution stated:

Resolved, that the right of suffrage in the first branch of the national Legislature ought . . . to be . . . in proportion to the whole number of white and other free citizens and inhabitants of every age, sex, and condition including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, except Indians, not paying taxes in each State.

State of the Resolutions Submitted to the Consideration of the House by the Honorable Mr[.] Randolph, as Altered, Amended, and Agreed to in a Committee of the Whole House, *supra* note 29, para. 7.

35. 1 RECORDS, *supra* note 13, at 540, 542 (July 6, 1787) (motion of Gouverneur Morris, Pennsylvania, and James Wilson, Pennsylvania, to refer the clause to the Committee of Five Members to Whom Was Referred the First Clause of the First Proposition Reported from the Grand Committee).

representation. It deleted the extant formula, including “and three fifths of all other persons not comprehended in the foregoing description, except Indians, not paying taxes in each State,”³⁶ and instead fixed a ratio of one representative for every 40,000 “inhabitants” with augmentations of representatives to be determined “upon the principles of their [the states’] wealth and number of inhabitants.”³⁷ This reformulation in terms of “inhabitants,” without specifically including or excluding “Indians,” the Federal Convention adopted.³⁸ Consequently, the resolutions of the Virginia Plan, as then amended, did not mention “Indians” but referred only to “Inhabitants” of the thirteen states.³⁹

36. State of the Resolutions Submitted to the Consideration of the House by the Honorable Mr[.] Randolph, as Altered, Amended, and Agreed to in a Committee of the Whole House, *supra* note 29, para. 7.

37. Report of the Committee of Five Members to Whom Was Referred the First Clause of the First Proposition Reported from the Grand Committee [of the Federal Convention to Whom Were Referred the Eighth Resolution and Such Part of the Seventh Resolution As Had Not Already Been Decided On] (July 7 or 8 or 9, 1787), *reprinted in* 1 RECORDS, *supra* note 13, at 559.

38. The Federal Convention first ratified the principle of reapportionment according to the wealth and numbers of “inhabitants,” set forth as the second paragraph of the Report of the Committee of Five Members. 1 RECORDS, *supra* note 13, at 560 (July 9, 1787) (motion of unnamed delegates). The principle would modify the initial apportionment. The Convention referred the first paragraph of that report, fixing the initial number of representatives for each state as one representative for every 40,000 “inhabitants,” to another committee, the Committee of One Member from Each State to Whom Was Referred the First Paragraph of the Report of the Committee of Five Members. *Id.* at 560, 562 (July 9, 1787) (motion of Roger Sherman, Connecticut, and Gouverneur Morris, Pennsylvania). This committee set the number of representatives for each state. Report of the Committee of One Member from Each State to Whom Was Referred the First Paragraph of the Report of the Committee of Five Members (July 9 or 10, 1787), *reprinted in* 1 RECORDS, *supra* note 13, at 566 (July 10, 1787). The Federal Convention approved this reallocation. *Id.* at 570 (July 10, 1787) (motion of unnamed delegates). It disapproved a motion to ask the Committee of One Member from Each State upon what principle it decided the new allocation. *Id.* at 571 (July 10, 1787) (motion of unnamed delegates). The Federal Convention ratified the whole of the amended seventh resolution on July 16, 1787. 2 *id.* at 15-16 (July 16, 1787) (motion of unnamed delegates, referring to “inhabitants”).

39. See Proceedings of the [Federal] Convention for the Establishment of a National Government para. 7, cls. 2, 3 (July 23, 1787) (resolutions referred to Committee of Detail on July 23, 1787, for reformulation into a constitution), *reprinted in* 2 RECORDS, *supra* note 13, at 129, 130-31.

“Inhabitants” did comprehend blacks and slaves, but probably did not include Native Americans. 1 *id.* at 597 (July 12, 1787) (“Inhabitants” as a term of the seventh resolution meant “white & 3/5 of black inhabitants”); Act of Feb. 8, 1786, ch. VIII, 1786 N.Y. Laws 9, 10 (in law implementing Resolution of Apr. 18, 1783, 24 J. CONTINENTAL CONG. 256, 260 (G. Hunt ed. 1922), “Indians who pay taxes” were neither “Citizens

The Federal Convention referred these amended resolutions to the Committee of Detail on July 23, 1787, to organize and draft a constitution consistent with them.⁴⁰ The Committee returned a draft on August 6 which mentioned “Indians” in its provisions for *taxation*, in terms similar to the original clause:

The proportions of direct taxation shall be regulated by the whole number of white and other free citizens and inhabitants, of every age, sex and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, (except Indians not paying taxes)⁴¹

The draft did not expressly exclude “Indians not paying taxes” from the formula for apportioning *representation* but did so indirectly by reference to and incorporation of the clause defining the subjects of taxation. After fixing the initial ratio of representation among the states,⁴² article IV, section 4 of the draft prescribed that “the Legislature shall . . . [in enumerated cases that should vary the initial ratio] regulate the number of representatives by the number of inhabitants, according to the provisions herein after made,”⁴³ The Federal Convention struck “according to the provisions herein after made” and inserted “according to the rule hereafter to be provided for direct taxation.”⁴⁴ The Framers amended and approved the

and Inhabitants” nor “Slaves”); see *infra* note 47 & text accompanying notes 45, 47. “Inhabitants” did not mean “residents.” Cf. 2 RECORDS, *supra* note 13, at 239 (Aug. 9, 1787) (motion to strike “resident” and insert “inhabitant” during deliberations of qualifications for election to the Senate). The delegates to the Federal Convention never decided that Native Americans were to be represented in Congress. See *supra* note 32 and accompanying text.

40. 2 RECORDS, *supra* note 13, at 95 (July 23, 1787) (motion of Elbridge Gerry, Massachusetts).

41. See Report of the Committee of Detail to Whom Were Referred the Proceedings of the Federal Convention, art. VI [VII], § 3 (Aug. 6, 1787), reprinted in 2 RECORDS, *supra* note 13, at 182-83. The report misnumbered the seventh article as article “VI.”

42. Report of the Committee of Detail to Whom Were Referred the Proceedings of the Federal Convention, *supra* note 41, art. IV, § 3.

43. *Id.* art. IV, § 4.

44. 2 RECORDS, *supra* note 13, at 219 (Aug. 6, 1787) (motion of Hugh Williamson, North Carolina). The Federal Convention had already decided that the rules for taxation and representation should be the same. Proceedings of the [Federal] Convention for the Establishment of a National Government, *supra* note 39, para. 7. Indeed, it was suggested that this approach—specifying the rule for taxation, and merely making the rule for

clauses treating taxation (article VI [VII], section 3) and representation (article IV, section 4) without deliberation in either case of the significance of "Indians."⁴⁵

This version of the clause excepted "Indians not paying taxes." Previous versions, interpreted with a comma after "Indians," had excepted all "Indians" from the bases of representation. If a literal interpretation fixes accurately the delegates' purposes, then the change has significance.⁴⁶ The numbers of Native Americans paying taxes in each state would determine to some extent the proportions of taxation among the states and their representation in the Congress, even if those Native Americans were not actually represented in Congress. As a practical matter, the effect was negligible. A Native American would not be subject to state taxation unless she or he had left the tribe permanently and had joined a community of the state.⁴⁷ Few Native Americans were

representation the same as the rule for taxation—would obscure and make more acceptable the inclusion of blacks as a basis for apportioning representation. 1 RECORDS, *supra* note 13, at 595 (July 12, 1787) (statement of James Wilson, Pennsylvania). The Committee of Detail gave effect to this decision in the constitution it proposed, although it did not identify "the provisions herein after made." The subsequent amendment by the Federal Convention corrected this oversight.

45. 2 RECORDS, *supra* note 13, at 219-23 (Aug. 8, 1787) (consideration of art. IV, § 4, on representation); *id.* at 350 (Aug. 20, 1787) (consideration of art. VI [VII], § 3, on taxation); *id.* at 356-57 (Aug. 21, 1787) (consideration of art. VI [VII], § 3, on taxation).

46. The evidence does not completely resolve whether a literal interpretation is appropriate. The first two drafts of the Articles of Confederation excepted "Indians not paying taxes." Articles of Confederation—First Draft, *supra* note 27, art. XI, at 548; Articles of Confederation—Second Draft, *supra* note 27, art. XI, at 677-78 col. 2. The Articles of Confederation itself included no such provision. See The Articles of Confederation art. VIII (U.S. 1781), *reprinted in* 9 J. CONTINENTAL CONG. 907, 913 col. 2 (W. Ford ed. 1907) (Nov. 15, 1777). An amendment to it proposed in 1783 excepted "Indians." Resolution of Apr. 18, 1783, *reprinted in* 24 J. CONTINENTAL CONG. 256, 260 (G. Hunt ed. 1922). Mr. Madison's notes and various reports during the Federal Convention exhibited both versions. See *supra* notes 26, 29-30 and accompanying text; *supra* text accompanying note 41.

The three-fifths clause is rational either way: Either the number excludes only those Native Americans not subject to taxation, or it includes three fifths "of all other persons not comprehended in the foregoing description" who are not paying taxes and are not Native Americans. A free black paying taxes would thus be counted as one person, not as three fifths of one person. According to the first two drafts of the Articles of Confederation, however, only an exclusion of "Indians not paying taxes" is sensible.

47. The members of the Federal Convention never discussed the meaning of "Indians not paying taxes." See *supra* text accompanying notes 32, 45. One gleans this meaning of the term from contemporaneous interpretations of a like term in the Articles of Confederation. Report of the Committee on Indian Affairs in the Southern Depart-

thus subject to taxation.⁴⁸

The Federal Convention then formed a Committee of Style and Arrangement and referred to it the approved articles of the draft.⁴⁹ The report of the Committee stated the three-fifths clause

ment (July 31, 1787), *reprinted in* 33 J. CONTINENTAL CONG. 455, 457-59 (R. Hill ed. 1936) (Aug. 3, 1787) [hereinafter Southern Department 1787 Indian Affairs Committee Report]; Notes of John Adams on the Proceedings of the Continental Congress (July 26, 1776) (statement of Thomas Jefferson, Virginia), *reprinted in* 6 J. CONTINENTAL CONG. 1077, 1077-78 (W. Ford ed. 1906); Letter of James Madison to James Monroe (Nov. 27, 1784) ("By Indians not members of a State, must be meant those, I conceive who do not live within the body of the Society, or whose Persons or property form no objects of its laws."), *reprinted in* 2 THE WRITINGS OF JAMES MADISON 91, 91 (G. Hunt ed. 1901). Subsequent opinions have reiterated this definition. See Taxation of Indian Cotton, 12 Op. Att'y's Gen. 208, 214 (1867) ("Even when these Indians [existing under their regular tribal associations] and their territory are situated within the bounds of a State of the Union, they are not subject to State taxation."); "Indians Not Taxed"—Interpretation of Constitutional Provision, 57 Interior Dec. 195, 206 (1940) (Native Americans are subject to taxation by a state "either by settling or by purchasing property within its jurisdiction").

48. See F. COHEN, *supra* note 11, at 388. The first federal census of 1790 did not indicate the numbers of Native Americans whom the states taxed and who thus had already become members of colonial society and had relinquished membership in their own tribe or nation. It employed only the categories that the statute specified. The statute directed that "Indians not taxed" be excluded, but did not specify how to include any Native Americans who were taxed. The census basically counted free white persons, free "others," and slaves. Perhaps the omission of a category for "Indians taxed" indicates a paucity of such instances and an invisibility of the problem. One presumes that the category for free "others" would include those Native Americans paying taxes; it would also include free blacks. Free "others" comprised 1.57 percent of the total and 1.88 percent of all free persons. See RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES (1791 & photo. reprint n.d.); Act of Mar. 1, 1790, ch. 2, 1 Stat. 101.

49. See 2 RECORDS, *supra* note 13, at 553 (Sept. 8, 1787). As amended, the two clauses were:

[Art. IV,] Sect. 4. As the proportions of numbers in the different states will alter from time to time; as some of the States may hereafter be divided; as others may be enlarged by addition of territory; as two or more States may be united; as new States will be erected within the limits of the United States, the Legislature shall, in each of these cases, regulate the number of representatives by the number of inhabitants, according to the rule hereinafter made for direct taxation not exceeding the rate of one for every forty thousand.

[Art. VII,] Sect. 3. The proportions of direct taxation shall be regulated by the whole number of free citizens and inhabitants, of every age, sex, and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, (except Indians not paying taxes)

Id. at 566, 571 (art. IV, § 4, art. VII, § 3) (editor's compilation of the various amendments to the Report of the Committee of Detail to Whom Were Referred the Proceedings of the Federal Convention, *supra* note 41, which articles the Convention then referred to the Committee of Style and Arrangement).

as the Constitution states it, "excluding Indians not taxed,"⁵⁰ with the sole exception that the Federal Convention subsequently substituted "Service" for "Servitude."⁵¹ The Federal Convention agreed to the Constitution on September 17, 1787.⁵²

Of what import is the three-fifths clause? First, it grants no power to the United States over Native Americans. Secondly, throughout its formulation, Native Americans were never discussed. The term "Indians not paying taxes," adopted from a previously proposed amendment to the Articles of Confederation to define the "equitable ratio" of representation and taxation among the states, was incorporated without discussion. It implies that states had some power to tax individual Native Americans. Lastly, also by implication, the Framers excluded all Native American tribes "within" the limits of the states⁵³ from the basis of apportioning representation in the national legislature, for tribes could not be taxed.⁵⁴

B. *The Indian Commerce Clause*

The first recorded consideration of a national legislative power that might pertain to Native Americans appears in a working paper of the Committee of Detail, two months after the Federal Convention convened. On Edmund Randolph's sketch of a constitution, in the margin of its proposed legislative power "To provide tribunals and punishment for mere offences against the law of nations," John Rutledge of South Carolina annotated

50. Compare Report of the Committee of Style and Arrangement art. I, § 2, cl. b (Sept. 12, 1787), reprinted in 2 RECORDS, *supra* note 13, at 590, 590, with U.S. CONST. art. I, § 2, cl. 3 (three-fifths clause).

51. 2 RECORDS, *supra* note 13, at 607 (Sept. 13, 1787) (motion of Edmund Randolph, Virginia).

52. *Id.* at 644-45 (Sept. 17, 1787) (motion of Benjamin Franklin, Pennsylvania).

53. The use of "within" throughout this essay must be considered with care; therefore, it is placed in quotation marks. "Within the limits of the state" or "within the limits of the United States" implies, wrongly, that Native Americans or their lands were or are within the territorial boundaries, jurisdiction, or political boundaries of the state or the United States and thus were or are subject to the sovereignty or personal and territorial jurisdiction of the state or United States. *E.g.*, *infra* note 63. Statutes and discussions about sovereignty frequently used the word "within."

54. See *supra* note 47 and accompanying text; *cf.* [Northwest] Ordinance of July 13, 1787, art. 3, reprinted in 32 J. OF THE CONTINENTAL CONG. 334, 340-41 (R. Hill ed. 1936), ratified in Act of Aug. 7, 1789, ch. 8, § 3, 1 Stat. 50, 51 n.a; Treaty with the Cherokee Nation (Treaty of Hopewell), Nov. 28, 1785, United States-Cherokee Nation, art. 12, 7 Stat. 18, 20 (providing that the Cherokee Nation had a right to send a deputy to Congress); Treaty with the Delaware Nation, Sept. 17, 1778, United States-Delaware Nation, art. 6, 7 Stat. 13, 14 (providing that the Delaware and other nations might "form a state" and "have a representation [in Congress]").

“Indian Affairs.”⁵⁵ The “law of nations,” as European jurists had variously fashioned it, did treat Native Americans.⁵⁶ However, the Committee of Detail’s report on August 6 did not include “Indian affairs” in that clause,⁵⁷ nor did it state any legislative power respecting Native Americans.⁵⁸ No subsequent discussion of this clause expressed any intent that it comprehend Native Americans.⁵⁹

On August 18, 1787, while the Convention was debating the powers of the legislative branch, James Madison proposed additional powers, to be submitted first to the Committee of Detail for its consideration. Among them was a distinct power “To regulate affairs with the Indians as well within as without the limits of the U. States.”⁶⁰ In place of Mr. Madison’s plenary power, the Committee of Detail proposed to amend the power “To regulate commerce with foreign nations, and among the several states;”⁶¹ to include “and with Indians, within the Limits of any State, not subject to the laws thereof.”⁶²

With this change, Congress would have the power to regulate commerce with Native Americans who were living “within” the territorial limits of a state but were neither citizens of the state nor subject to its jurisdiction.⁶³ Like article IX of the Articles

55. E. Randolph, [Draft] Constitution (July 26, 1787) (his sketch of the principles underlying and the powers to be granted by the Constitution), *reprinted in* 2 RECORDS, *supra* note 13, at 137, 143 & n.11.

56. See *infra* notes 126-28 and accompanying text.

57. Report of the Committee of Detail to Whom Were Referred the Proceedings of the Federal Convention, *supra* note 41, art. VI [VII], § 1, cl. 12 (“To declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations”).

58. See *id.* arts. III-VIII [XI].

59. See 2 RECORDS, *supra* note 13, at 315-16 (Aug. 17, 1787) (“to define and punish piracies and felonies committed on the high seas, counterfeiting the securities and current coin of the U. States, and offences agst. the law of Nations”); *id.* at 614-15 (Sept. 14, 1787) (motion of Gouverneur Morris, Pennsylvania).

60. *Id.* at 325 (Aug. 18, 1787) (motion of James Madison, Virginia).

61. Report of the Committee of Detail to Whom Were Referred the Proceedings of the Federal Convention, *supra* note 41, art. VI [VII], § 1, cl. 2. This clause the Convention had approved without amendment on August 16. 2 RECORDS, *supra* note 13, at 308 (Aug. 16, 1787).

62. Report of the Committee of Detail (Aug. 22, 1787), *reprinted in* 2 RECORDS, *supra* note 13, at 366, 367.

63. “Limits” and “jurisdiction” were distinct terms. See 2 RECORDS, *supra* note 13, at 463 (Aug. 30, 1787) (motion and statement of Gouverneur Morris, Pennsylvania, regarding a proposed clause about the admission of new states comprising territory within the “limits” of existing states, moving to substitute “jurisdiction” for “limits”

of Confederation,⁶⁴ this national power could not interfere with the legislative rights and the jurisdiction of the states; but its scope was even more limited than that of article IX, for it extended only to "commerce," not to all "affairs."⁶⁵ It should be noted that the Articles of Confederation, James Madison's proposal, and the report of the Committee of Detail all concerned regulation or management of "affairs" or "commerce" *with* Native Americans, not *of* Native Americans.⁶⁶ The power did not reach the domestic or foreign affairs of tribes.

Although the delegates did discuss the regulation of commerce with foreign nations and among the states, they did not discuss the Committee of Detail's proposed amendment⁶⁷ and referred it instead to another committee on August 31.⁶⁸ This committee reported on September 4 what is now the commerce clause:⁶⁹ that the power "To regulate commerce with foreign nations, and among the several States;"⁷⁰ be amended to include "and with the Indian tribes."⁷¹ This second amendment would limit the national power further. As amended, the object of the power

and explaining that this substitute, for example, would "guard the case of Vermont, the jurisdiction of N. York not extending over Vermont which was in the exercise of sovereignty, tho' Vermont was within the asserted limits of New York"). Thus, Native Americans could be within the limits of a state but not subject to its jurisdiction.

64. "The 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 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 Articles of Confederation art. IX, para. 4 (U.S. 1781), *reprinted in* 9 J. CONTINENTAL CONG. 907, 919 col. 2 (W. Ford ed. 1907) (Nov. 15, 1777).

65. Compare Report of the Committee of Detail, *supra* note 62, with The Articles of Confederation art. IX, para. 4 (U.S. 1781). See also *infra* note 96, which discusses the Articles of Confederation.

66. Report of the Committee of Detail, *supra* note 62; 2 RECORDS, *supra* note 13, at 325 (Aug. 18, 1787) (motion of James Madison, Virginia); The Articles of Confederation art. IX, para. 4 (U.S. 1781).

67. 2 RECORDS, *supra* note 13, at 449-53 (Aug. 29, 1787) (motion of Charles Pinckney, South Carolina, and Luther Martin, Maryland); see also *id.* at 211 (Aug. 7, 1787).

68. *Id.* at 481 (Aug. 31, 1787) (motion of Roger Sherman, Connecticut).

69. U.S. CONST. art. I, § 8, cl. 3 ("To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;").

70. Report of the Committee of Detail to Whom Were Referred the Proceedings of the Federal Convention, *supra* note 41, art. VI [VII], § 1, cl. 2.

71. Report of the Committee of Eleven to Whom Such Parts of the Constitution, As Have Been Postponed, and Such Parts of Reports, As Have Not Been Acted On, Were Referred para. 2 (Sept. 4, 1787), *reprinted in* 2 RECORDS, *supra* note 13, at 497.

was “Indian tribes,” not individual “Indians.”⁷² The power would reach tribes “within” the limits of states, even though tribes were not subject to the jurisdiction of states. It would not reach individual Native Americans—even those who had relinquished tribal membership and were subject to the jurisdiction of a state.

The Federal Convention approved this proposal without debate.⁷³ The Committee of Style and Arrangement reviewed the clause,⁷⁴ made some stylistic changes, and reported it exactly as the Constitution states it.⁷⁵ The Federal Convention agreed to the Constitution on September 17, 1787.⁷⁶

This is all that the Framers said (and recorded) at the Federal Convention about the relation of Native Americans and the Constitution.⁷⁷ Certain conclusions follow. First, the Indian commerce clause has been cited for a plenary legislative authority in Congress over Native Americans,⁷⁸ but the analysis above

72. Compare 2 RECORDS, *supra* note 13, at 325 (Aug. 18, 1787) (motion of James Madison, Virginia) (“Indians”), and Report of the Committee of Detail, *supra* note 62 (“Indians”), with Report of the Committee of Eleven, *supra* note 71, para. 2 (“Indian tribes”). *Contra* United States v. Holliday, 70 U.S. (3 Wall.) 407, 417 (1866) (“commerce with the Indian tribes, means commerce with the individuals composing those tribes”).

73. 2 RECORDS, *supra* note 13, at 499 (Sept. 4, 1787).

74. *Id.* at 569 (art. VII, § 1, cl. 2) (“To regulate commerce with foreign nations, and among the several states; and with the Indian tribes.”).

75. Compare Report of the Committee of Style and Arrangement, *supra* note 50, art. I, § 8, cl. c, with U.S. CONST. art. I, § 8, cl. 3 (commerce clause).

76. 2 RECORDS, *supra* note 13, at 644-45 (Sept. 17, 1787) (motion of Benjamin Franklin, Pennsylvania).

77. The Articles of Confederation had excepted imminent invasion by an Indian nation from its general mandate that states secure the consent of Congress before engaging in war. The Articles of Confederation art. VI, para. 5 (U.S. 1781) (“No State shall engage in any war without the consent of the United States, in Congress assembled, unless such State . . . 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 United States, in Congress assembled, can be consulted . . .”), reprinted in 9 J. CONTINENTAL CONG. 907, 912 col. 2 (W. Ford ed. 1907) (Nov. 15, 1777). The Constitution preserved for the states a broader exception, for any imminent invasion. U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress, . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”). The Framers did not mention Native Americans during deliberations of this clause, either. See 2 RECORDS, *supra* note 13, at 442-43 (Aug. 28, 1787); Report of the Committee of Detail to Whom Were Referred the Proceedings of the Federal Convention, *supra* note 41, art. XII [XIII]; Report of the Committee of Style and Arrangement, *supra* note 50, art. I, § 10, cl. a; 2 RECORDS, *supra* note 13, at 625-26 (Sept. 15, 1787).

78. See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (“while the Interstate Commerce Clause is concerned with maintaining free trade among the

demonstrates that the clause conferred no such power. Secondly, the treaty clause,⁷⁹ the property clause,⁸⁰ and the war powers⁸¹ have each been cited to confer upon the federal government constitutional authority over Native Americans,⁸² but the Framers never mentioned Native Americans during their recorded

States . . . , the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) ("Congress has broad power to regulate tribal affairs under the Indian Commerce Clause"). See also *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). But cf. *United States v. Kagama*, 118 U.S. 375, 378-79, 383-84 (1886) (federal criminal statute was constitutional, not under Indian commerce clause, for the code of common-law crimes makes no reference to trade or intercourse, but because Native Americans are wards of the nation).

Such citations are a little curious, considering the dictum in *Gibbons v. Ogden* that "[commerce] must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824). For example, "commerce with foreign nations" and "commerce . . . among the several states" never imputed to Congress a plenary power to regulate the affairs of states and foreign nations, as the Indian commerce clause has been held to authorize with respect to Native Americans. See *Cotton Petroleum Corp.*, 490 U.S. at 192.

79. U.S. CONST. art. II, § 2, cl. 2 ("He [the Executive] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; . . .").

80. *Id.* 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; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.").

81. *Id.* art. I, § 8, cls. 1, 11, 12, 13, 15, 16 ("The Congress shall have Power To . . . provide for the common Defence . . . of the United States; . . . To declare War, . . . To raise and support Armies, . . . To provide and maintain a Navy; . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; . . . To provide for organizing, arming, and disciplining, the Militia, . . .").

82. The Supreme Court has cited for such authority the treaty clause, e.g., *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973); *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943); *United States v. Forty-three Gallons of Whisky*, 93 U.S. 188 *passim* (1876); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832), the property clause, see *Oklahoma v. Atchison, Topeka & Sante Fe Ry.*, 220 U.S. 277, 284-85 (1911); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 44 (1831) (Baldwin, J., concurring); cf. *United States v. Kagama*, 118 U.S. 375, 379-80 (1886), and the war powers, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832); see *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943); *United States ex rel. Hualpai Indians v. Sante Fe Pac. R.R.*, 314 U.S. 326, 347 (1941); *Johnson & Graham's Lessee v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 588-91 (1823); see also *United States v. Gemmill*, 535 F.2d 1145, 1148 (9th Cir.), *cert. denied*, 429 U.S. 982 (1976).

debates about the treaty clause,⁸³ the property clause,⁸⁴ or the war powers of the Congress.⁸⁵ Thirdly, Congress has since been

83. See [Draft] The Hamilton Plan arts. IV, VI (1787) (statement of Alexander Hamilton, New York, on his general scheme for a government, including *inter alia* a treaty power but not mentioning Native Americans), *reprinted in* 1 RECORDS, *supra* note 13, at 282, 292 (June 18, 1787); The Pinckney Plan paras. 9, 15 (1787) (including a treaty power but not mentioning Native Americans), *reprinted in* 2 RECORDS, *supra* note 13, at 134, 135-36; E. Randolph, *supra* note 55 (including a treaty power but not mentioning Native Americans, although John Rutledge subsequently emended "Indian Affairs" beside a different clause establishing power in the legislature to address offences against the law of nations), *reprinted in* 2 RECORDS, *supra* note 13, at 137, 143, 145; Report of the Committee of Detail to Whom Were Referred the Proceedings of the Federal Convention, *supra* note 41, art. VIII [IX], § 1 (including a treaty power but not mentioning Native Americans); 2 RECORDS, *supra* note 13, at 297-98 (June 18, 1787) (debating the treaty power but not mentioning Native Americans); *id.* at 392-94 (Aug. 23, 1787) (same); Report of the Committee of Eleven to Whom Such Parts of the Constitution, As Have Been Postponed, and Such Parts of Reports, As Have Not Been Acted On, Were Referred, *supra* note 71, para. 7 (including a treaty power but not mentioning Native Americans); 2 RECORDS, *supra* note 13, at 538, 540-41, 543 (Sept. 7, 1787) (debating the treaty power but not mentioning Native Americans); *id.* at 547-50 (Sept. 8, 1787) (same); Report of the Committee of Style and Arrangement, *supra* note 50, art. II, § 2(a) (including a treaty power but not mentioning Native Americans).

84. See 2 RECORDS, *supra* note 13, at 324 (Aug. 18, 1787) (motion of James Madison, Virginia, proposing an additional legislative power, "To dispose of the unappropriated lands of the U. States," to be referred to the Committee of Detail, but not mentioning Native Americans); *id.* at 461-66 (Aug. 30, 1787) (not mentioning Native Americans); *id.* at 578 (art. XVII, para. 2, not mentioning Native Americans); Report of the Committee of Style and Arrangement, *supra* note 50, art. IV, § 3, para. 2 (not mentioning Native Americans); *cf.* Letter from Gouverneur Morris to Henry W. Livingston (Nov. 25, 1803) (discussing his remembrance concerning the power of the United States over its territory, but not mentioning Native Americans), *reprinted in* 3 RECORDS, *supra* note 13, at 401; Letter from Gouverneur Morris to Henry W. Livingston (Dec. 4, 1803) (discussing his remembrance concerning the power of the United States over its territory, but not mentioning Native Americans), *reprinted in* 3 RECORDS, *supra* note 13, at 404.

85. See 1 RECORDS, *supra* note 13, at 18-19 (May 29, 1787) (statement of Edmund Randolph, Virginia, discussing the war powers before introducing a resolution relevant to them in the Virginia Plan, but not mentioning Native Americans); *id.* at 24-26 (May 29, 1787) (statement of Edmund Randolph) (same); The Virginia Plan, *supra* note 23, para. 6 (not mentioning Native Americans); 1 RECORDS, *supra* note 13, at 54 (May 31, 1787) (statement of James Madison, Virginia) (same); *id.* at 65-66 (June 1, 1787) (statements of John Rutledge, South Carolina, and James Wilson, Pennsylvania) (same); *id.* at 144 (June 6, 1787) (statement of George Mason, Virginia) (same); The New Jersey Plan, *supra* note 30, paras. 4, 6 (same); 1 RECORDS, *supra* note 13, at 292 (June 18, 1787) (statement of Alexander Hamilton, New York, on his general scheme for a government, including *inter alia* war powers but not mentioning Native Americans); E. Randolph, *supra* note 55 (sketching the principles of and powers to be granted by the Constitution, including war powers, but not mentioning Native Americans), *reprinted in* 2 RECORDS, *supra* note 13, at 143-44; J. Wilson, [Draft] Constitution arts. 8, 10 (1787) (same), *reprinted in* 2 RECORDS, *supra* note 13, at 163, 167-69; Report of the

embellished with a status and power of guardianship of Native American tribes,⁸⁶ but the Constitution does not establish and the Framers never discussed such a status and plenary power.⁸⁷

C. *The Original Understanding, According to the Text and Debates*

Analysis of the Constitution's text and the Framers' deliberations reveals that the original understanding of the national power with respect to Native Americans comprehended only two principles. First, the few Native Americans within the jurisdiction (not limits) of a state and taxed by that state would augment that state's proportions of taxation and representation. However, the three-fifths clause did not require members of Congress to represent these Native Americans or their interests; the formula

Committee of Detail to Whom Were Referred the Proceedings of the Federal Convention, *supra* note 41, art. VI [VII], § 1, cls. 14-17, art. XII [XIII] (not mentioning Native Americans); 2 RECORDS, *supra* note 13, at 318-19 (Aug. 17, 1787) (same); *id.* at 326, 329-33 (Aug. 18, 1787) (same); *id.* at 341 (Aug. 20, 1787) (motion of Charles Pinckney, South Carolina) (same); Report of the Committee of Eleven to Whom Were Referred the Propositions Respecting the Debts of the Several States and the Militia cl. 2 (Aug. 21, 1787) (same), *reprinted in* 2 RECORDS, *supra* note 13, at 356 (Aug. 21, 1787); *id.* at 384-88, 389-90 (Aug. 23, 1787) (same); *id.* at 443 (Aug. 28, 1787) (art. XIII adopted as amended without mention of Native Americans); *id.* at 563 (Sept. 10, 1787) (statement of Edmund Randolph, Virginia) (not mentioning Native Americans); Report of the Committee of Style and Arrangement, *supra* note 50, art. 1, § 8, cls. *l-n*, *p-q* (same); 2 RECORDS, *supra* note 13, at 617-18 (Sept. 14, 1787) (motion of George Mason, Virginia, and Edmund Randolph, Virginia) (same); *id.* at 633 (Sept. 15, 1787) (statement of Elbridge Gerry, Massachusetts) (same); *cf.* Martin, *The Genuine Information, delivered to the Legislature of the State of Maryland, relative to the Proceedings of the General Convention, held in Philadelphia, in 1787* (serial publication of a speech by Luther Martin, delegate of Maryland to the Federal Convention, delivered on Nov. 29, 1787, printed in *Maryland Gazette and Baltimore Advertiser*, Dec. 28, 1787 through Feb. 8, 1788) (outlining issues before the Federal Convention concerning war powers, but not mentioning Native Americans), *reprinted in* 3 RECORDS, *supra* note 13, at 172, 207-09.

86. *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (plenary power of Congress to legislate about Native Americans is "based on a history of treaties and the assumption of a 'guardian-ward' status"); *United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935); *United States v. Candelaria*, 271 U.S. 432, 439-41, 443 (1926); *United States v. Sandoval*, 231 U.S. 28, 45-47 (1913); *United States v. Kagama*, 118 U.S. 375, 381-84 (1886); *cf.* *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) (although not imputing to Congress derivative legislative power, holding that Native American nations are not "foreign" states, but "domestic dependent nations," whose "relation to the United States resembles that of a ward to his guardian").

87. *See* U.S. CONST. (not declaring that any powers of guardianship exist in the United States or that Native Americans have the status of wards of the United States); *see supra* text accompanying notes 32, 59, 77, 83-85 & *infra* text accompanying note 125 (Framers never discussed Native Americans at all).

only determined the ratio of representation and taxation among the states. Native Americans, like blacks, were not actually represented.⁸⁸

Secondly, the national legislative power is limited to commerce with Native American tribes, and extends no farther. The Framers restricted Mr. Madison's proposal of a separate and broad legislative power "To regulate affairs with the Indians as well within as without the limits of the U. States" to a partial and narrower power "To regulate Commerce with . . . the Indian Tribes."⁸⁹

One can estimate why and how Mr. Madison's comprehensive—indeed plenary—power became a limited power. In 1781, the states had transferred to the Continental Congress the "sole and exclusive right and power" to treat with Native Americans.⁹⁰ But between 1781 and 1787, in spite of article IX, states had regulated and confiscated Native American lands, had warred with Native American tribes, and had engaged in commerce with Native American tribes.⁹¹

88. 2 RECORDS, *supra* note 13, at 223 (Aug. 8, 1787) (statement of Roger Sherman, Connecticut) ("Mr. Sherman. did not regard the admission of the Negroes into the ratio of representation, as liable to such insuperable objections. It was the freemen of the Southn. States who were in fact to be represented according to the taxes paid by them, and the Negroes are only included in the Estimate of the taxes. This was his idea of the matter."). Compare MASS. BAY CONSTR. art. V (1778) (proposed constitution which towns of Massachusetts Bay disapproved had provided in part that "EVERY male inhabitant of any town in this State, being free and twenty one years of age, excepting negroes, Indians and mulattoes, shall be entitled to vote . . ."), reprinted in THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780, at 190, 192 (O. Handlin & M. Handlin eds. 1966) [hereinafter POPULAR SOURCES], with Return of Town of Charlemont (May 12, 1778) (objecting to exclusion of negroes, Indians, and mulattoes), reprinted in POPULAR SOURCES, *supra*, at 217, 217, and Return of Town of Sutton (May 18, 1778) ("And it must be thought more insulting tho not so cruel [as exclusion of blacks], to deprive the original Natives of the Land the Privileges of Men."), reprinted in POPULAR SOURCES, *supra*, at 230, 231, and Return of Town of Boothbay (May 20, 1778) ("[M]uch less can we consent thus injuriously to treat the original Lords and proprietors of the land."), reprinted in POPULAR SOURCES, *supra*, at 245, 248-49, and Return of Town of Georgetown (May 25, 1778) (disapproving that "a Man being born in Africa, India or ancient America or even being much Sun burnt deprived him of having a Vote for Representative"), reprinted in POPULAR SOURCES, *supra*, at 277, 277.

89. See *supra* text accompanying notes 60-73.

90. The Articles of Confederation art. IX, para. 4 (U.S. 1781).

91. See Act of Mar. 1, 1788, ch. 47, 1788 N.Y. Laws 100 (authorizing treaties between New York and Native Americans); Treaty with the Oneida Nation (Treaty of Fort Schuyler), Sept. 22, 1788, New York-Oneida Nation, cited in Oneida Indian Nation of New York v. New York, 860 F.2d 1145, 1148 (2d Cir. 1988); Treaty with the Creek Nation (Treaty of Shoulder-Bone), Nov. 3, 1786, Georgia-Creek Nation, reprinted in 2

Mr. Madison mentioned such encroachments upon federal power during the Convention.⁹² This statement was the only recorded expression during the Convention of any problem involving Native Americans which the Constitution should meet. It concerned the fundamental problem of the relation between national sovereignty and state sovereignty and encroachment upon federal authority. In *The Federalist*, Mr. Madison again criticized the effectively "complete sovereignty in the States" under article IX.⁹³

To address this problem, Mr. Madison proposed a power for the national government roughly as broad as the federal power under the Articles of Confederation—a power which the states had not respected. Where the Articles of Confederation had also expressly preserved "the legislative right of any State within its own limits,"⁹⁴ however, the power proposed by Mr. Madison had extended to "within . . . the limits of the U. States," *n.b.* within the limits of each state.⁹⁵ What could well have occurred behind closed doors was another compromise: States, having arrogated to themselves and exercised the powers concerning Native American affairs that they had originally granted to the

DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, MARCH 4, 1789-MARCH 3, 1791: SENATE EXECUTIVE JOURNAL AND RELATED DOCUMENTS 180 (L. DePauw ed. 1974) [hereinafter DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS]; Treaty with the Creek Nation (Treaty of Galphinton), Nov. 12, 1785, Georgia-Creek Nation, *reprinted in 2-1 AMERICAN STATE PAPERS: INDIAN AFFAIRS* 17 (W. Lowrie & M. Clarke eds. 1832); Treaty with the Oneida Nation (Treaty of Fort Herkimer), June 23, 1785, New York-Oneida Nation, *cited in Oneida Indian Nation of New York v. New York*, 860 F.2d 1145, 1148 (2d Cir. 1988); Treaty with the Creek Nation (Treaty of Augusta), Nov. 1, 1783, Georgia-Creek Nation, *reprinted in 2 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, supra*, at 165. *See also* Southern Department 1787 Indian Affairs Committee Report, *supra* note 47, at 455-62 (North Carolina, Georgia); H. MANLEY, *THE TREATY OF FORT STANWIX 1784*, at 23-32 (1932); F. PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1790-1834*, at 31-40 (1962); Graymont, *New York State Indian Policy after the Revolution*, 57 N.Y. HIST. 438, 444-60 (1976).

92. 1 RECORDS, *supra* note 13, at 316 (June 19, 1787) (statement of James Madison, Virginia).

93. *See THE FEDERALIST* No. 42, at 279, 284-85 (J. Madison) (J. Cooke ed. 1961). *See also* Southern Department 1787 Indian Affairs Committee Report, *supra* note 47, at 457 (Georgia's and North Carolina's construction of The Articles of Confederation art. IX, para. 4, "leave the federal powers [of regulating the trade and managing all affairs with the Native Americans], in this case, a mere nullity").

94. The Articles of Confederation art. IX, para. 4 (U.S. 1781), *reprinted in 9 J. CONTINENTAL CONG.* 907, 919 col. 2 (W. Ford ed. 1907) (Nov. 15, 1777).

95. 2 RECORDS, *supra* note 13, at 325 (Aug. 18, 1787) (motion of James Madison, Virginia).

federal government, decided to yield to the national government only power over commerce with the Native American tribes.⁹⁶

The states had undertaken a similar retraction of federal power during formulation of the Articles of Confederation.⁹⁷ In that instance, some members of the Continental Congress did express their motives. While discussing the first draft of the Articles of Confederation, they expressed the gamut of views about its “sole and exclusive Right and Power of . . . Regulating the Trade, and managing all Affairs with the Indians.”⁹⁸ Some argued that the colonies should not vest in Congress the power to manage every affair concerning Native Americans, including trade because the trade was profitable to the individual colonies.⁹⁹ Others

96. For another view, see 1 F. PRUCHA, *supra* note 12, at 50 (“The lack of debate [during the Convention] on the question [of Native Americans] indicates, perhaps, the universal agreement that Indian affairs should be left in the hands of the federal government.”).

97. Under the initial draft proposed by John Dickinson of Delaware, “The United States assembled shall have the sole and exclusive Right and Power of . . . Regulating the Trade, and managing all Affairs with the Indians . . .” Articles of Confederation—First Draft, *supra* note 27, art. XVIII, at 550. Specifically with respect to territory, 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 . . . and the great Councils of the Indians, for the general benefit of all the United Colonies.

Id. art. XIV, at 549. The states restricted the federal powers to Native Americans “not members of any of the States” and struck entirely the proposed prohibition upon the states’ right of pre-emption. Articles of Confederation—Second Draft, *supra* note 27, art. XIV, at 681 n.1, 682 col. 2. Compare Letter of James Madison to James Monroe, *supra* note 47.

The states disapproved two subsequently proposed amendments, and adopted a third forming the final article. The first proposal would have further restricted the federal power, replacing “not members of any of the states,” with “not residing within the limits of any of the United States[.]” 9 J. CONTINENTAL CONG. 844 (W. Ford ed. 1907) (Oct. 27, 1777). The second would have augmented the federal power, to one of “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[.]” *Id.* Instead of these two proposals, the states appended to “the sole and exclusive power of . . . regulating the trade, and managing all affairs with the Indians, not members of any of the states,” the proviso, “provided, that the legislative right of any State, within its own limits be not infringed or violated.” *Id.* at 845 (Oct. 28, 1777). It was this proviso which created the “compleat sovereignty in the States” that Mr. Madison criticized.

98. Articles of Confederation—First Draft, *supra* note 27, art. XVIII, at 550.

99. Notes of John Adams on the Proceedings of the Continental Congress (July 26, 1776) (statements of Edward Rutledge, South Carolina; Thomas Lynch, Jr., South Carolina; and Thomas Stone, Maryland), reprinted in 6 J. CONTINENTAL CONG. 1077, 1077, 1079 (W. Ford ed. 1906).

replied that only the Continental Congress, not the individual colonies, should have this power in order to preclude conflicts between colonies with different commercial interests respecting Native Americans and to prevent conflicts between individual colonies and Native American tribes.¹⁰⁰ Thomas Jefferson noted that the power would reach only Native Americans subject to the laws of a colony, not those outside a colony's jurisdiction.¹⁰¹ The delegates to the Federal Convention in 1787 who ultimately limited the national power might have shared and iterated these contrary views.

The original understanding—that no plenary power exists in the national government—implies that many acts of the United States respecting Native Americans were and are *ultra vires*. These acts cannot become “constitutional” even though Congress enacted them, the President signed them, and the Supreme Court upheld them.¹⁰² Nor could the United States confer upon

100. Notes of John Adams on the Proceedings of the Continental Congress (July 26, 1776) (statements of Button Gwinnett, Georgia; George Walton, Georgia; James Wilson, Pennsylvania; and Roger Sherman, Connecticut), *reprinted in* 6 J. CONTINENTAL CONG. 1077, 1077-79 (W. Ford ed. 1906).

101. Notes of John Adams on the Proceedings of the Continental Congress (July 26, 1776) (statement of Thomas Jefferson, Virginia), *reprinted in* 6 J. CONTINENTAL CONG. 1077, 1077-78 (W. Ford ed. 1906).

102. *E.g.*, H.R.J. Res. 205, ch. 516, § 2(a), 61 Stat. 920, 921 (Aug. 8, 1947) (authorizing Secretary of Agriculture to contract for sale of timber in National Forest “notwithstanding any claim of possessory rights” that were based upon aboriginal occupancy or title but not confirmed by patent or judicial decision or included in a reservation), *held constitutional in* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279, 284-85, 288-91 (1955) (by right of conquest, Congress may extinguish Native American title in its own discretion without compensation pursuant to U.S. CONST. amend. V); Act of June 6, 1900, ch. 813, § 6, 31 Stat. 672, 676 (ratifying Treaty with the Comanche, Kiowa, and Apache Tribes (Treaty of Fort Sill), Oct. 6, 1892, United States-Comanche Tribe-Keowa Tribe-Apache Tribe, art. 1, 31 Stat. 676, 676, which ceded to the United States 480,000 acres of land, notwithstanding that treaty was not signed in accordance with prior Treaty with the Kiowa and Apache Tribes, Oct. 21, 1867, United States-Keowa Tribe-Apache Tribe, art. 12, 15 Stat. 581, 585, pursuant to which no treaty for cession of any portion of the reservation would be valid unless signed by three fourths of all adult, male members of the tribe), *held constitutional in* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (act did not violate U.S. CONST. amend. V because the prior treaty of 1867 could not limit the power of Congress over Native Americans as wards of the United States and its power to abrogate treaties); Act of June 28, 1898, ch. 517, §§ 11, 21, 28, 30 Stat. 495, 497, 502, 504 (providing that the federal government may determine which Native Americans are citizens of tribes and may allot Native American lands only to those determined to be citizens of the tribes, and abolishing tribal courts), *held constitutional in* Stephens v. Cherokee Nation, 174 U.S. 445, 488-92 (1899), *approved*, Cherokee Nation v. Hitchcock, 187 U.S. 294, 306-08 (1902) (Congress has “power to provide a method for determining membership of

states powers over Native Americans or Native American lands which the United States did not have itself,¹⁰³ such as

five civilized nations, and for ascertaining the citizenship thereof preliminary to a division of the property of the tribe among its members” and “authority to adopt measures to make the tribal property productive, and secure therefrom an income for the benefit of the tribe”); Act of Feb. 8, 1887, ch. 119, §§ 1, 5, 6, 24 Stat. 388, 388, 389, 390 (codified as amended at 25 U.S.C. §§ 331, 348, 349) (conferring upon the President a discretion to divide Native American lands held in common and allot parcels to individual Native Americans; requiring issuance of patents for any allotments, the United States to hold them in trust for 25 years or any greater period; authorizing the United States to purchase for the benefit of white settlers only any Native American lands not allotted, the purchase money to be held in trust for Native Americans; subjecting to the civil and criminal laws of the state or territory in which they live Native Americans who (must) receive allotments and those who reside separately from any Native American tribe and have “adopted the habits of civilized life”; and conferring citizenship of the United States upon the same), *held constitutional in* *Stephens v. Cherokee Nation*, 174 U.S. 445, 484-91 (1899) (by implication), *and in* *United States v. Rickert*, 188 U.S. 432, 437-39 (1903) (by implication), *and in* *United States v. Nice*, 241 U.S. 591, 600-01 (1916) (by implication); Act of March 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153) (making it a crime for one Native American to commit murder, manslaughter, rape, assault with intent to kill, arson, burglary, or larceny upon another Native American upon Native American land, and subjecting that Native American to federal law and sanction), *held constitutional in* *United States v. Kagama*, 118 U.S. 375, 378-79, 383-84 (1886) (act is constitutional, not under Indian commerce clause, for the code of common-law crimes makes no reference to trade or intercourse, but because Native Americans are wards of United States), *approved*, *United States v. Antelope*, 430 U.S. 641, 648 (1977); Internal Revenue Act of July 20, 1868, ch. 186, § 107, 15 Stat. 125, 167 (imposing federal taxes on certain articles produced on Native American lands), *held constitutional in* *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620 (1871); *see also* *Washington Dep’t of Ecology v. United States Env’tl. Protection Agency*, 752 F.2d 1465, 1466, 1469 (9th Cir. 1985) (Resource Conservation and Recovery Act, 42 U.S.C. §§ 6903(13)(A), 6903(15), 6928(a)(1), applies to Native American tribes, and the Environmental Protection Agency has authority to implement a hazardous waste management program on Native American lands).

103. For example, Public Law 280 conferred upon five named states, and any other state that so determined, civil and criminal jurisdiction over causes of action and offenses by or against Native Americans on Native American lands, and provided that the state’s civil and criminal laws shall have the same force and effect within Native Americans’ lands and society. Act of Aug. 15, 1953, ch. 505, §§ 2, 4, 7, 67 Stat. 588, 588, 589, 590 (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360 & note); *e.g.*, *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979) (upholding state civil and criminal jurisdiction over Native Americans and Native American lands, assumed without their consent under Act of Aug. 15, 1953, ch. 505, §§ 2, 4, 67 Stat. 588, 588, 589 (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360), in areas of compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and operation of motor vehicles on public roads).

taxation,¹⁰⁴ civil jurisdiction,¹⁰⁵ criminal jurisdiction,¹⁰⁶ jurisdiction over hunting and fishing rights,¹⁰⁷ and jurisdiction over water rights.¹⁰⁸

The constitutional and legal consequence of this original understanding is a tension between what the national government may do under the Constitution and what the states may do

104. *E.g.*, Act of May 29, 1924, ch. 210, 43 Stat. 244 (codified at 25 U.S.C. § 398) (states may tax in all respects the production of oil and gas and other minerals on Native American lands), *construed in* *British-American Oil Producing Co. v. Board of Equalization*, 299 U.S. 159 (1936), *and in* *Montana v. Blackfoot Tribe of Indians*, 471 U.S. 759, 766-68 (1985) (Congress can authorize imposition of state taxes on Native American tribes and individual Native Americans); Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 388, 390 (codified as amended by Act of May 8, 1906, ch. 2348, 34 Stat. 182, at 25 U.S.C. § 349), *construed in* *Goudy v. Meath*, 203 U.S. 146, 149-50 (1906) (under § 6 of the General Allotment Act of 1887, states may tax allotted lands of Native Americans within Native American reservation), *and in* *Squire v. Capoeman*, 351 U.S. 1, 7-8 (1956) (under Act of May 8, 1906, ch. 2348, 34 Stat. 182, states may tax allotted lands of Native Americans within Native American reservations after patent in fee is issued), *and in* *Confederated Tribes & Bands of the Yakima Nation v. County of Yakima*, 903 F.2d 1207, 1211-16 (9th Cir. 1990) (under 25 U.S.C. § 349, states may impose and levy ad valorem and excise sales taxes upon lands owned by Native Americans, patented in fee simple, and located within Native American reservations), *petition for cert. filed*, 59 U.S.L.W. 3180 (U.S. Sept. 5, 1990) (No. 90-408).

105. *E.g.*, Act of Aug. 15, 1953, ch. 505, §§ 4, 7, 67 Stat. 588, 589, 590 (codified at 28 U.S.C. § 1360 & note) (conferring upon five named states, and any other state that so determined, civil jurisdiction over actions by or against Native Americans on Native American lands, and providing that the state's civil laws shall have the same force and effect within Native Americans' lands and society); Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 388, 390 (codified as amended at 25 U.S.C. § 349) (conveyance to Native Americans of allotted land by patent in fee simple subjects Native Americans to the civil and criminal laws of the state or territory "within" which the Native American land is located).

106. *E.g.*, Act of Aug. 15, 1953, ch. 505, §§ 2, 7, 67 Stat. 588, 588, 590 (codified at 18 U.S.C. § 1162) (conferring upon five named states, and any other state that so determined, criminal jurisdiction over offenses by or against Native Americans on Native American lands, and providing that the state's criminal laws shall have the same force and effect within Native Americans' lands and society); Act of July 2, 1948, ch. 809, 62 Stat. 1224 (codified at 25 U.S.C. § 232) (conferring upon the state of New York criminal jurisdiction over offenses committed by or against Native Americans on all reservations within the state, except for jurisdiction over hunting and fishing by Native Americans pursuant to agreement, treaty, or custom); Act of Aug. 7, 1882, ch. 434, § 7, 22 Stat. 341, 342 (conferring upon Nebraska criminal and civil jurisdiction over Native Americans and subjecting Native Americans to the civil and criminal laws of Nebraska).

107. *E.g.*, Act of Jan. 5, 1927, ch. 22, 44 Stat. 932 (authorizing New York to regulate hunting and fishing on three reservations).

108. *E.g.*, *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983) (Act of July 10, 1952, ch. 651, § 208, 66 Stat. 549, 560 (codified at 43 U.S.C. § 666) conferred upon courts of Montana and Arizona, and state courts generally, jurisdiction to adjudicate Native Americans' water rights).

pursuant to the tenth amendment.¹⁰⁹ In theory, the powers of states might increase, being no longer pre-empted by federal laws.

The tenth amendment, of course, does not vest new powers in the states; the reservoir of authority in the states cannot exceed its original bounds. Under the tenth amendment, Native American tribes and nations would continue not to be subject to the jurisdiction of states or the states in Congress assembled.¹¹⁰ Yet states have exercised power over Native Americans and Native American lands, without authority, in taxes,¹¹¹ civil jurisdiction,¹¹² criminal

109. U.S. CONST. amend X. The amendment states that "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." *Id.*

110. See *supra* notes 47, 54, 63 and accompanying text.

111. *E.g.*, *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 610 (1943) (Oklahoma could impose inheritance tax upon cash and securities, lands not exempt from direct taxation by Acts of Congress, and miscellaneous personal property and insurance belonging to member of the Five Civilized Tribes of Oklahoma, but could not tax lands specifically exempt from direct taxation by Acts of Congress); *United States v. Rickert*, 188 U.S. 432 (1903) (County of Roberts, South Dakota, could not tax or assess lands of Native Americans held by allotment, permanent improvements such as houses, or personal property); *McClanahan v. State Tax Comm'n*, 14 Ariz. App. 452, 484 P.2d 221 (1971), *rev'd*, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973) (Arizona has no jurisdiction to impose tax on income of Navajo Indians residing on Navajo Reservation and whose income is derived wholly from sources on the reservation); *Blue-Jacket v. Comm'rs of Johnson County*, 3 Kan. 294 (1865), *rev'd*, *Blue Jacket v. Board of Comm'rs [The Kansas Indians]*, 72 U.S. (5 Wall.) 737 (1867) (Kansas could not tax Native American lands); *Bryan v. Itasca County*, 303 Minn. 395, 228 N.W.2d 249 (1975) (state may impose personal property tax upon property owned by Native American on Native American land), *rev'd*, 426 U.S. 373 (1976) (§ 4 of Public Law 280 does not grant states power to tax Native Americans of reservation).

112. *E.g.*, *United States v. Candelaria*, 271 U.S. 432, 444 (1926) (state court had jurisdiction to enter decree against Native Americans in action concerning title to Native American land); *Williams v. Lee*, 83 Ariz. 241, 319 P.2d 998 (1958) (Arizona's courts could exercise jurisdiction over civil suits by non-Native Americans against Native Americans although the action arises on a reservation, unless an act of Congress expressly prohibits such jurisdiction), *rev'd*, 358 U.S. 217 (1959); *Montana ex rel. Firecrow v. District Court*, 167 Mont. 139, 536 P.2d 190 (1975), *rev'd sub nom. Fisher v. District Court*, 424 U.S. 382 (1976) (state court has no jurisdiction, and Tribe has exclusive jurisdiction, over an adoption proceeding in which all parties are members of the tribe and residents of the reservation); *Montana ex rel. Kennerly v. District Court*, 154 Mont. 488, 466 P.2d 85 (1970), *vacated*, *Kennerly v. District Court*, 400 U.S. 423 (1971) (state court lacked jurisdiction over action on debt against Native Americans for transactions occurring on reservation); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C.*, 321 N.W.2d 510 (N.D. 1982) (court has no jurisdiction over civil actions arising within Native American lands unless the Native Americans of the reservation vote to accept state jurisdiction), *vacated*, 467 U.S. 138 (1984) (under federal law, state courts could exercise subject-matter jurisdiction over claims for negligence and breach of contract for performance wholly on Native American reservation).

jurisdiction,¹¹³ zoning,¹¹⁴ hunting and fishing rights,¹¹⁵ water rights,¹¹⁶ religion,¹¹⁷ and general police powers.¹¹⁸ The states have

113. *E.g.*, *Robinson v. Sigler*, 187 Neb. 144, 145-46, 148, 187 N.W.2d 756, 758, 759 (holding that Public Law 280, § 2, conferred upon state jurisdiction over homicide by Native American on reservation, and stating in dictum that the inherent police powers of the state apply both to Native Americans and Native American lands unless preempted by federal law), *appeal dismissed*, 404 U.S. 987 (1971); *Anderson v. Britton*, 212 Or. 1, 20, 23, 318 P.2d 291, 300, 301-02 (1957) (same), *cert. denied*, 356 U.S. 962 (1958).

114. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 109 S. Ct. 2994 (1989) (plurality opinion) (county had zoning power over Native American land owned by non-member), *rev'g in part & aff'g in part* *Confederated Tribes & Bands of the Yakima Indian Nation v. Whiteside*, 828 F.2d 529 (9th Cir. 1987).

115. *E.g.*, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (New Mexico could not restrict Tribe's regulation of hunting and fishing by the Tribe on its own reservation and could not regulate hunting and fishing by non-members on Native American land); *Metlakatla Indian Community v. Egan*, 362 P.2d 901 (Alaska 1961) (state law prohibiting operation of fish traps applied to Native Americans fishing in Native Americans' waters), *vacated*, 369 U.S. 45 (1962) (Alaska could not forbid the use of salmon traps in Native Americans' waters); *Department of Game v. Puyallup Tribe, Inc.*, 86 Wash. 2d 664, 668-69, 548 P.2d 1058, 1063-64 (1976) (state could regulate fishing by Native Americans both on and off reservation), *vacated on other grounds*, *Puyallup Tribe, Inc. v. Department of Game [Puyallup III]*, 433 U.S. 165, 175-77 (1977) (state could regulate fishing by Native Americans on Native American lands).

116. *E.g.*, *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983) (courts of Montana and Arizona, and state courts generally, had jurisdiction to adjudicate Native Americans' water rights under Act of July 10, 1952, ch. 651, § 208, 66 Stat. 549, 560 (codified at 43 U.S.C. § 666)); *Arizona v. California*, 373 U.S. 546, 600 (1963) (rejecting Arizona's arguments to gain water rights at the expense of those reserved to Native Americans); *United States v. Superior Court*, 144 Ariz. 265, 273-75, 697 P.2d 658, 666 (1985) (state court could adjudicate Native American water rights); *Montana ex rel. Greely v. Confederated Salish & Kootenai Tribes*, 219 Mont. 76, 82-89, 712 P.2d 754, 758-62 (1985) (same); *see also* *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 702-03 (1899).

117. *Employment Div., Dep't of Human Resources v. Smith*, 110 S. Ct. 1595 (1990) (if state statute is neutral on its face, without reference to religious use, free exercise clause permits a state to prohibit by criminal law the sacramental use of peyote by Native American practicing Native American religion), *rev'g* 307 Ore. 68, 763 P.2d 146 (1988) (state statute prohibited the sacramental use of peyote by Native American practicing Native American religion, but such violated the free exercise clause).

118. *E.g.*, *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979) (upholding state civil and criminal jurisdiction over Native Americans and Native American lands, without their consent, in areas of compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and operation of motor vehicles on public roads); *see also* *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-16 (1987) (dictum) (state and local laws can apply to Native Americans on Native American lands if state's interests suffice to justify the assertion of state authority, even if otherwise pre-empted because inconsistent with federal and tribal interests reflected in federal law); *Rice v. Rehner*, 463 U.S. 713, 718 (1983) (dictum) (state laws can apply to Native

been even less inclined than has the national government to introduce humanity into their interactions with Native Americans,¹¹⁹ and have themselves undertaken to dominate Native American tribes.¹²⁰ By voiding national authority, this original understanding might therefore implicate even more serious *practical* consequences for Native Americans.

III. Unstated Understandings

Inquiry into the original understanding about Native Americans should examine not only the Constitution's text and the debates, but also whether the Constitution's structure necessarily implies and the Framers necessarily intended any powers without declaring them.¹²¹ The question introduces issues which complicate the original understanding—it might even yield conclusions contrary to those of Part II—because the debates instance a remarkable omission. Although the states and individuals coveted Native American lands “within” the United States and the Western Territory, neither the Framers nor the Constitution (of a government primarily “instituted for the protection of property”¹²²) discussed the status of Native American

American lands, unless such application would interfere with tribal self-government or would impair a right granted or reserved by federal law); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (dictum) (same); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973) (dictum) (“the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption”).

119. *E.g.*, F. COHEN, *supra* note 11, at 646-53 (discussing instances when states tried to deny rights or benefits to Native Americans).

120. *E.g.*, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); Southern Department 1787 Indian Affairs Committee Report, *supra* note 47, at 455-62 (North Carolina, Georgia); V. DELORIA, JR. & C. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 203-09 (2d printing 1984); H. MANLEY, *supra* note 91, at 23-32; F. PRUCHA, *supra* note 91, at 31-40; Letter from Warriors, Chiefs, and Representatives of the Cherokee Nation to President Washington and the Senate of the United States (May 19, 1789) (“We rejoice much to hear that the Great Congress have got new powers And have become Strong. we now Hope that whatever is done hereafter by the Great Council will no more be destroyed and made small by any State:”), *reprinted in* 2 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 91, at 185, 186; see *supra* text accompanying notes 111-18.

121. See Brest, *supra* note 16.

122. 1 RECORDS, *supra* note 13, at 594 (July 12, 1787) (statement of Charles Cotesworth Pinckney, South Carolina); see also *id.* at 533 (July 5, 1787) (statement of Gouverneur Morris, Pennsylvania).

“property”¹²³ and “sovereignty.”¹²⁴

Native American tribes occupied lands “within” the political boundaries asserted by states and “within” the Western Territory (the lands between the Allegheny Mountains and the Mississippi River). The Framers did consider the Western Territory and the possibility of new states there; in fact, they debated competing claims to the territory by various states and the United States. Yet no delegate expounded upon or even acknowledged the fact that Native Americans were already occupying these lands claimed by states and the United States.¹²⁵

123. “Property” is enclosed in quotation marks in order to distinguish Native American conceptions of their relationship with the land and with the things they made from Anglo-American conceptions of property and from conceptions of property in the law of nations. Anglo-Americans probably did not and do not have words to describe that relationship. For a discussion of Native American conceptions, see *infra* note 142. See generally W. CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* 58-67 (1983); I. SUTTON, *INDIAN LAND TENURE: BIBLIOGRAPHIC ESSAYS AND A GUIDE TO THE LITERATURE* (1975); Fletcher, *Land Tenure*, in 1 *HANDBOOK OF AMERICAN INDIANS NORTH OF MEXICO* 756 (F. Hodge ed. 1959).

124. As Native Americans had no Anglo-American conception of property, so they had no like conception of sovereignty. See *infra* note 142. The United States, however, attributed sovereignty to them in order to validate, within the Western legal tradition, their grants and cessions of land by treaty to the United States. D. GETCHES & C. WILKINSON, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 37, 269 (2d ed. 1986). Concluding, as this article does, that the United States was not sovereign over Native Americans, does not imply that Native Americans were sovereign in the sense that the Western legal tradition defines the term.

125. See The Virginia Plan, *supra* note 23, paras. 10, 11 (“Resolvd. that provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of Government & territory or otherwise, with the consent of a number of voices in the National legislature less than the whole. . . . Resd. that a Republican Government & the territory of each State, except in the instance of a voluntary junction of Government & territory, ought to be guaranteed by the United States to each State”) (not mentioning Native Americans); 1 *RECORDS*, *supra* note 13, at 121 (June 5, 1787) (same); *id.* at 202 (June 11, 1787) (same); *id.* at 206 (June 11, 1787) (same); State of the Resolutions Submitted to the Consideration of the House by the Honorable Mr[.] Randolph, as Altered, Amended, and Agreed to in a Committee of the Whole House, *supra* note 29, para. 14 (same); [Draft] The New Jersey Plan para. 7, cl. 3 (1787) (“Whereas it is necessary . . . that the States should be consolidated, by which means all the Citizens thereof will become equally intitled to and will equally participate in the same Privileges and Rights, and in all waste, uncultivated, and back Territory and Lands; it is therefore resolved, that all the Lands contained within the Limits of each State individually, and of the U. S. generally be considered as constituting one Body or Mass, and be divided into thirteen or more integral Parts.”) (same), reprinted in 3 *RECORDS*, *supra* note 13, at 612, 613; The New Jersey Plan, *supra* note 30, para. 7 (same); 1 *RECORDS*, *supra* note 13, at 405 (June 25, 1787) (statement of George Read, Delaware) (same); *id.* at 412 (June 25, 1787) (statement of George Read, Delaware) (same); *id.* at 441 (June 27, 1787) (statement of Luther Martin, Maryland, that “The smaller states yielded rights, not the large states—They

To determine whether the Framers intended and the Constitution implied any powers of national or state sovereignty over Native American lands without so stating—whether the original understanding included any unstated understandings—, this part reviews contemporaneous treatises on sovereignty, proceedings of the Continental Congress, treaties with Native American tribes, and *The Federalist*.

A. Contemporary Jurisprudence about Sovereignty and Jurisdiction

Perhaps the Framers believed in common and had no cause to articulate European jurists' conceit that Native American tribes did not own their lands. The argument took various forms. Perhaps the Framers believed that Native Americans were uncivilized and even barbarous, which condition precluded their

gave up their claim to the unappropriated lands") (same); *id.* at 463 (June 29, 1787) (statement of George Read, Delaware, that "The ungranted lands also which have been assumed by particular States must also be given up.") (same); *id.* at 533-34 (July 5, 1787) (statement of Gouverneur Morris, Pennsylvania) (same); *id.* at 541 (July 6, 1787) (statement of Rufus King, Massachusetts) (same); 2 *id.* at 2-3 (July 14, 1787) (motion of Elbridge Gerry, Massachusetts, and Rufus King, Massachusetts) (same); *id.* at 46 (July 18, 1787) (same); Proceedings of the [Federal] Convention for the Establishment of a National Government, *supra* note 39, para. 8, cl. 9 (same); E. Randolph, *supra* note 55 (same), reprinted in 2 RECORDS, *supra* note 13, at 147-48; Report of the Committee of Detail to Whom Were Referred the Proceedings of the Federal Convention, *supra* note 41, art. VIII [XI], §§ 2, 3, art. XVI [XVII] (same); 2 RECORDS, *supra* note 13, at 442 (Aug. 28, 1787) (same); *id.* at 454-56 (Aug. 29, 1787) (same); *id.* at 461-66 (Aug. 30, 1787) (same); *id.* at 470 (Aug. 30, 1787) (same); *id.* at 543 (Sept. 7, 1787) (motion of Hugh Williamson, North Carolina, and Richard Dobbs Spaight, North Carolina, "that no Treaty of Peace affecting Territorial rights shd be made without the concurrence of two thirds of the members of the Senate present.") (same); *id.* at 565, 578 (art. XVII, para. 1) (same); Report of the Committee of Style and Arrangement, *supra* note 50, art. IV, § 3, cl. 1 (same); 2 RECORDS, *supra* note 13, at 628 (Sept. 15, 1787) (same); *cf.* Martin, *supra* note 85 (outlining issues before the Federal Convention concerning the Western lands, but not mentioning Native Americans), reprinted in 3 RECORDS, *supra* note 13, at 223-27; Letter from Gouverneur Morris to Henry W. Livingston (Nov. 25, 1803), *supra* note 84 (reporting that during the Federal Convention, he "knew as well then, as I do now, that all North America must at length be annexed to us," but never mentioning Native Americans); Letter from Gouverneur Morris to Henry W. Livingston (Dec. 4, 1803), *supra* note 84 (reporting his opinion that the United States cannot "admit, as a new State, territory, which did not belong to the United States when the Constitution was made," but that the United States would govern such territory as provinces; but noting that, at the Federal Convention, "a strong opposition would have been made" to this limitation upon admission of states; and in no case mentioning Native Americans).

being sovereigns and their having title to land.¹²⁶ Perhaps the Framers assumed a different doctrine articulated by European jurists, that discovery and possession of foreign land by one European sovereign founded its title *vis-à-vis* all other European nations,¹²⁷ or perhaps the Framers accepted its variation, that

126. A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 653 (E. Cannan ed. 1937) (5th ed. 1789) (“Among nations of hunters, the lowest and rudest state of society, such as we find it among the native tribes of North America, every man is a warrior as well as a hunter. When he goes to war, either to defend his society, or to revenge the injuries which have been done to it by other societies, he maintains himself by his own labour, in the same manner as when he lives at home. His society, for in this state of things there is properly neither sovereign nor commonwealth, is at no sort of expence, either to prepare him for the field, or to maintain him while he is in it.”); *id.* at 669-70 (“Among nations of hunters, . . . there is scarce any property, or at least none that exceeds the value of two or three days labour; . . . The acquisition of valuable and extensive property, therefore, necessarily requires the establishment of civil government. Where there is no property, or at least none that exceeds the value of two or three days labour, civil government is not so necessary.”); *id.* at 735 (hunters, e.g. tribes of North America, are barbarous societies, not civilized societies); C. INGLIS, A MEMORIAL CONCERNING THE IROQUOIS, OR FIVE CONFEDERATE NATIONS OF INDIANS IN THE PROVINCE OF NEW-YORK (1771) (describing their present state, numbers, and situation; adducing arguments why government should interpose for their conversion to Christianity and reduction to a civilized state; and presenting a plan for their conversion), reprinted in 4 THE DOCUMENTARY HISTORY OF THE STATE OF NEW YORK 659 (E. O’Callaghan ed. 1851); see J. LOCKE, TWO TREATISES OF GOVERNMENT: ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND END OF CIVIL GOVERNMENT §§ 26, 30 (P. Laslett rev. ed. 1963) (rev. 3d ed. 1698); 1 C. DE SECONDAT [BARON DE MONTESQUIEU], ESPRIT DES LOIS [THE SPIRIT OF LAWS] bk. 18, chs. 9, 11-12 (1748) (Native Americans form “savage nations” and are “dispersed clans,” “generally hunters,” “not possessed of landed property”); *cf.* Letter from William Johnson to Arthur Lee (Feb. 28, 1771), reprinted in 4 THE DOCUMENTARY HISTORY OF THE STATE OF NEW YORK, *supra*, at 269. *But cf.* 1 F. DE VICTORIA, RELECTIONES THEOLOGICAE XII: DE INDIS [TWELVE THEOLOGICAL LECTURES: ON INDIANS] *359-60 (1557) (J. Simon ed. 1696) (“[T]here is another title which can be set up, namely, by right of discovery . . . [T]hose regions which are deserted become, by the law of nations and the natural law, the property of the first occupant. . . . Not much, however, need be said about this third title of ours, because, as proved above, the barbarians were true owners . . .”), translated in 7 THE CLASSICS OF INTERNATIONAL LAW 138-39 (J. Scott ed. 1917).

127. See E. DE Vattel, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE [THE LAW OF NATIONS, OR PRINCIPLES OF NATURAL LAW] bk. 1, § 207 (1st ed. 1758), translated in 4-3 THE CLASSICS OF INTERNATIONAL LAW 84 (J. Scott ed. 1916) (“When . . . a Nation finds a country uninhabited and without an owner, it may lawfully take possession of it, and after it has given sufficient signs of its intention in this respect, it may not be deprived of it by another Nation. In this way navigators setting out upon voyages of discovery and bearing with them a commission from their sovereign, when coming across . . . uninhabited lands, have taken possession of them in the name of their Nation; and this title has usually been respected, provided actual possession has followed shortly after.”); *cf.* G.F. VON MARTENS, PRÉCIS DU DROIT DES GENS MODERNE DE L’EUROPE FONDÉ SUR LES TRAITES ET L’USAGE [PRECIS OF THE LAW OF MODERN

the English Crown had discovered and was thus sovereign over the American colonies, subject only to the rights of Native Americans to occupy the territory¹²⁸—which sovereignty Great Britain had ceded with her title¹²⁹ to the states in the Treaty of Paris.¹³⁰ A fourth possibility is that the Framers assumed that

EUROPEAN NATIONS, FOUNDED ON THE TREATIES AND CUSTOMS] bk. IV, ch. IV, § 2 (W. Cobbett trans. 1803) (1788) (“To claim the sole property of a thing, a person must, 1. have been able to hold it legitimately, and must have a good reason for his exclusive possession. This reason may be founded on the inutility of the thing, if its use remained in common, or on the security of the possessor’s property, already lawfully acquired, which may require an exclusive possession of something, which, of itself, he would not want. 2. It must have been effectively possessed, that is to say, seized with an intention to be kept. 3. The claimant must be in a situation to maintain the possession of the thing claimed.”).

128. E. DE VATTEL, *supra* note 127, bk. 1, § 209 (“There is another . . . question which has arisen principally in connection with the discovery of the New World[,] . . . whether a nation may lawfully occupy any part of a vast territory in which are to be found only wandering tribes whose small numbers can not populate the whole country. . . . [T]hese tribes can not take to themselves more land than they have need of or can inhabit and cultivate. Their uncertain occupancy of these vast regions can not be held as a real and lawful taking of possession; and when the Nations of Europe, which are too confined at home, come upon lands which the savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them and establish colonies in them.”); *cf. id.* bk. 1, §§ 204-205 (“When a Nation takes possession of a country which belongs to no one, it is considered as acquiring *sovereignty* [right of supreme jurisdiction] over it as well as *ownership* [right of exclusive use and alienation]; for, being free and independent, it can not intend, when it settles a territory, to leave to others the right to rule it, nor any other right which belongs to sovereignty. The entire space over which a Nation extends its sovereignty forms the sphere of its jurisdiction, and is called its *domain*.”). *But see* J. LOCKE, *supra* note 126, § 9 (“’Tis certain their Laws [of “any Prince or State”] by vertue of any Sanction they receive from the promulgated Will of the Legislative, reach not a Stranger. They speak not to him, nor if they did, is he bound to hearken to them. The Legislative Authority, by which they are in Force over the Subjects of that Common-wealth, hath no Power over him. Those who have the Supream Power of making Laws in *England, France or Holland*, are to an *Indian*, but like the rest of the World, Men without Authority: . . .”); H. DE GROOT [H. GROTIUS], *DE JURE BELLI AC PACIS LIBRI TRES* [ON THE LAW OF WAR AND PEACE IN THREE BOOKS] bk. 2, ch. 3, § IV (rev. ed. 1646) (when colonies take land from neighboring territories and assign it to colonists, “jurisdiction over the lands which were assigned nevertheless remained under the control of those from whose territory they were taken”), translated in 3-2 THE CLASSICS OF INTERNATIONAL LAW 206 (J. Scott ed. 1925); *see also* *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542 (1832) (dictum); *cf.* G.F. VON MARTENS, *supra* note 127, bk. IV, ch. IV, § 2 (“But all empire, when separated from property, supposes the consent, express or tacit, of those over whom it is to be exercised.”).

129. Treaty of Peace, Feb. 10, 1763, France-Great Britain-Spain, arts. 4, 7, 42 CONSOLIDATED TREATY SERIES 279, 324, 325 (C. Parry ed. 1969).

130. Treaty of Paris, Sept. 3, 1783, United States-Great Britain, arts. 1-2, 8 Stat.

Native Americans were a conquered people, subject to the sovereignty of the conqueror.¹³¹ Finally, perhaps they adopted the principle of natural law, that Native Americans never occupied the land by cultivation and use, but moved from place to place in hunting and gathering, and therefore their use was not exclusive and could not subordinate possession by a people of cultivators.¹³² In short, perhaps the Framers had already presumed

80, 81-82; cf. Treaty with the Shawanoe Nation, Jan. 31, 1786, United States-Shawnee Nation, art. 2, 7 Stat. 26, 26 (“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.”).

131. *Campbell v. Hall* [*Grenada Case*], 98 Eng. Rep. 1045, 1047, 1 Cowper’s Rep. 204, 208 (K.B. 1774) (finding as propositions “too clear to be controverted” that “[a] country conquered by *British* arms becomes a dominion of the king in the right of his crown; and, therefore, necessarily subject to the legislature, the parliament of *Great Britain*,” that “the conquered inhabitants once received under the king’s protection, become subjects, and are to be universally considered in that light, not as enemies or aliens,” that “the law and legislative government of every dominion, equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there,” and that “the laws of a conquered country continue in force, until they are altered by the conqueror”); *Calvin v. Smith* [*Calvin’s Case*], 77 Eng. Rep. 377, 398, 7 Coke’s Rep. 1a, 17b (Ex. Ch. 1609) (“[I]f a Christian King should conquer a kingdom of an infidel, and bring them under his subject, there *ipso facto* the laws of the infidel are abrogated . . . and in that case, until certain laws be established amongst them, the King . . . shall judge them and their causes according to natural equity . . .”). *Contra* J. LOCKE, *supra* note 126, §§ 176, 180-187 (conquest by an *unjust* war conveys no title, and conquest in a lawful war, that is, one against the unjust use of force, entails absolute power over the people conquered but no right or title to their estates or possessions).

132. W. CRONON, *supra* note 123, at 55-58; 1 C. DE SECONDAT, *supra* note 126, bk. 18, chs. 9, 11-12; E. DE VATEL, *supra* note 127, bk. 1, §§ 207, 209; J. WINTHROP, CONCLUSIONS FOR THE PLANTATION IN NEW ENGLAND 7 (Old South Leaflets No. 50, 1894) (1629 or 1630) (“And for the Natives in New England they inclose noe land neither have any settled habitation nor any tame cattle to improve the land by, & soe have noe other but a naturall right to those countries Soe as if wee leave them sufficient for their use wee may lawfully take the rest, there being more then enough for them & us.”); *accord* Johnson & Graham’s Lessee v. M’Intosh, 21 U.S. (8 Wheat.) 543, 569-70 (1823); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 142-43 (1810) (Native Americans did not have exclusive use of the land, and Georgia could grant to others absolute title to land that Native Americans occupied); *see* 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *3-4 (G. Tucker ed. 1803); J. LOCKE, *supra* note 126, §§ 26-27, 29, 31, 34-38; S. VON PUENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO [OF THE LAW OF NATURE AND NATIONS IN EIGHT BOOKS] bk. 4, ch. 6, § 3 (2d ed. 1688), translated in 17-2 THE CLASSICS OF INTERNATIONAL LAW 570 (J. Scott ed. 1934) (“Regarding occupancy . . . of lands, it must be carefully considered whether it is made by one person, or by several at the same time. Any single individual is held to have occupied land when he undertakes to cultivate it, or marks out its boundaries. Yet it is understood

on the basis of one or more of these principles that the United States was sovereign over Native American tribes and lands—perhaps a commonplace which they saw no need to inscribe in the Constitution but which Chief Justice Marshall memorialized in 1823.¹³³

Sovereignty was the central and common problem of the latter half of the eighteenth century¹³⁴ (according to histories that limit

that he will not embrace more than what one family . . . can defend.”). *But cf.* H. DE GROOT, *supra* note 128, bk. 2, ch. 2, §§ II, XVII (“Again, if within the territory of a people there is any deserted and unproductive soil, this also ought to be granted to foreigners if they ask for it. Or it is right for foreigners even to take possession of such ground, for the reason that uncultivated land ought not to be considered as occupied except in respect to sovereignty, which remains unimpaired in favour of the original people”); S. VON PUFENDORF, *supra*, bk. 4, ch. 6, §§ 3-4 (“But when a group of men have together occupied some portion of land, this has usually been done . . . when a group of men take under possession some desert tract of land, the bounds of which have been fixed either by nature or by the decision of men. . . . [O]ccupancy as a whole’ . . . establishes dominion for the whole group, as such, over all things in that district, not merely immovables, but also moveables, and animal life, or at least the right to use the last named to the exclusion of all others. . . . [I]f anything be discovered in such an area that is still without a private owner, it should not at once be regarded as unoccupied, and free to be taken by any man as his own, but it will be understood to belong to the whole people.”). Therefore, the principle of Mr. von Pufendorf concerning cultivation applied only in cases of individuals, but did not apply to Native American tribes, who held land in common.

133. See *Johnson & Graham’s Lessee v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 585-86, 591-92 (1823). The Court held that the United States had absolute title to the lands occupied by Native Americans under the doctrine of discovery. *Id.* at 588. In dictum, Chief Justice Marshall iterated that, according to public policy but not law, conquered occupants “shall not be wantonly oppressed” but shall be assimilated or safely governed as a distinct people, if such assimilation and governance consisted with the purposes of the sovereign. However, he also opined that Native Americans

were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible

That law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances.

Id. at 589-91.

134. See generally T. ABERNETHY, *WESTERN LANDS AND THE AMERICAN REVOLUTION* (1937) (describing the practical politics of determining sovereignty in the Western lands); I. J. GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 182-95 (1971) (describing adjudication under auspices of the Continental Congress of disputes about territorial limits); M. JENSEN, *THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 1774-1781*, at 150-76 (1940); F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 145-52 (1985) (discussing

their subject matter to politics, wars, and statesmen). Who was sovereign over the territory of Native Americans illustrated the problem.¹³⁵ The Framers never enquired during the Federal Convention whether Native Americans were sovereigns of these lands.¹³⁶ Instead, their deliberations and machinations only concerned whether individual states or the United States had or should have sovereignty and jurisdiction of the "Western lands," those between the Allegheny Mountains and the Mississippi River.¹³⁷

Julius Goebel has noted that the states used the law of nations to resolve controversies among the thirteen commensurate jurisdictions after the Revolutionary War.¹³⁸ The starting point was the proposition that each state was sovereign within and throughout the limits specified in its antecedent colonial charter. Charters of New Hampshire, Rhode-Island and Providence Plantations, New York, Pennsylvania, New Jersey, Maryland, and Delaware specified definite limits.¹³⁹ The charters of Mas-

the various theoretical formulations of whether and how the colonies assumed sovereignty upon declaring independence); P. ONUF, *THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES 1775-1787* (1983); 1 F. PRUCHA, *supra* note 12, at 11-18, 21-28 (describing various methods with which colonists dispossessed Native Americans of land and various theories offered to justify them); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 344-89 (1969) (discussing the development of the principle that sovereignty resided in the people).

135. *E.g.*, Report of [the Committee] on Indians Affairs in the Southern Department, *reprinted in* 27 J. CONTINENTAL CONG. 453 (G. Hunt ed. 1928) (May 28, 1784) [hereinafter Southern Department 1784 Indian Affairs Committee Report]; Report of the Committee To Whom Were Referred Sundry Papers on Indian Affairs in the Northern and Middle Departments, *reprinted in* 25 J. CONTINENTAL CONG. 680 (G. Hunt ed. 1922) (Oct. 15, 1783); Mensch, *The Colonial Origins of Liberal Property Rights*, 31 BUFFALO L. REV. 635, 714-19 (1982); W. Johnson, Review [for the Earl of Shelburne] of the Trade and Affairs of the Indians in the Northern District of America (Sept. 22, 1767), *reprinted in* 7 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW-YORK 953, 958-59 (E. O'Callaghan ed. 1856); *see* Proclamation of Sept. 22, 1783, *reprinted in* 25 J. CONTINENTAL CONG. 602 (G. Hunt ed. 1922); Proclamation of Oct. 7, 1763 (Eng.), *reprinted in* 3 THE AMERICAN INDIAN AND THE UNITED STATES: A DOCUMENTARY HISTORY 2315 (W. Washburn ed. 1973); *see also* Thomas, *Introduction to INDIAN LAND CESSIONS IN THE UNITED STATES*, 18 U.S. BUR. OF AM. ETHNOLOGY ANN. REP. pt. 2, H.R. DOC. NO. 736, 56th Cong., 1st Sess. 527 (C. Royce ed. 1899).

136. *See supra* note 125 and accompanying text.

137. The reader will find maps useful to understanding the problems of territorial jurisdiction discussed below in *ATLAS OF EARLY AMERICAN HISTORY: THE REVOLUTIONARY ERA, 1760-1790*, at 16-18 (L. Cappon ed. 1976).

138. 1 J. GOEBEL, JR., *supra* note 134, at 46-47.

139. Grant to the Duke of York (Oct. 30, 1712) (charter of territory including New Jersey), *reprinted in* 4 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS,

sachusetts Bay, Connecticut, Virginia, North Carolina, South Carolina, and Georgia all granted expanses westward "to the South Sea."¹⁴⁰

When the colonies denied in 1776 that sovereign powers any longer originated in the Crown, and then defeated the Crown in 1783, some states argued that sovereignty vested in each state,¹⁴¹ with inequalities of power attending the inequalities of territory. Other states wanted to limit the extent of another state's dominion; to accomplish this they had to acknowledge and to invoke a sovereign power superior to both.¹⁴² Prior to

AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2590, 2590-91 (F. Thorpe ed. 1909) [hereinafter *THE FEDERAL AND STATE CONSTITUTIONS*]; Charter of Delaware (1701) ("the Territories of Pennsylvania"), *reprinted in 1 THE FEDERAL AND STATE CONSTITUTIONS, supra*, at 557, 557; Charter of the Province of Pennsylvania (1681), *reprinted in 5 THE FEDERAL AND STATE CONSTITUTIONS, supra*, at 3035, 3036; Grant to Duke of York (June 6, 1674) (charter of territory including part of the present state of New York), *reprinted in 3 THE FEDERAL AND STATE CONSTITUTIONS, supra*, at 1641, 1641; Charter of Rhode-Island and Providence Plantations (1663), *reprinted in 6 THE FEDERAL AND STATE CONSTITUTIONS, supra*, at 3211, 3220-21; Charter of Maryland (1632), *reprinted in 3 THE FEDERAL AND STATE CONSTITUTIONS, supra*, at 1677, 1678; Grant of New Hampshire to Capt. John Mason (Nov. 7, 1629), *reprinted in 5 THE FEDERAL AND STATE CONSTITUTIONS, supra*, at 2433, 2434.

140. Charter of Georgia (1732), *reprinted in 2 THE FEDERAL AND STATE CONSTITUTIONS, supra* note 139, at 765, 771; Charter of Carolina (1665) (charter of territory including North Carolina and South Carolina), *reprinted in 5 THE FEDERAL AND STATE CONSTITUTIONS, supra* note 139, at 2761, 2762-63; Charter of Connecticut (1662), *reprinted in 1 THE FEDERAL AND STATE CONSTITUTIONS, supra* note 139, at 529, 535; Charter of Massachusetts Bay (1629), *reprinted in 3 THE FEDERAL AND STATE CONSTITUTIONS, supra* note 139, at 1846, 1850; Charter of Virginia (1612) ("from Sea to Sea West and North-west"), *reprinted in 7 THE FEDERAL AND STATE CONSTITUTIONS, supra* note 139, at 3802, 3803.

141. See The Declaration of Independence para. 32 (U.S. 1776); The Articles of Confederation art. II (U.S. 1781); Treaty of Paris, Sept. 3, 1783, United States-Great Britain, art. 1, 8 Stat. 80, 81.

142. *E.g.*, 1 RECORDS, *supra* note 13, at 323-24 (June 19, 1787) (statement of Rufus King, Massachusetts, that the states were not sovereigns, the Union was sovereign, and Congress could act alone without the states).

The states were assuming and employing the unity of sovereignty. Unitary sovereignty presumes that political relations and property rights are hierarchical. Property rights, title, and dominion derive ultimately from one sovereign and are allocated within that sovereignty. Whatever property right exists, whatever property regime exists, one sovereign establishes it and governs it. In other words, as a philosophical or as a practical matter, never do two contrary sovereign principles govern the "same" property.

In all cases, it seems, rights in land derive from polity. *E.g.*, I. SUTTON, *supra* note 123, at 4. The polity, however constituted, of whatever real or theoretical origin, is the one sovereign. (In earlier times, of course, philosophers or theologians debated whether

the Revolutionary War, the superior power one petitioned was the Crown; now states appealed to the Continental Congress to limit another state's claims in the Western lands.¹⁴³ Some states argued that, the Western lands being "unlocated and unsettled when the American revolution took place," they should be national territory, not territory over which former colonies, now states, were sovereign.¹⁴⁴

These fundamental disagreements about the source and extent of a state's sovereignty elucidate why the Framers expressly chose *not to decide* whether the United States, the individual states, or neither had jurisdiction over Native Americans' lands and therefore could govern them. Instead, the Framers were "for doing nothing in the constitution in the present case, and for leaving the whole matter in Status quo,"¹⁴⁵ and they determined that "nothing in this constitution contained, shall be so construed as to prejudice any claims either of the U— S— or of any particular State."¹⁴⁶

property rights were the province of secular rulers or sacred rulers. In some systems, all property was governed by one sovereign, either secular or sacred; in others, property was differentiated into kinds, and the civil government lorded over some kinds and God or the church lorded over other kinds. In the latter cases, strictly, God was sovereign. See, e.g., McKeon, *The Development of the Concept of Property in Political Philosophy: A Study in the Background of the Constitution*, 48 INT'L J. ETHICS 297 (1930.)

While in reality the theoretical assumption of unitary sovereignty is often true, sometimes it is false. In North America in the seventeenth and eighteenth centuries, Native Americans had, and European colonists claimed, interests in same places of North America. Native Americans, however, had no concept of title to land. "[L]and was not regarded as property; it was like the air, it was something necessary to the life of the race, and therefore not to be appropriated by any individual or group of individuals to the permanent exclusion of all others." Fletcher, *supra* note 123, at 756. When Native Americans shared with colonists the land they used, they had no sense that they were conveying a property right within a property system under one political or territorial sovereign. Any agreements they reached with European nations did not suddenly create a system of property rights grounded in a premise of unitary sovereignty. For Native Americans, land was not political in this sense; "property" was social and sacred. See, e.g., W. CRONON, *supra* note 123, at 54-81, 227-28; I. SUTTON, *supra* note 123, at 5. See generally *id.* at 24-27.

143. M. JENSEN, *supra* note 134, at 151.

144. Martin, *supra* note 85, reprinted in 3 RECORDS, *supra* note 13, at 226; e.g., T. PAINE, PUBLIC GOOD: BEING AN EXAMINATION INTO THE CLAIM OF VIRGINIA TO THE VACANT WESTERN TERRITORY, AND OF THE RIGHT OF THE UNITED STATES TO THE SAME (1780), reprinted in 2 THE COMPLETE WRITINGS OF THOMAS PAINE 304 (P. Foner ed. 1945); cf. 1 RECORDS, *supra* note 13, at 541 (July 6, 1787) (statement of Rufus King, Massachusetts, that the federal government was sovereign of the North West Territory).

145. 2 RECORDS, *supra* note 13, at 462 (Aug. 30, 1787) (statement of Hugh Williamson, North Carolina).

146. *Id.* at 466 (Aug. 30, 1787) (motion of Gouverneur Morris, Pennsylvania); accord U.S. CONST. art. IV, § 3, cl. 2.

The original understanding probably did not comprehend any theory of sovereign power, federal or state, over Native American nations. Either none of the theories of sovereignty catalogued above informed the original understanding, because article IV, section 3, clause 2 of the Constitution intentionally excluded each of them;¹⁴⁷ or this clause addressed only competing claims between the United States and individual states without denying that one or the other exercised jurisdiction over Native American territory or peoples. In either case, states still could not exercise jurisdiction over Native American tribes “within” their limits;¹⁴⁸ by the same reasoning, neither could the national government exercise jurisdiction over Native American territory or peoples “within” the United States.¹⁴⁹

Even the several contemporary theories, or fictions, of sovereignty would not justify national or state sovereignty over Native American lands. The doctrine of discovery was a convenient one of them; however, it governed priority of title among European nations, not between Native Americans and the British or Americans,¹⁵⁰ and it established title to uninhabited, not

147. See U.S. CONST. art. IV, § 3, cl. 2 (“and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State”).

148. See *supra* notes 47, 54, 63 and accompanying text.

149. The Supreme Court applies analogous reasoning to Native American tribes. Tribes cannot exercise jurisdiction over people who are not members of the tribe or over lands located within the reservation but owned in fee by persons who are not members of tribe. *E.g.*, *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 109 S. Ct. 2994 (1989) (plurality opinion) (Tribe generally does not have zoning power over Native American lands owned in fee by non-members); *Montana v. United States*, 450 U.S. 544, 557 (1981) (Crow Tribe may prohibit or regulate hunting or fishing by non-members on lands belonging to the Tribe, but it has no power to regulate hunting and fishing by non-members on lands located within the reservation but owned in fee by non-members); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (tribal courts do not have criminal jurisdiction over offenses by non-members on reservations). By the same reasoning, states and the United States would not be able to exercise jurisdiction over persons who were not members of the state or the United States (Native Americans) or over lands located “within” the state or the United States but held by persons who were not members of the state or the United States (Native Americans’ lands).

150. *Johnson & Graham’s Lessee v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 588 (1823); *accord Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543-44, 546, 559 (1832) (dictum); see E. DE VATTEL, *supra* note 127, bk. 1, §§ 204-205, 207 (generally, other nations may not deprive the discovering nation of the new territory); *cf.* Notes of a Conversation [of Thomas Jefferson, Secretary of State] with Mr. [George] Hammond [British Minister] (June 7, 1792), reprinted in 1 THE WRITINGS OF THOMAS JEFFERSON 193, 196-97 (P. Ford ed. 1892) (pursuant to the law of nations, the United States had a “right of preemption” of the lands of Native Americans). *But cf.* E. DE VATTEL, *supra* note 127, bk. 1, § 209

inhabited territory.¹⁵¹ Another theory posited that Native Americans, being in a state of nature, could not be sovereigns of their lands; yet it was argued with equal vigor that the colonies, upon revolution, reverted to a state of nature.¹⁵² It was asserted that Native Americans were a conquered people, subject to the sovereignty of the conqueror; yet the assertion was mere rhetoric.¹⁵³ It was asserted that Native Americans did not use and cultivate the land and therefore, under principles of natural law, could not be sovereign of it or exclude others from using it; but failure to use and cultivate the land did not suffice to deny the Crown's claims to unsurveyed lands, *viz.* the colonial grants and charters extending to the "South Sea."¹⁵⁴ Furthermore, the United States *had* recognized property rights in Native Americans.¹⁵⁵

Such logical inconsistencies do not preclude inconsistent political choices to adopt the fiction anyway, and the Constitution

(addressing specifically the powers of European nations with respect to the territory of Native Americans, European nations may lawfully take possession of certain lands of Native Americans and establish colonies upon them).

151. E. DE Vattel, *supra* note 127, bk. 1, §§ 204-205, 207; see H. DE GROOT, *supra* note 128, bk. 2, ch. 2, § XVII, ch. 3, § IV; J. LOCKE, *supra* note 126, § 9; 1 F. VICTORIA, *supra* note 126, at *359-60; *cf.* G.F. VON MARTENS, *supra* note 127, at 161. *But cf.* 1 C. DE SECONDAT, *supra* note 126, bk. 18, chs. 11-13; A. SMITH, *supra* note 126, at 653; E. DE Vattel, *supra* note 127, bk. 1, § 209.

152. F. McDONALD, *supra* note 134, at 144-47; *e.g.*, 1 RECORDS, *supra* note 13, at 324 (June 19, 1787) (statement of Luther Martin, Maryland). *Contra id.* at 324-25 (June 19, 1787) (statement of Alexander Hamilton, New York).

153. W. Johnson, *supra* note 135, reprinted in 7 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW-YORK, *supra* note 135, at 958-59. *Cf.* Report of Henry Knox, Secretary of War, to [George Washington,] the President of the United States, Relative to the Northwestern Indians (June 15, 1789), reprinted in 2-1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 91, at 12, 13. See *infra* text accompanying notes 168-74.

154. Mensch, *supra* note 135, *passim* & 686-87 (describing the conflicts in New York between title based on use and occupancy and title based on grants of the Crown). Compare H. DE GROOT, *supra* note 128, bk. 2, ch. 2, §§ II, XVII; S. VON PUFENDORF, *supra* note 132, bk. 4, ch. 6, §§ 3-4.

155. *E.g.*, [Northwest] Ordinance of July 13, 1787, art. 3, reprinted in 32 J. CONTINENTAL CONG. 334, 340-41 (R. Hill ed. 1936), ratified in Act of Aug. 7, 1789, ch. 8, § 3, 1 Stat. 50, 51 *n.a.*; Articles of Confederation—First Draft, *supra* note 27, arts. XIV, XVIII; Southern Department 1787 Indian Affairs Committee Report, *supra* note 47, at 458; Report of the Committee on Indian Affairs in the Northern Department, reprinted in 33 J. CONTINENTAL CONG. 477, 478 (R. Hill ed. 1936) (Aug. 9, 1787) [hereinafter Northern Department 1787 Indian Affairs Committee Report]; Report of Henry Knox, Secretary of War, to the President of the United States, Relative to the Northwestern Indians, *supra* note 153, reprinted in 2-1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 91, at 13.

abounds with inconsistency; but given the inapplicability, logically, of these theories of sovereignty and the express exclusion of them in article IV of the Constitution, imputing to the Framers an unarticulated choice and incorporation of any of them should require evidence of the choice, not just evidence of their availability. Much better evidence is found in the deliberations of the Continental Congress.

B. *The Proceedings of the Continental Congress*

The first draft of the Articles of Confederation stated that "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; . . ." ¹⁵⁶ The provision was removed ¹⁵⁷ (although one discovers its echo in the treaty with the Delaware Nation in 1778 ¹⁵⁸). In conjunction, the first draft would have vested in the United States a

sole and exclusive Right and Power of . . . Limiting the Bounds of those Colonies, which by Charter or Proclamation, or under any pretence, are said to extend to the South Sea, and ascertaining those Bounds of any other Colony that appear to be indeterminate— Assigning Territories for new Colonies, either in Lands to be thus separated from Colonies and heretofore purchased or obtained by the Crown of Great-Britain from the Indians, or hereafter to be purchased or obtained from them— . . . ¹⁵⁹

Thus, the first draft would not enact nor anticipate any of the theories of sovereignty that politicians subsequently asserted.

The recorded debate about this provision presented more diverse views. One member of the Continental Congress from Virginia claimed that some Native American nations were tributary to Virginia. ¹⁶⁰ Thomas Jefferson opined that some Native Americans were living in a colony and thus were subject to its

156. Articles of Confederation—First Draft, *supra* note 27, art. XIV, at 549.

157. See Articles of Confederation—Second Draft, *supra* note 27, at 679-80 col. 2.

158. Treaty with the Delaware Nation, Sept. 17, 1778, United States-Delaware Nation, art. 6, 7 Stat. 13, 14.

159. Articles of Confederation—First Draft, *supra* note 27, art. XVIII, at 550-51.

160. Notes of John Adams on the Proceedings of the Continental Congress (July 26, 1776) (statements of Carter Braxton, Virginia), reprinted in 6 J. CONTINENTAL CONG. 1077 (W. Ford ed. 1906).

laws.¹⁶¹ James Wilson argued, on the other hand, that the United States had “no right over the Indians, whether within or without the real or pretended limits of any Colony Grants made three thousand miles to the eastward, have no validity with the Indians.”¹⁶²

Once the Revolutionary War was fought, in which Native Americans generally allied with Great Britain,¹⁶³ and the Treaty of Paris was signed, a new theory of sovereignty with respect to Native Americans was announced, one based on conquest and cession instead of purchase. Great Britain ceded to the colonies its title (whatever its title) to the territory between the Atlantic Ocean and the Mississippi River,¹⁶⁴ territory upon which Native Americans had lived long before 1608. This Treaty of Paris did not settle the conflicts between colonists and Native Americans.¹⁶⁵ Nonetheless, the colonists equated victory over Great Britain with conquest of the Native Americans and the lands upon which they lived. The Continental Congress of 1783 claimed sovereignty on the basis of cession and conquest:

[T]he committee believe . . . that they [Native Americans] are not in a temper to relinquish their territorial claims, without further struggles. That if an Indian war should be rekindled, repeated victories might produce the retreat of the Indians, but could not prevent them from regaining possession of some part of the distant lands and extensive territories, which appertain to the United States; That . . . it is just and necessary that lines of property should be ascertained and established between the United States and them, which will be convenient to the respective tribes, and

161. Notes of John Adams on the Proceedings of the Continental Congress (July 26, 1776) (statements of Thomas Jefferson, Virginia), *reprinted in* 6 J. CONTINENTAL CONG. 1077, 1077-78 (W. Ford ed. 1906).

162. Notes of John Adams on the Proceedings of the Continental Congress (July 26, 1776) (statements of James Wilson, Pennsylvania), *reprinted in* 6 J. CONTINENTAL CONG. 1077, 1078 (W. Ford ed. 1906).

163. See 1 F. PRUCHA, *supra* note 12, at 36-50. See generally B. GRAYMONT, *THE IROQUOIS IN THE AMERICAN REVOLUTION* (1972); W. MOHR, *FEDERAL INDIAN RELATIONS, 1774-1788*, at 37-91 (1933); J. O'DONNELL III, *SOUTHERN INDIANS IN THE AMERICAN REVOLUTION* (1973).

164. Treaty of Paris, Sept. 3, 1783, United States-Great Britain, arts. 1-2, 8 Stat. 80, 81-82.

165. *E.g.*, W. MOHR, *supra* note 163, at 93-99; Horsman, *American Indian Policy in the Old Northwest, 1783-1812*, 18 WM. & MARY Q. (n.s.) 35 (1961); see Treaty of Paris, Sept. 3, 1783, United States-Great Britain, 8 Stat. 80 (making no provision for Native Americans).

commensurate to the public wants, Nor . . . can the Indians themselves have any reasonable objections against the establishment recommended. They were . . . aggressors in the war, without even a pretence of provocation; To stop the progress of their outrages, the war, at a vast expence to the United States, was carried into their own country, which they abandoned. Waiving then the right of conquest and the various precedents which might be quoted in similar instances, a bare recollection of the facts is sufficient to manifest the obligation they are under to make atonement for the enormities which they have perpetrated, . . . and they possess no other means to do this act of justice than by a compliance with the proposed boundaries. . . . [I]f they should appear dissatisfied at the lines which it may be found necessary to establish, rather to give them some compensation for their claims than to hazard a war, which will be much more expensive; Whereupon,

Resolved, That a convention be held with the Indians residing in the northern and middle departments, . . . for the purposes of receiving them into the favor and protection of the United States, and of establishing boundary lines of property for separating and dividing the settlements of the citizens from the Indian villages and hunting grounds,

Secondly, That the Indians be informed that after a contest of eight years for the sovereignty of this country Great Britain has relinquished to the United States all claim to the country within the limits described by the second article of the provisional treaty between the United States and the King of Great Britain

. . . .
Fourthly, That the following lines shall be proposed to be mutually agreed upon and established between the United States and the several tribes of Indians who shall be affected thereby;

Resolved, That the preceding measures of Congress relative to Indian affairs, shall not be construed to affect the territorial claims of any of the states, or their legislative rights within their respective limits.¹⁶⁶

166. Report of the Committee To Whom Were Referred Sundry Papers on Indian

The Continental Congress used this rhetorical version in negotiations with Native American tribes.¹⁶⁷ The candid conclusions about sovereignty expressed in the committee's prefatory comments, however, assumed neither title nor conquest. Native Americans' "own country" must be purchased in treaty; they were not conquered.¹⁶⁸ By 1787, the Continental Congress made these private understandings public, replacing the cant of conquest and cession. The Northwest Ordinance of 1787 provided:

Affairs in the Northern and Middle Departments, *supra* note 135, at 681-82, 683-84, 686, 693; *see also* Southern Department 1784 Indian Affairs Committee Report, *supra* note 135 (asserting like principles and proposing like resolutions with respect to Native Americans nations in the southern department). *But see* Resolution of May 1, 1783, *reprinted in* 24 J. CONTINENTAL CONG. 319 (G. Hunt ed. 1922), in which the Continental Congress resolved to

inform the several Indian nations, on the frontiers of the United States, that preliminary articles of peace have been agreed on, and hostilities have ceased with Great Britain, and to communicate to them that . . . the United States are disposed to enter into friendly treaty with the different tribes; and to inform the hostile Indian nations that unless they cease all hostilities against the citizens of these states, and accept of these friendly proffers of peace, Congress will take the most decided measures to compel them thereto

Id. at 319-20. This resolution did not presume that the Native American tribes were already conquered.

167. *E.g.*, Treaty with the Shawanoe Nation, Jan. 31, 1786, United States-Shawnee Nation, art. 2, 7 Stat. 26, 26; H. MANLEY, *supra* note 91, at 23-24; Horsman, *supra* note 165, at 38-39; Speech of David Ramsay, Chairman of the Congress of the United States, to Cornplanter, of the Seneca Nation, *reprinted in* 30 J. CONTINENTAL CONG. 235, 235 (J. Fitzpatrick ed. 1934) (May 5, 1786) ("The United States alone possess the sovereign power within the limits described at the late Treaty of peace between them and the King of England. . . . You [Cornplanter] may also assure the Indians that they tell lies, who say that the King of England has not in his late Treaty with the United States given up, to them the lands of the Indians."). *Compare* Treaty with the Cherokee Nation, May 20, 1777, Georgia-South Carolina-Cherokee Nation, art. 1, *reprinted in* 8-1 AMERICAN STATE PAPERS: PUBLIC LANDS 51, 52 (W. Lowrie & M. Clarke eds. 1832) ("The Cherokee nation acknowledge that the troops . . . did effect and maintain the conquest of all the Cherokee lands eastward of the Unacaye mountain; and to and for their people did acquire, possess, and yet continue to hold, in and over the said lands, all and singular rights incidental to conquest: and the Cherokee nation, in consequence thereof, do cede the said lands to the said people, the people of South Carolina.').

168. *See also* H. MANLEY, *supra* note 91, at 23-32; Letter from George Washington, Commander-in-Chief, Continental Army, to James Duane, Chairman, Committee to Confer with the Commander in Chief, Continental Congress (Sept. 7, 1783), *reprinted in* 27 THE WRITINGS OF GEORGE WASHINGTON 133 (J. Fitzpatrick ed. 1938); Letter from Philip Schuyler, Commissioner on Indian Affairs, to President of Congress (July 29, 1783), in PAPERS OF THE CONTINENTAL CONGRESS, 1774-1789, No. 153, at 601, 602-03 (National Archives and Records Service Microfilm No. 247, Roll No. 173, 1959).

The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorised by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.¹⁶⁹

In 1787, a committee of the Continental Congress “conceive that it has been long the opinion of the country, supported by Justice and humanity, that the Indians have just claims to all lands occupied by and not fairly purchased from them;”¹⁷⁰ Another committee claimed that Native American tribes in the Northwest Territory were within the “power and limits” of the United States, but proceeded to conclude, “may it not be politic and Just to treat with the Indians more on a footing of equality, . . . and instead of attempting to give lands to the Indians to proceed on the principle of fairly purchasing of them and taking the usual deeds?”¹⁷¹ Secret instructions to the Governor of the Northwest Territory also recognized Native Americans’ independent “sovereignty”:

Altho’ the purchase of the Indian right of Soil is not a primary object of holding this Treaty, yet you will not Neglect any opportunity that may Offer of extinguishing the Indian rights to the Westward as far as the River Mississippi.

You may stipulate that the East and West line Ordered to be run by the Ordinance of the 20th May 1785 shall be the boundary between the United States and the Indian tribes; provided they stipulate that it shall run throughout unto the River Mississippi,¹⁷²

169. [Northwest] Ordinance of July 13, 1787, art. 3, *reprinted in* 32 J. CONTINENTAL CONG. 334, 340-41 (R. Hill ed. 1936), *ratified in* Act of Aug. 7, 1789, ch. 8, § 3, 1 Stat. 50, 51 n.a.

170. Southern Department 1787 Indian Affairs Committee Report, *supra* note 47, at 458; e.g., Northern Department 1787 Indian Affairs Committee Report, *supra* note 155, at 478.

171. Northern Department 1787 Indian Affairs Committee Report, *supra* note 155, at 478-80. *See also* Southern Department 1784 Indian Affairs Committee Report, *supra* note 135, at 455-56.

172. Instructions to the Governor of the Northwest Territory, *reprinted in* 33 J. CONTINENTAL CONG. 711, 712 (R. Hill ed. 1936) (Oct. 26, 1787); Ordinance of May 20, 1785, *reprinted in* 28 J. CONTINENTAL CONG. 375 (J. Fitzpatrick ed. 1933). The boundary line is mapped in *ATLAS OF EARLY AMERICAN HISTORY: THE REVOLUTIONARY ERA, 1760-1790*, *supra* note 137, at 61.

It is probable that the members of the Continental Congress acknowledged these understandings publicly because Native Americans did not acquiesce in the Congress' conceit¹⁷³ and instead were ready to war—an event the fledgling government could ill-afford.¹⁷⁴

These decisions by the Continental Congress might admit of a second interpretation, that the United States might not have desisted from pretensions of sovereignty but in stead might have changed from a policy of assuming ownership of land by eminent domain to a policy of assuming it by purchase. Sovereignty did not necessarily entail ownership *per se*, but the sovereign always had jurisdiction to define, regulate, and take property and property rights.¹⁷⁵ The excerpts above do not resolve this speculative question unambiguously, for they mingle Realpolitiks and blus-

173. Notes of John Adams on the Proceedings of the Continental Congress (July 26, 1776) (statement of James Wilson, Pennsylvania), *reprinted in* 6 J. CONTINENTAL CONG. 1077, 1078 (W. Ford ed. 1906); W. MOHR, *supra* note 163, at 93-163; 1 F. PRUCHA, *supra* note 12, at 45; Horsman, *supra* note 165, at 35-39. Compare Letter from Sir William Johnson to the Lords of Trade, Board of Trade (Oct. 1764), *reprinted in* 7 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW-YORK, *supra* note 135, at 665 ("I must beg leave to observe, that the Six Nations, Western Indians, ettc, having never been conquered, either by the English or French, nor subject to the Laws, consider themselves as a free people.").

174. *E.g.*, Northern Department 1787 Indian Affairs Committee Report, *supra* note 155, at 477-80; Southern Department 1787 Indian Affairs Committee Report, *supra* note 47, at 456-58; Southern Department 1784 Indian Affairs Committee Report, *supra* note 135, at 455-56.

175. F. McDONALD, *supra* note 134, at 10-36, 147-54; Mensch, *supra* note 135; G.F. VON MARTENS, *supra* note 127, at 160-61 ("Empire may be joined to property . . . but it may also be separated from it, and may extend over a thing which is the property of others, . . ."); Scheiber, *Property Law, Expropriation, and Resource Allocation by Government, 1789-1910*, 33 J. ECON. HIST. 232 (1973), *reprinted in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 132 (L. Friedman & H. Scheiber eds. 1978); Report by Lords of Trade (Eng. Nov. 23, 1761) (acknowledging "soleinn compacts by which they [Native Americans] had yielded to us the Dominion, but not the property of those Lands"), *reprinted in* 7 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW-YORK, *supra* note 135, at 473; *e.g.*, *Texaco, Inc. v. Short*, 454 U.S. 516, 525-29 (1982); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-95 (1926); *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 532 (1848). *But see* H. DE GROOT, *supra* note 128, bk. 2, ch. 3, § IV (when colonies take land from neighboring territories and assign it to colonists, "jurisdiction over the lands which were assigned nevertheless remained under the control of those from whose territory they were taken"); J. LOCKE, *supra* note 126, §§ 176, 180-87 (conquest by an unjust war conveys no title, and conquest in a lawful war entails absolute power over the people conquered but no right or title to their estates or possessions); *cf.* G.F. VON MARTENS, *supra* note 127, at 161 ("But all empire, when separated from property, supposes the consent, express or tacit, of those over whom it is to be exercised.").

ter; the evidence strongly suggests that the United States was not sovereign and did not pretend to sovereignty.

Basically, the Continental Congress recognized that Native Americans would not “relinquish their territorial claims.”¹⁷⁶ The members therefore directed national policy towards determining boundaries “between the United States and the Indian tribes.”¹⁷⁷ Takings and cessions of territory were to be accomplished by war or by treaty between sovereigns, not by legislative or judicial process under one sovereign. The principles and solutions proposed between 1776 and 1787 evince an understanding that Native Americans could and did hold the right to their lands. The United States had no territorial nor personal jurisdiction over the independent nations of Native Americans, just as the states did not.¹⁷⁸

C. *Treaties with Native American Nations*

The Supreme Court of the United States has also relied upon treaties between the United States and various Native American nations to assert that the latter lost their “sovereignty” to the national government.¹⁷⁹

176. Report of the Committee To Whom Were Referred Sundry Papers on Indian Affairs in the Northern and Middle Departments, *supra* note 135, at 681; see *supra* text accompanying note 173.

177. Instructions to the Governor of the Northwest Territory, *reprinted in* 33 J. CONTINENTAL CONG. 711, 712 (R. Hill ed. 1936) (Oct. 26, 1787).

178. In 1789, Henry Knox concurred:

The Indians being the prior occupants, possess the right of the soil. It cannot be taken from them unless by their free consent, or by the right of conquest in case of a just war. To dispossess them on any other principle, would be a gross violation of the fundamental laws of nature, and of that distributive justice which is the glory of a nation.

Report of Henry Knox, Secretary of War, to the President of the United States, Relative to the Northwestern Indians, *supra* note 153, *reprinted in* 2-1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 91, at 13. His report later mentions that the United States had already “come into the possession of sovereignty, and an extensive territory.” *Id.* The Treaty of Paris “absolutely invested them [Congress] with the fee of all the Indian lands within the limits of the United States.” *Id.* Native Americans, however, maintained that “they were the only rightful proprietors of the soil.” *Id.* “Congress so far conformed to the idea, as to appropriate a sum of money solely to the purpose of extinguishing the Indian claims to lands they had ceded to the United States The principle of the Indian right to the lands they possess . . . [was] thus conceded” *Id.*

179. *E.g.*, *Williams v. Lee*, 358 U.S. 217, 218 (1959) (“Through conquest and treaties they [Indian tribes] were induced to give up complete independence and the right to go to war in exchange for federal protection, aid, and grants of land.”); *cf.* *Johnson & Graham’s Lessee v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 581-85 (1823) (discussing treaties among European nations and stating that they ceded title and

Prior to 1787, colonial and state governments understood that Native American tribes have the right and power to enter into treaties with foreign nations.¹⁸⁰ For example, following the declaration of independence in 1776 and before the Constitution's enactment, the United States entered into a treaty with the Delaware Nation "guarantee[ing] to the aforesaid nation of Delawares, and their heirs, all their teritoreal rights in the fullest and most ample manner, as it hath been bounded by former treaties."¹⁸¹ One of the most interesting passages in this treaty

sovereignty of lands upon which Native Americans lived). *But cf.* *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551-52, 560-61 (1832) (placing themselves under the protection of the United States did not imply "claims to their lands," "dominion over their persons," or "surrender of their national character").

180. See Act of Mar. 1, 1788, ch. 47, 1788 N.Y. Laws 100 (authorizing treaties between New York and Native Americans); Draft [by the Lords of Trade for King George III] of an Instruction for the Governors of Nova Scotia, New Hampshire, New York, Virginia, North Carolina, South Carolina, and Georgia Forbidding Them to Grant Lands or To Make Settlements Which May Interfere With the Indians Bordering on These Colonies (Eng. Dec. 7, 1761), reprinted in 7 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW-YORK, *supra* note 135, at 478.

For examples of this understanding, see Treaty with the Oneida Nation (Treaty of Fort Schuyler), Sept. 22, 1788, New York-Oneida Nation, cited in *Oneida Indian Nation of New York v. New York*, 860 F.2d 1145, 1148 (2d Cir. 1988); Treaty with the Creek Nation (Treaty of Shoulder-bone), Nov. 3, 1786, Georgia-Creek Nation, reprinted in 2 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 91, at 180; Treaty with the Cherokee Nation, May 20, 1777, Georgia-South Carolina-Cherokee Nation, reprinted in 8-1 AMERICAN STATE PAPERS: PUBLIC LANDS, *supra* note 167, at 51; Treaty of Easton, Oct. 24, 1758, New Jersey-Pennsylvania-Oneida Nation-Onondaga Nation-Mohawk Nation-Seneca Nation-Tuscarora Nation-Cayuga Nation, reprinted in MINUTES OF CONFERENCES, HELD AT EASTON, IN OCTOBER, 1758, WITH THE CHIEF SACHEMS AND WARRIORS OF THE MOHAWKS, ONEIDOEES, ONONDAGOES, CAYUGAS, SENACAS, TUSCARORAS, TUTELOES, SKANIADARADIGRONOS, CONSISTING OF THE NANTICOKES AND CONOYS, WHO NOW MAKE ONE NATION; CHUGNUTS, DELAWARES, UNAMIES, MAHICKANDERS, OR MOHICKONS; MINISINKS, AND WAPINGERS, OR PUMPTONS (B. Franklin & D. Hall, Philadelphia, Pa. publ. 1758), reprinted in INDIAN TREATIES PRINTED BY BENJAMIN FRANKLIN 1736-1762, at 213 (J. Boyd ed. 1938). See also Southern Department 1787 Indian Affairs Committee Report, *supra* note 47, at 457 (Georgia treated with the Creek Nation, and Georgia and North Carolina averred that they had the power to treat with Native Americans); R. BARSH & J. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 33 (1980); B. GRAYMONT, *supra* note 163, *passim* (Americans continually negotiated with Indian tribes to persuade them not to ally with the British); W. MOHR, *supra* note 163, at 109-10, 140-51 (negotiations and treaties initiated by Spain, Georgia, New York, North Carolina, South Carolina, Virginia); J. O'DONNELL III, *supra* note 163, *passim* (same).

181. Treaty with the Delaware Nation, Sept. 17, 1778, United States-Delaware Nation, art. 6, 7 Stat. 13, 14. The article expressly denied the allegation that the United States "design[ed] . . . to extirpate the Indians and take possession of their country." *Id.*

agreed that the states and the Delaware Nation each became allies of the other “if either of the parties are engaged in a just and necessary war with any other nation or nations.”¹⁸² The treaty even provided that all Native American tribes could form a state together and join the confederation with representation in Congress.¹⁸³ A treaty with the Cherokee Nation in 1785 contained a like provision.¹⁸⁴ In such provisions the colonies, the states, and the federal government recognized Native American tribes and nations as sovereigns, not “domestic dependent nations . . . in a state of pupillage”—the term later used in Chief Justice Marshall’s trilogy.¹⁸⁵

The Framers might have conceived a difference between treaties with Native Americans and treaties with all other foreign nations. In practice the Continental Congress derived its authority to conclude treaties with Native Americans from article IX, paragraph 4, of the Articles of Confederation¹⁸⁶ whereas paragraph 1 of article IX conferred general authority to conclude any treaty with any nation.¹⁸⁷ While the Constitution does not preserve the distinction, the Framers might have assumed it.¹⁸⁸

182. *Id.* art. 2 (“[I]f either of the parties are engaged in a just and necessary war with any other nation or nations, that then each shall assist the other in due proportion to their abilities, till their enemies are brought to reasonable terms of accommodation . . .”).

183. *Id.* art. 6 (inviting the Delawares and other tribes “to join the present confederation, and to form a state whereof the Delaware nation shall be the head, and have a representation: Provided, nothing contained in this article to be considered as conclusive until it meets with the approbation of Congress.”).

184. “That the Indians may have full confidence in the justice of the United States, respecting their interests, they shall have the right to send a deputy of their choice, whenever they think fit, to Congress.” Treaty with the Cherokee Nation (Treaty of Hopewell), Nov. 28, 1785, United States-Cherokee Nation, art. 12, 7 Stat. 18, 20.

185. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

186. *See, e.g.*, Southern Department 1787 Indian Affairs Committee Report, *supra* note 47, at 458; Report of the Committee To Whom Were Referred Sundry Papers on Indian Affairs in the Northern and Middle Departments, *supra* note 135; Report of the Committee to Whom Was Committed the Letter from His Excellency the President of the State of Pennsylvania Respecting a Peace with the Indians, *reprinted in* 24 J. CONTINENTAL CONG. 264 (G. Hunt ed. 1922) (Apr. 21, 1783); Proclamation of Sept. 22, 1783, *reprinted in* 25 J. CONTINENTAL CONG. 602 (G. Hunt ed. 1922).

187. The Articles of Confederation art. IX, para. 1 (U.S. 1781) (“The United States, in Congress assembled, shall have the sole and exclusive right and power of . . . entering into treaties and alliances . . .”), *reprinted in* 9 J. CONTINENTAL CONG. 907, 915 col. 2 (W. Ford ed. 1907) (Nov. 15, 1777).

188. *Cf.* Message from George Washington, President, to the Senate of the United States (Sept. 17. 1789) (suggesting that the United States conform its procedures for adoption of treaties with Native American nations to those for ratification of treaties with European nations, therefore implying that the Constitution does not require the

Citation to the specific authority of paragraph 4 instead of the general authority of paragraph 1, however, does not change the fact that the colonies, the states, and the federal government recognized Native American tribes and nations as sovereigns, not dependents.

Native American tribes did accept in treaties (knowingly or unknowingly) the "protection" of the United States. A treaty with the Wyandot, Delaware, Chippewa, and Ottawa Nations in 1785 stated that "The said Indian nations do acknowledge themselves and all their tribes to be under the protection of the United States and of no other sovereign whatsoever."¹⁸⁹ Treaties with the Cherokee,¹⁹⁰ Choctaw,¹⁹¹ Chickasaw,¹⁹² and Shawnee¹⁹³ Nations included a similar acknowledgement. According to contemporary jurists, this protection did not deprive Native Americans of their "sovereignty" or confer jurisdiction, territorial or personal, upon the United States.¹⁹⁴ On one occasion, however,

same procedure for both), in 1 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 26 (1828); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831) (in a case construing article III and the scope of the judicial power of the United States, distinguishing Native American nations from foreign states within the meaning of the entire Constitution).

189. Treaty with the Wyandot, Delaware, Chippewa, and Ottawa Nations (Treaty of Fort M'Intosh), Jan. 21, 1785, United States-Wyandot Nation-Delaware Nation-Chippewa Nation-Ottawa Nation, art. 2, 7 Stat. 16, 16.

190. Treaty with the Cherokee Nation (Treaty of Hopewell), Nov. 28, 1785, United States-Cherokee Nation, art. 3, 7 Stat. 18, 19 ("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 whatsoever.").

191. Treaty with the Choctaw Nation, Jan. 3, 1786, United States-Choctaw Nation, art. 2, 7 Stat. 21, 21 ("The Commissioners plenipotentiary of all the Choctaw Nation do hereby acknowledge the tribes and towns of the said Nation and the lands within the boundary allotted to the said Indians to live and hunt on as mentioned in the third article to be under the protection of the United States of America and of no other Sovereign whatsoever.").

192. Treaty with the Chickasaw Nation, Jan. 10, 1786, United States-Chickasaw Nation, art. 2, 7 Stat. 24, 24 ("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 whatsoever.").

193. Treaty with the Shawanoe Nation, Jan. 31, 1786, United States-Shawnee Nation, art. 5, 7 Stat. 26, 27 ("The United States do grant peace to the Shawanoe nation, and do receive them into their friendship and protection.").

194. See H. DE GROOT, *supra* note 128, bk. 1, ch. 3, § XXI (states being by treaty under protection of another are nonetheless not under the other state's domination); E. DE Vattel, *supra* note 127, bk. 1, ch. 1, § 6 (a state under protection of another does not give up its sovereignty); see also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 552 (1832) ("protection" entailed only "an engagement to punish aggressions on them [Indian tribes]," not "claim[s] to their lands" nor "dominion over their persons").

at the close of the Revolutionary War, members of the Continental Congress proposed the contrary, that protection of the Six Nations did entail territorial jurisdiction.¹⁹⁵

Treaties between Native American tribes and the United States also established in the United States in Congress assembled "the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper."¹⁹⁶ These generic provisions attempted to implement the requirements of article IX of the Articles of Confederation¹⁹⁷—requirements which the states had continued to ignore.¹⁹⁸ By such provisions, Native American tribes did not relinquish management of domestic aspects of their trade and affairs. Instead,

195. In 1782, a committee of the Continental Congress concluded "that all the lands belonging to the Six Nations of Indians, and their tributaries, have been in due form put under the protection of the Crown of England by the said Six Nations, as appendant to the late government of New York, so far as respects jurisdiction only." Report of the Committee on the Cessions of New York, Virginia, Connecticut, and the Petitions of the Indiana, Vandalia, Illinois, and Wabash Companies, *reprinted in 22 J. CONTINENTAL CONG.* 225, 226 (G. Hunt ed. 1914) (May 1, 1782). The committee had found that the colony of New York and the Crown of England had always deemed the Six Nations to be "dependents" of and to be "appendant" to New York. *Id.* Cession by New York to the United States would vest "the jurisdiction of the whole western territory belonging to the Six Nations, and their tributaries, . . . in the United States." *Id.* But the report then proposed the resolution,

That nothing herein before determined by Congress, shall be construed so as to suppose any claim or right in Congress, in point of property of soil, to any lands belonging to the Indian nations, unless the same have been *bona fide* purchased of them by the Crown of England, or which may hereafter be purchased by the United States in Congress assembled, for the use of the United States, and that at a public treaty to be held for that purpose.

Id. at 231-32. This latter resolution informed the subsequent treaty with the Six Nations in 1784. See Treaty with the Six [Iroquois] Nations (Treaty of Fort Stanwix), Oct. 22, 1784, United States-Oneida Nation-Onondaga Nation-Mohawk Nation-Seneca Nation-Tuscarora Nation-Cayuga Nation, 7 Stat. 15.

196. Treaty with the Cherokee Nation (Treaty of Hopewell), Nov. 28, 1785, United States-Cherokee Nation, art. 9, 7 Stat. 18, 20; Treaty with the Choctaw Nation, Jan. 3, 1786, United States-Choctaw Nation, art. 8, 7 Stat. 21, 22 ("For the benefit and comfort of the Indians and for the prevention of injuries or oppressions on the part of the Citizens [of the United States] 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."); Treaty with the Chickasaw Nation, Jan. 10, 1786, United States-Chickasaw Nation, art. 8, 7 Stat. 24, 25 ("For the benefit and comfort of the Indians and for the prevention of injuries or oppressions on the part of the citizens [of the United States] 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.").

197. The Articles of Confederation art. IX, para. 4 (U.S. 1781).

198. See *supra* text accompanying note 91.

tribes promised to treat with the United States rather than with any state or individual of a state; they would respect the internal allocation of powers among the United States, the thirteen states, and citizens¹⁹⁹ declared in the Articles of Confederation and the Constitution.²⁰⁰ When the United States and tribes agreed to this provision on trade and affairs, the United States recognized that at the same time Native American nations continued to treat with Great Britain, Spain, and France, and after ratification of the Constitution, with North Carolina, which had not yet joined the Union, and over which the United States lacked constitutional power.²⁰¹ These principles were reiterated after the Constitution became effective in 1789, in treaties with the Wyandot, Delaware, Ottawa, Chippewa, Potawatomi, and Sac Nations;²⁰² the Creek Nation;²⁰³ and the Cherokee Nation.²⁰⁴

Not surprisingly, these treaties were mostly concerned with the lands of the Native Americans.²⁰⁵ Generally, they provided either that the tribe ceded its land to the United States, or that the United States allotted land to the tribe, and they defined certain "property" rights of the tribe. For example, the treaty with the Delaware Nation stated:

199. *Accord* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 553-54 (1832).

200. U.S. CONST. art. I, § 8, cl. 3; The Articles of Confederation art. IX, para. 4 (U.S. 1781).

201. Instructions of George Washington, President of the United States, to Benjamin Lincoln, Cyrus Griffin and David Humphries, Commissioners on Indian Affairs in the Southern Department (Aug. 29, 1789) (instructing the Commissioners to determine whether Spain and the Creek Nation had concluded any treaties), *reprinted in* 2 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 91, at 202, 208; Message from George Washington, President, to the Senate of the United States (Aug. 22, 1789), in 1 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA, *supra* note 188, at 20, 20.

202. Treaty with the Wiandot, Delaware, Ottawa, Chippewa, Pattawatima, and Sac Nations (Treaty of Fort Harmar), Jan. 9, 1789, United States-Wyandot Nation-Delaware Nation-Ottawa Nation-Chippewa Nation-Potawatomi Nation-Sac Nation, art. 14, 7 Stat. 28, 31.

203. Treaty with the Creek Nation (Treaty of New York), Aug. 7, 1790, United States-Creek Nation, art. 2, 7 Stat. 35, 35 ("The undersigned Kings, Chiefs and Warriors, for themselves and all parts of the Creek Nation within the limits of the United States, do acknowledge themselves, and the said parts of the Creek Nation, to be under the protection of the United States of America, and of no other sovereign whosoever; and they also stipulate that the said Creek Nation will not hold any treaty with an individual State, or with individuals of any State.").

204. Treaty with the Cherokee Nation (Treaty of Holston), July 2, 1791, United States-Cherokee Nation, arts. 2, 6, 7 Stat. 39, 39, 40.

205. Maps useful to understanding the boundaries described below may be found in ATLAS OF EARLY AMERICAN HISTORY, *supra* note 137, at 61; ATLAS OF AMERICAN HISTORY plates 60-61, 90 (J. Adams ed. 1943); INDIAN LAND CESSIONS IN THE UNITED STATES, *supra* note 135, app.

[T]he United States do engage to guarantee to the aforesaid nation of Delawares, and their heirs, all their teritorial rights in the fullest and most ample manner, as it hath been bounded by former treaties, as long as they the said Delaware nation shall abide by, and hold fast the chain of friendship now entered into.²⁰⁶

The treaty with the Six Nations promised that “The Oneida and Tuscarora Nations shall be secured in the possession of the Lands on which they are settled.”²⁰⁷ It also established a boundary for these lands, roughly the Western boundary of New York and Pennsylvania between Lake Ontario and the Ohio River, which boundary

shall be the Western boundary of the Lands of the Six Nations, so that the Six Nations shall and do yield to the United States all claims to the Country West of the said boundary and then they shall be secured in the peaceful possession of the Lands they inhabit East & North of the same²⁰⁸

The Six Nations ceded land to the United States; other, later treaties had the United States “allot” the land to the Native American nation. With respect to the Wyandot and Delaware Nations, “[t]he United States allot all the Lands contained within the said lines to the Wiandot and Delaware Nations to live and to hunt on—and to such of the Ottawa nation as now live thereon.”²⁰⁹ With respect to the Choctaws,

206. Treaty with the Delaware Nation, Sept. 17, 1778, United States-Delaware Nation, art. 6, 7 Stat. 13, 14.

207. Treaty with the Six [Iroquois] Nations (Treaty of Fort Stanwix), Oct. 22, 1784, United States-Oneida Nation-Onondaga Nation-Mohawk Nation-Seneca Nation-Tuscarora Nation-Cayuga Nation, art. 2, 7 Stat. 15, 15.

208. *Id.* art. 3.

209. Treaty with the Wiandot, Delaware, Chippewa, and Ottawa Nations (Treaty of Fort M’Intosh), Jan. 21, 1785, United States-Wiandot, Delaware, Chippewa, and Ottawa Nations, art. 4, 7 Stat. 16, 17. In turn,

The Indians who sign this Treaty as well in behalf of all their Tribes as of themselves do acknowledge the Lands East South and West of the lines described in the third Article so far as the said Indians formerly claimed the same to belong to the United States and none of their Tribes shall presume to settle upon the same or any part of it.

Id. art. 6. The United States thus intended to limit the Wyandot and Delaware nations to a small part of Ohio. *Id.* art. 3. Likewise, the United States “allotted” land to the Shawnee Nation and the Shawnee Nation was deemed to have “relinquished” all title outside the stated boundaries. Treaty with the Shawanoe Nation, Jan. 31, 1786, United States-Shawnee Nation, art. 6, 7 Stat. 26, 27.

the Choctaw Nation do hereby acknowledge the tribes and towns of the said Nation and the lands with the boundary allotted to the said Indians to live and hunt on as mentioned in the third article to be under the protection of the United States of America and of no other Sovereign whosoever.²¹⁰

Chief Justice Marshall later commented upon the use of "allot" in the treaties and whether it permitted an inference that the United States, rather than the Native American nations, were the prior sovereign of the lands. He decided that the Native Americans were ceding the lands to the federal government, and presumed that they would not understand the connotations and implications of the English word "allot."²¹¹

These treaties formed before and after the Constitutional Convention, interpreted in accordance with principles and understandings expressed in contemporary documents (though the views of Native Americans were not included), do not suggest that the United States were sovereign over Native Americans, nor do they confirm an understanding that all territory ceded by the Treaty of Paris, including that upon which Native Americans lived, was subject to extra-constitutional powers incident to sovereignty.²¹² In fact, they evidence the contrary. In treaties,

210. Treaty with the Choctaw Nation, Jan. 3, 1786, United States-Choctaw Nation, art. 2, 7 Stat. 21, 21. The territory of Georgia circumscribed these lands. *Id.* art. 3.

211. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 552-53 (1832) (dictum); *accord Jones v. Meehan*, 175 U.S. 1, 11 (1899); V. DELORIA, JR. & C. LYTLE, *supra* note 120, at 5; Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 CALIF. L. REV. 601, 610-11 (1975); W. Johnson, *supra* note 135, reprinted in 7 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW-YORK, *supra* note 135, at 958-59 ("whatever words, are usually made use of respecting their submission [to conquest] etc: are only to be understood as in compliance with form and custom, the latter having no just idea of such expressions, and calling themselves no more than our friends and Allies.").

212. Indeed, the Supreme Court decided later that the extra-constitutional powers of sovereignty operate only with respect to external affairs and other sovereigns, not with respect to domestic affairs. *Perez v. Brownell*, 356 U.S. 44, 57 (1958) (the Constitution does not specifically vest Congress with power to regulate foreign affairs, but the states "must be held to have granted that [Federal] Government the powers indispensable to its functioning effectively in the company of sovereign nations"); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-19 (1936) (contradistinct from powers of the federal government respecting domestic or internal affairs, its powers respecting foreign or external affairs, or other sovereigns, did not depend upon affirmative grants of the Constitution and would have vested in the federal government even if they had never been mentioned in the Constitution). It follows that, insofar as the United States employed extra-constitutional powers of sovereignty to treat with Native Americans, they were foreign sovereigns. *But cf.* *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (Native American nations were "domestic dependent nations").

the rhetorical principle of “right of conquest” gave way to the “British and Colonial practice of purchasing the right of soil from the Indians.”²¹³ The treaties presumed that Native American tribes were independent and sovereign;²¹⁴ being independent and sovereign, the Constitution could not confer upon the national government any domestic power over them. In any case, no treaty could have “authorize[d] what the Constitution forbids, or a change in the character of the government.”²¹⁵

D. The Contemporary Rhetoric of The Federalist

The Federalist is useful evidence of which arguments and conceptions its readers would find persuasive. The essays are not perfect evidence of the original understanding, however, because they were written for purposes of persuasion with methods of rhetoric.²¹⁶

Publius discussed Native Americans in four essays. The third essay argued that the war powers should be national; a national power would tend to prevent wars with Native Americans which individual states provoked or invited.²¹⁷ Essay twenty-four argued that standing armies in a time of peace were necessary for protecting the western frontier from attacks by Native Americans.²¹⁸ Alexander Hamilton added that garrisons on the frontier

213. 1 F. PRUCHA, *supra* note 12, at 49; Report of Henry Knox, Secretary of War, to George Washington, President (May 23, 1789), in 1 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA, *supra* note 188, at 3, 3-4 (May 25, 1789). The report stated that the principles of treaties ordered by the Continental Congress were

that the Indians are greatly tenacious of their lands, and generally do not relinquish their right, excepting on the principle of a specific consideration expressly given for the purchase of the same.

That the practice of the late English colonies and government, in purchasing the Indian claims, has firmly established the habit in this respect, so that it cannot be violated but with difficulty, and an expense greatly exceeding the value of the object.

Id. at 3-4.

214. See also *supra* text accompanying notes 175-78.

215. *Geofroy v. Riggs*, 133 U.S. 258, 267 (1889).

216. See, e.g., A. FURTWANGLER, *THE AUTHORITY OF PUBLIUS: A READING OF THE FEDERALIST PAPERS* 17-39 (1984); 1 J. GOEBEL, JR., *supra* note 134, at 292-323.

217. THE FEDERALIST No. 3, at 13, 16-17 (J. Jay) (J. Cooke ed. 1961) (“Not a single Indian war has yet been occasioned by aggressions of the present Federal Government, feeble as it is, but there are several instances of Indian hostilities having been provoked by the improper conduct of individual States . . .”).

218. THE FEDERALIST No. 24, at 152, 156-57 (A. Hamilton) (J. Cooke ed. 1961) (“Previous to the revolution, and even since the peace, there has been a constant necessity for keeping small garrisons on our western frontier. No person can doubt that these will continue to be indispensable, if it should only be against the ravages and depredations of the Indians. These garrisons must either be furnished by occasional detachments from the militia, or by permanent corps in the pay of the government.”).

“will be keys to the trade with the Indian nations” and that a standing army was needed to protect the garrisons against seizure by the British or the Spanish.²¹⁹ Essay twenty-five, discussing why the Constitution should vest this power in the national government instead of the states, argued that

The territories of Britain, Spain and of the Indian nations in our neighbourhood, do not border on particular States; but incircle the Union from MAINE to GEORGIA. The danger, though in different degrees, is therefore common. And the means of guarding against it ought in like manner to be the objects of common councils and of a common treasury.²²⁰

Essay forty-two discussed two classes of powers vested in the national government, a class of powers “in respect to other nations”²²¹ and a class of powers “which provide for the harmony and proper intercourse among the States.”²²² The power to regulate commerce with foreign nations fell among the former class;²²³ the power to regulate commerce among the states and with the Native American tribes fell among the latter and was more particularly a species of “restraint[] imposed on the authority of the States.”²²⁴

Insofar as *The Federalist* is competent evidence of the original understanding, these four essays do not elucidate the meaning of the text, but they illuminate the intent of the Framers. The third and twenty-fifth essays expressed the intent to bring wars with Native Americans within the scope of the national war powers. Essays twenty-four and twenty-five acknowledged that Native Americans were beyond the “frontier” and outside the border of the Union. Essay twenty-five even likened Native American nations to British and Spanish territories; indeed, they were “nations.”²²⁵

Essay forty-two, however, did not classify the Indian commerce clause with the national powers concerning “other nations” (such as the foreign commerce clause); instead, James Madison classified it with the national powers promoting harmony among the states. This classification might imply that he did not equate

219. *Id.* at 157.

220. THE FEDERALIST No. 25, at 158, 158 (A. Hamilton) (J. Cooke ed. 1961).

221. THE FEDERALIST No. 42, *supra* note 93, at 279.

222. *Id.* at 282.

223. *Id.* at 279.

224. *Id.* at 282.

225. THE FEDERALIST No. 25, *supra* note 220, at 158.

Native American tribes with foreign nations; the differentiation of the clauses supports this proposition.²²⁶ It might imply instead that the Indian commerce clause was more significant to the audience of *The Federalist* for its internal effects—as a restraint upon states—than for its external effect, to present a unified position to the Native American tribes. Indeed, the primary concern before, during, and after the Federal Convention was the encroachments by states upon the general authority of article IX of the Articles of Confederation.²²⁷ Considered as a whole, these essays did not argue or assume that Native American tribes were subjects of the United States, beholden to its sovereignty, or that they were wards of the nation, over whom the United States exercised powers of guardianship.

IV. *What then shall we do?*

It is a pity that so many Americans today think of the Indian as a romantic or comic figure in American history, without contemporary significance. In fact, the Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.²²⁸

The United States—its President, its Congress, and its Supreme Court—can exercise no power over Native Americans

226. *Accord Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18-19 (1831).

227. James Madison wrote:

The 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. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled; and has been a question of frequent perplexity and contention in the Federal Councils. And how 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.

THE FEDERALIST No. 42, *supra* note 93, at 284.

228. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

unless the Constitution grants it.²²⁹ Examination of the text of the Constitution, the intentions of the Framers, contemporary notions about sovereignty, the records of the Continental Congress, and contemporary treaties with Native American nations makes it clear that the Constitution has never granted to the United States a plenary power over Native Americans.

The only legislative power which the Constitution grants to Congress is the Indian commerce clause.²³⁰ Not even a tortured interpretation of "commerce" would yield a "plenary authority to limit, modify or eliminate the powers of local self-government"²³¹ of Native Americans, a plenary power to manage, control, or take Native American lands without compensation,²³² a plenary power to determine whether a tribe does or does not exist and whether a Native American is or is not a member of it,²³³ or a plenary power to control all social, cultural, economic, proprietary, political, and personal facets of Native Americans' lives.²³⁴

Not only does the Constitution not grant the federal government such powers, but the Framers explicitly voted not to create such powers in the Constitution. The Committee of Detail rejected, on August 22, 1787, the power "To regulate affairs with the Indians as well within as without the limits of the U. States." The sole legislative power was limited to commerce, and only commerce *with* Native American tribes, not *of* Native American tribes. It never encompassed all affairs of Native American nations.

The debates resounded with concerns about the western lands: Would the states retain all of their chartered expanses, or would

229. U.S. CONST. art. I, § 1, art. II, § 1, cl. 1, amend. X; e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) ("The government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, . . . is now universally admitted."). Compare The Articles of Confederation art. II (U.S. 1781) (Continental Congress, under Articles of Confederation, possessed only those specific powers which the Articles of Confederation delegated to it); *Oneida Indian Nation of New York v. New York*, 860 F.2d 1145, 1152-53 (2d Cir. 1988) (same), *cert. denied*, 110 S. Ct. 200 (1989).

230. U.S. CONST. art. I, § 8, cl. 3.

231. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-57 (1978).

232. E.g., *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 288-89 (1955); *Shoshone Tribe v. United States*, 299 U.S. 476 (1937); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *Johnson & Graham's Lessee v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823).

233. E.g., *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 85-86 (1977); *United States v. Sandoval*, 231 U.S. 28, 46, 47 (1913).

234. E.g., *United States v. Wheeler*, 435 U.S. 313, 319 (1978).

new states be carved from the territory between the Allegheny Mountains and the Mississippi River? Yet no Framers remarked the extensive and antecedent "property rights" of Native Americans already living there. One must wonder if the Framers believed that the United States already held absolute title to these lands and could subject Native Americans and their lands to the powers of sovereignty. The evidence surveyed above in Part III demonstrates an understanding in 1787 that the United States was not sovereign.

For two hundred years the United States has exercised arbitrary and unconstitutional powers over Native Americans. For two hundred years the Congress and the President have enacted numerous statutes that directly violated the Constitution and have used unconstitutional powers to create conditions of poverty and servitude for Native Americans.²³⁵ Against every challenge, the Supreme Court has ruled that the Constitution itself vested these powers in Congress.²³⁶ Even when the United States conferred citizenship upon Native Americans by statute,²³⁷ such citizenship did not defeat these powers. According to the Supreme Court, Native Americans are not citizens in a constitutional sense.²³⁸

The implications of a limited federal power for state powers respecting Native Americans are beyond the scope of this article, but they warrant careful study. In any case, the tenth amendment of the Constitution could not reserve to the states powers which they did not already have, and it was understood that neither the Constitution nor the status of sovereign vested in a state any civil authority over the independent Native American nations.

Unfortunately, this article can only be an afterthought. For two hundred years the majority has intentionally destroyed the lives and cultures of Native Americans, and these effects cannot be annulled. Native American culture has been disfigured so extensively that returning to the original understanding and eliminating at this time what little socioeconomic support the federal government extends would further destroy their ways of life.

What then shall we do?

235. See generally F. COHEN, *supra* note 11; 1-2 F. PRUCHA, *supra* note 12.

236. See *supra* text accompanying notes 1-7, 102-08.

237. Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401b).

238. *Elk v. Wilkins*, 112 U.S. 94 (1884); see *Tiger v. Western Inv. Co.*, 221 U.S. 286, 315-16 (1911).

First, we can prevent with national legislation any further contravention of and disrespect of Native Americans' territorial and personal sovereignty. We can confess the fallacy of a policy grounded in "manifest destiny," and we can change it. At this point, it is the least we can do.

Secondly, a process must be jointly designed by which to decide how to remedy this unjust and unconstitutional situation. A committee of Native Americans and congressional leaders could work out how the numerous unconstitutional statutes regulating every aspect of Native American life should be modified. Among other things, this process must allow Native Americans to choose, as individuals and as nations, whether to be independent of or to participate in the society, politics, and culture of the United States.²³⁹

Finally, advocates for Native Americans can use the research and argument above in the courts, to challenge exercises of state and federal power over Native Americans and their lands and thus to accomplish the ends of self-determination and self-government.

239. One extensive discussion of Native Americans' interests in self-government and self-determination is V. DELORIA & C. LYLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* (1984).