

## The Missing Indian Affairs Clause

Lorianne Updike Toler<sup>†</sup>

*Congressional plenary power over Native Americans sits in direct conflict with tribal sovereignty. Scholarship and case law justifying plenary power run the gamut from finding an expansive preconstitutional federal plenary power over Native Americans to narrowly reading the Indian Commerce Clause to limit congressional power to trade alone. All claim historical legitimacy, but none has been able to explain why the Indian Affairs Clause from the Articles of Confederation failed to appear in the Constitution or, conversely, why the new federal government never limited itself to regulating Indian trade. The combination of the unexplained textual shrinkage and disharmony between text and practice seems to suggest that the Framers made a mistake in drafting the Constitution.*

*Based on archival and forensic research, this Article concludes that the Constitution is missing an Indian Affairs Clause first by mistake, then by design. The five-member Committee of Detail, tasked by the Constitutional Convention with producing a working draft of the Constitution, seems to have accidentally omitted an Indian Affairs Clause. Inclusion of a congressional power over Indian trade and affairs was compelled by its long prehistory and a unanimous vote by the Convention, and John Rutledge as Committee chair directed James Wilson to include it in a marginal note. The evidence indicates that Wilson meant to comply with the command: not only was he personally motivated to comply, but he placed a check mark next to the Clause. However, he simply failed to include the power in his final draft. Thereafter, James Madison caught the mistake, and the Committee of Detail deigned to address its lapse by importing “Indian Tribes” into the Commerce Clause but refused to restore power over “Indian affairs,” converting an innocent mistake into a meaningful omission. None thereafter seemed to notice the disappearance of the Indian affairs power, and the omission has caused two centuries of confusion to the detriment of the tribes.*

---

<sup>†</sup> Olin Searle Fellow, Yale Law School’s Information Society Project. This Article is dedicated to my former law professor, Larry Echo Hawk, a member of the Pawnee Nation and Assistant Secretary of the Interior for Indian Affairs for President Barack Obama. I am greatly indebted to those who have provided helpful insights and comments on earlier drafts and underlying research, including Akhil Amar, Jack Balkin, William Baude, Steve Calabresi, Bradford Clark, Nicholas Cole, William Ewald, Lawrence Friedman, Shlomo Klapper, David Landau, Soren Schmidt, Michalyn Steele, Larry Solum, and Kevin Worthen. I thank my parents, John B. Updike and V. Lauri Updike, for acting as technical editors, and the very able editors of *The University of Chicago Law Review*. My heartfelt thanks also goes to Lee Arnold at the Historical Society of Pennsylvania for providing access to James Wilson’s Papers and particularly his drafts of the Constitution, and to Julie Miller, Julie Biggs, and Jennifer Evers from the Conservation Division of the Library of Congress for providing images and doing further forensic research of Randolph’s sketch. Finally, my thanks go to the indispensable Yale Law librarians, who never cease to lend valuable and timely assistance.

*This history raises serious questions for constitutional theory, federal Native American policy, state-tribal relations, and Commerce Clause jurisprudence. This Article addresses the implications of the missing clause for congressional plenary power over tribes and suggests that the Constitution, written without an Indian Affairs Clause, should be taken seriously. By its omission, the preconstitutional Indian affairs power was split between the president and Congress under the Constitution's enumerated powers, with the residue flowing back to the tribes, not the states. In the stead of congressional plenary power, this Article recommends the reinitiation of tribal treaty-making as a fix for the missing clause. Re-treating with tribes is consistent with the Constitution's text, history, structure, and precedent. The time is ripe for such a change: current events and the present moment of racial awareness could provide the impetus for overturning one and a half centuries of colonialism and restoring beleaguered tribal sovereignty.*

INTRODUCTION.....	414
I. THE CONFUSED STATE OF INDIAN AFFAIRS .....	421
A. The Pragmatists: Pre- and Extraconstitutional Powers .....	421
B. The Holists and the Washington Settlement .....	432
C. Originalists and Semantics .....	437
D. Field Preemption.....	438
II. THE MISSING CLAUSE .....	444
A. Committee of Detail Documents .....	446
B. Wilson's Mistake .....	454
1. Remit, structure, and working method of the Committee of Detail.....	455
2. Wilson's check marks.....	460
3. Wilson's vested interests in a federal Indian affairs power.....	461
C. The Convention's Partial Resurrection.....	464
D. The Ratifiers' Oversight .....	473
III. SIGNIFICANCE AND THE FIX.....	476
A. Significance for Plenary Power .....	476
1. The universality of broad intent. ....	476
2. Splitting the Indian affairs power.....	479
B. The Fix: Re-treating with Tribes.....	482
CONCLUSION .....	485

## INTRODUCTION

Billy Jo Lara, a Turtle Mountain Native American, struck a federal officer on the Spirit Lake Reservation. He was then tried, in succession, before the Spirit Lake Tribal Court and the Federal District Court for the District of North Dakota. Having already served ninety days in prison for his tribal conviction, Lara claimed double jeopardy before the federal tribunal, triggering

two questions: (1) whether the tribal conviction was issued by a separate sovereign (thus precluding the double jeopardy claim), and (2) whether Congress had the power to adjust tribal sovereignty as it had in 1991, permitting one tribe (Spirit Lake) jurisdiction over a member of another tribe (Turtle Mountain).<sup>1</sup>

Upon arrival at the Supreme Court, *United States v. Lara*<sup>2</sup> required the Court to address the largest controversy in Native American law: the tension between tribal sovereignty and congressional plenary power over tribes.<sup>3</sup> Justice Stephen Breyer, writing for the Court, summarily concluded that the tribes are sovereign, resting on Congress's acceptance of Chief Justice John Marshall's designation of the tribes as "domestic dependent nations."<sup>4</sup> Justice Breyer then turned to the more convoluted history of congressional plenary power over tribes. He recognized that plenary power had traditionally derived from the combined weight of the Indian Commerce Clause and the treaty power.<sup>5</sup> In elaborating on the grants of both constitutional provisions, Justice Breyer rested on previous Court decisions in affirming that the "central function of the Indian Commerce Clause . . . is to provide Congress with plenary power to legislate in the field of Indian affairs."<sup>6</sup> The treaty power, on the other hand, "does not literally authorize Congress to act legislatively, for it is an Article II power authorizing the President, not Congress, 'to make Treaties.'"<sup>7</sup> However, "treaties made pursuant to that power can authorize Congress to deal with matters with which otherwise Congress could not deal."<sup>8</sup>

Yet the treaty power was no longer doing the textual work for Indian affairs: as Justice Breyer admitted, "in 1871 Congress ended the practice of entering into treaties with the Indian

---

<sup>1</sup> *United States v. Lara*, 541 U.S. 193, 197–98 (2004).

<sup>2</sup> 541 U.S. 193 (2004).

<sup>3</sup> Throughout this Article, I use "Native" and "tribe" to refer to indigenous U.S. American peoples; I generally use "Indian" only when referring to a legal term of art such as "Indian affairs" or the "Indian Commerce Clause," when such will provide greater clarity, or when quoting another source. While I recognize that these terms are outdated, they are common in the scholarly discourse.

<sup>4</sup> *Lara*, 541 U.S. at 199 (quoting H.R. REP. NO. 102-261, at 3–4 (1991) (Conf. Rep.)); see also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (identifying tribes as "domestic dependent nations").

<sup>5</sup> *Id.* at 200.

<sup>6</sup> *Id.* (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)).

<sup>7</sup> *Id.* at 201 (quoting U.S. CONST. art. II, § 2, cl. 2).

<sup>8</sup> *Id.* (quotation marks omitted) (quoting *Missouri v. Holland*, 252 U.S. 416, 433 (1920)).

tribes.”<sup>9</sup> No matter, however, as “this Court has explicitly stated that the statute in no way affected Congress’ plenary powers to legislate on problems of Indians.”<sup>10</sup> Additionally, as Indian affairs “were more an aspect of military and foreign policy than a subject of domestic or municipal law” during the nation’s first century, “Congress’ legislative authority would rest in part, not upon affirmative grants of the Constitution, but upon the Constitution’s adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that this Court has described as necessary concomitants of nationality.”<sup>11</sup> Thus, with the evisceration of the president’s power to treat with the tribes, the plenary power to regulate Indian affairs was lodged in the Indian Commerce Clause and in “necessary,” “preconstitutional” powers that had some origin in foreign and military policy.

Although concurring in the judgment, Justice Clarence Thomas castigated the majority for “utterly” failing to find any enumerated power justifying Congress’s plenary power to alter tribal sovereignty.<sup>12</sup> With regard to the treaty power, he thought it “the one mechanism that the Constitution clearly provides for the Federal Government to interact with sovereigns other than the States” and thus regarded the congressional act abrogating tribal treaty-making with alarm.<sup>13</sup> With regard to the Indian Commerce Clause, Justice Thomas was adamant that it did *not* provide plenary power over Indian affairs,<sup>14</sup> and noted that the Court in *United States v. Kagama*<sup>15</sup> had held such a construction of the Clause to be “very strained.”<sup>16</sup> Elsewhere, Justice Thomas has regarded assertions of Congress’s plenary power as “inconsistent” with Indian Commerce Clause history.<sup>17</sup> For the

---

<sup>9</sup> *Lara*, 541 U.S. at 201.

<sup>10</sup> *Id.* (quotation marks omitted) (quoting *Antoine v. Washington*, 420 U.S. 194, 203 (1975)).

<sup>11</sup> *Id.* (quotation marks omitted).

<sup>12</sup> *Id.* at 215, 224 (Thomas, J., concurring in the judgment) (quotation marks omitted).

<sup>13</sup> *Id.* at 215.

<sup>14</sup> *Lara*, 541 U.S. at 224 (quoting *id.* at 200 (majority opinion)).

<sup>15</sup> 118 U.S. 375 (1886).

<sup>16</sup> *Lara*, 541 U.S. at 224 (Thomas, J., concurring in the judgment) (quoting *Kagama*, 118 U.S. at 378–79).

<sup>17</sup> *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 660 (2013) (Thomas, J., concurring); see also *United States v. Bryant*, 136 S. Ct. 1954, 1968 (2016) (Thomas, J., concurring) (“[T]he Court created this new power [over Indian affairs] because it was unable to find an enumerated power justifying the federal Major Crimes Act, which for the first time punished crimes committed by Indians against Indians on Indian land.”); *Upstate Citizens for Equal., Inc. v. United States*, 140 S. Ct. 2587, 2587 (2017) (Thomas, J., dissenting from the denials of certiorari) (“[P]recedents have acquiesced in Congress’ assertion of a plenary

Founders, Indian commerce was Indian trade, and was further limited to tribes, not persons.<sup>18</sup>

Justices Breyer and Thomas's debate in *Lara* not only encapsulates the tensions between tribal sovereignty and congressional plenary power, but also the array of scholarly opinions on point. While all modern scholars accept tribal sovereignty as a given, there is much disagreement over the origins of plenary power. Taking his cue from Justice Breyer, one scholar on the far left preaches Indian affairs as a "preconstitutional" federal power; whatever power the Indian Commerce Clause excludes is imbibed into the Constitution by "necessity."<sup>19</sup> Another pragmatist approach relies on international law and notions of "inherent sovereignty" that are outside of but not inconsistent with the Constitution to supply needed federal power over tribal affairs.<sup>20</sup> A more moderate position draws on both pragmatist approaches and adds to them the totality of the Constitution's discrete texts as grounded in the Washington administration's accommodation in asserting general federal power to treat with and *prospectively* legislate concerning Natives.<sup>21</sup> Yet another scholar looks carefully at the same textual sources before determining that no general power over Native Americans exists, but that each tribe requires individual treatment.<sup>22</sup> Liberal originalists conclude that the Indian Commerce Clause may be read broadly to embrace all Indian affairs,<sup>23</sup> while most conservative originalists follow

---

power to legislate in the field of Indian affairs. But neither the text nor the original understanding of the Indian Commerce Clause supports Congress' claim to such plenary power." (quotation marks, alterations, and citation omitted).

<sup>18</sup> *Adoptive Couple*, 570 U.S. at 659–60 (Thomas, J., concurring). Justice Thomas went further to assert, "the Clause was understood to reserve to the States general police powers with respect to Indians who were citizens of the several States." *Id.* at 660. For a further discussion of Justice Thomas's views and the authority upon which he relies, see *infra* notes 169–78 and accompanying text.

<sup>19</sup> See Matthew L.M. Fletcher, *Preconstitutional Federal Power*, 82 TUL. L. REV. 509, 562 (2007).

<sup>20</sup> Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 37 (1996) ("[P]lenary power in federal Indian law, like that in immigration law, arose from conceptions of the inherent sovereignty of nations under international law.").

<sup>21</sup> See M. Alexander Pearl, *Originalism and Indians*, 93 TUL. L. REV. 269, 296–97 (2018). See also generally Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015).

<sup>22</sup> See generally Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069 (2004).

<sup>23</sup> See, e.g., AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 107 (2005) (explaining that a broad reading of "Commerce" is most compatible with the Framers' general goal of enabling Congress to regulate "all interactions (and altercations) with . . .

Justice Thomas's line that "commerce" is synonymous with "trade,"<sup>24</sup> and that any expansive powers over Indian affairs are illegitimate. Each theory claims historical legitimacy, but none has been able to explain why the Indian Affairs Clause from the Articles of Confederation failed to appear in the Constitution.

Whatever their disagreement over federal power as it touches Natives, all scholars and Indian affairs historians can agree with Justice Thomas when, in addressing the inherent inconsistencies between tribal sovereignty and congressional plenary power, he concluded: "Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse federal Indian law and our cases."<sup>25</sup> Commenting on the tension, Professor Philip Frickey decried the entire genre as "rooted in conflicting principles that leave the field in a morass of doctrinal and normative incoherence"<sup>26</sup> and thus anomalous.<sup>27</sup> Similarly, Professor Steven McSloy called the field "chaotic" and "confused,"<sup>28</sup> and Professor Joseph Singer noted that the area of law is known for its "[c]onflicting lines of precedent and conflicting

---

Indian tribes" (emphasis in original)); see also JACK M. BALKIN, *LIVING ORIGINALISM* 13, 155–56 (2011).

<sup>24</sup> See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 281–97 (rev. ed. 2014); Prakash, *supra* note 22, at 1088–89 ("[N]o historical evidence supports the view that the original meaning of the phrase 'regulate commerce . . . with the Indian tribes' granted Congress a plenary power over Indian tribes." (alteration in original) (citation omitted)); Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 215–18 (2007) (noting that eighteenth-century speakers understood "commerce" with Native tribes to be exclusively trade with Natives, rather than as an umbrella term encompassing other interactions); see also Nathan Speed, Note, *Examining the Interstate Commerce Clause Through the Lens of the Indian Commerce Clause*, 87 B.U. L. REV. 467, 473–78 (2007) (reviewing early congressional acts to find that Congress did not regulate internal tribal matters via the Indian Commerce Clause); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 238–45 (2002) (relying on originalist history to deny congressional plenary power and assert a strong version of tribal sovereignty).

<sup>25</sup> *Lara*, 541 U.S. at 219 (Thomas, J., concurring in the judgment).

<sup>26</sup> Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1754 (1997); see also Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1797 (2019) (first quoting *Lara*, 541 U.S. at 214–15 (Thomas, J., concurring in the judgment); and then quoting Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433, 440 (2005)).

<sup>27</sup> Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433, 440 (2005).

<sup>28</sup> Steven Paul McSloy, *Back to the Future: Native American Sovereignty in the 21st Century*, 20 N.Y.U. REV. L. & SOC. CHANGE 217, 218, 220 (1993).

philosophies.”<sup>29</sup> In this unique area of the law, the disharmony between sovereignty and plenary power is perpetuated by an unexplained textual shrinkage between the Articles of Confederation and Constitution that seems to suggest that the Framers made a mistake in drafting the Constitution.

In fact, the Framers *did* make a mistake, at least initially. This Article examines the drafting history of the Constitution and suggests a startling explanation for the omission of an Indian Affairs Clause: at its heart, an innocent but consequential scrivener’s error that was later made intentional. The Committee of Detail, tasked by the Constitutional Convention with producing a working draft of the Constitution, seems to have accidentally omitted an Indian Affairs Clause in preparing the first working draft of the Constitution. Not only was inclusion of a congressional power over Indian affairs compelled by its long prehistory and a unanimous vote by the Convention, but John Rutledge as Committee chair recorded a committee vote directing James Wilson to include it.<sup>30</sup> The evidence indicates that Wilson meant to comply with the command: not only was he personally motivated to comply, but he placed a check mark next to the Clause. However, he simply failed to include the power in his final draft.<sup>31</sup>

When James Madison caught the mistake, this time the Committee of Detail partially fixed the omission by inserting “Indians” into the Commerce Clause at the last moment, but intentionally omitted the Indian Affairs Clause, likely to expedite the text without controversy through the Convention.<sup>32</sup> The error went unnoticed by the vast majority of the Convention, state ratifying conventions, and the public at large. It was later corrected by President George Washington and his administration via a multiclause approach to the Constitution that centered on executive treaty-making power.<sup>33</sup> Nearly a century later, once tribal treaty-making was terminated by statute, the Supreme Court turned to other means of justifying a noncommercial Indian affairs plenary power.<sup>34</sup>

---

<sup>29</sup> Joseph William Singer, *Remembering What Hurts Us Most: A Critique of the American Indian Law Deskbook*, 24 N.M. L. REV. 315, 318 (1994).

<sup>30</sup> See *infra* Part II.

<sup>31</sup> See *infra* Part II.C.

<sup>32</sup> See *infra* Part II.C.

<sup>33</sup> See *infra* note 117 and accompanying text.

<sup>34</sup> See, e.g., *supra* note 6.

This history raises serious questions for constitutional theory and federal Indian law policy. If the omission of the Indian affairs power was intentional, how does that impact the relationship between tribes and the federal government? Does congressional plenary power survive? How will the missing clause impact other Commerce Clause provisions? Does a congressional power over Indian affairs equate to plenary power? What will it mean for tribal-state relations, and treaty powers generally? If “Indian affairs” is intentionally missing from the Constitution, is the approach adopted in *Lara* adequate? These questions will require new tools, new methods, and new theory. The purpose of this Article is to raise these questions and address whether congressional plenary power survives what became an intentional omission of the Indian Affairs Clause, leaving further scholarship to propose comprehensive solutions for the remainder.

Here, based on the assumption that matching constitutional text to powers in practice is optimal,<sup>35</sup> this Article proposes that, without an Indian Affairs Clause, congressional plenary power over tribes is dealt a mighty if not mortal blow. Instead, to enable the federal government to address Indian affairs, this Article proposes the reinitiation of tribal treaty-making. This proposal takes its cue from President Washington: interpret the Constitution holistically as written, treating with Natives on noncommercial matters via the executive’s treaty power. Such a proposal is supported by the text, history, and structure of the Constitution, the recent trends in federal Indian law precedent, and many prudential reasons—including, most importantly, respect for tribal sovereignty and Native dignity.

In the three substantive sections that follow, this Article will first summarize the scholarly debate regarding congressional plenary power over tribes and the different strains of pre- and postenactment history upon which they rely. Second, it will carefully comb through Committee of Detail, Constitutional Convention, and ratification records to reconstruct the history of the missing clause. Finally, it will discuss the significance of the missing clause and propose the reinitiation of tribal treaty-making, outlining the various reasons for doing so.

---

<sup>35</sup> I am cognizant that this is not a universally shared presumption, nor is it consistently applied for at least some areas of the Constitution.



## I. THE CONFUSED STATE OF INDIAN AFFAIRS

The omission of an Indian Affairs Clause led to a disjuncture between Congress's plenary power over tribes in practice and the authorizing text of the Constitution. This schism has created confusion as scholars have sought to synthesize and bring harmony to this beleaguered area of constitutional law. Scholarly opinions run the gamut, and each explicitly or implicitly partakes of a particular pre- or postconstitutional historical approach to tribes. However, all have missed the true cause of the problem, plaguing their various diagnoses and prognoses, and failing to provide clarity and direction to this chaotic area of law.

## A. The Pragmatists: Pre- and Extraconstitutional Powers

The ways and means by which scholars of federal Indian law have addressed the plenary power disparity between text and practice are aptly reflected or presaged by Justices Breyer's and Thomas's opinions in *Lara*.<sup>36</sup> On one side of the spectrum, Professor Matthew Fletcher picks up on the verbiage utilized by Justice Breyer in identifying Indian affairs as a "preconstitutional" federal power inherited by the federal government under the new Constitution, of which the Commerce Clause vests only a part.<sup>37</sup> The remainder of these powers should be ascribed to the federal government by "necessity."<sup>38</sup> Says Fletcher, "Originalists . . . [are] unwilling or unable to recognize the history of federal-tribal relations *because that history is not reflected in the Constitution*."<sup>39</sup> Fletcher partakes here in a much larger literature on inherent sovereignty centering on the constitutionally unfettered foreign affairs power from *United States v. Curtiss-Wright*,<sup>40</sup> which limited the doctrine of enumerated powers to "internal affairs" and espoused international powers as "necessary concomitants of nationality" whether or not found in the Constitution.<sup>41</sup> Professor Sarah Cleveland postulated that Justice George Sutherland's inherent-sovereignty argument in *Curtiss-Wright* is partly founded in the expansive late nineteenth-century view of Congress's tribal plenary power that fully flowered in

---

<sup>36</sup> See *supra* notes 20–29 and accompanying text.

<sup>37</sup> See Fletcher, *supra* note 19, at 510–11 (citing *Lara*, 541 U.S. at 201).

<sup>38</sup> *Id.* at 562.

<sup>39</sup> *Id.* at 563 (emphasis in original).

<sup>40</sup> 299 U.S. 304 (1936).

<sup>41</sup> *Id.* at 316–17.

*Kagama*: the lack of constitutional text and the fact that tribal members fell outside of the Constitution's protections and traditional state boundaries gave rise to a plenary power rooted not in the Constitution, but in the necessities of sovereignty.<sup>42</sup>

Although *Kagama* claims no basis in history other than naked discovery, Fletcher's history is largely on point: the area of Indian affairs was separate and distinct from Indian commerce, and the former did not always embrace the latter. Both operated as separate administrative structural concepts and legal terms of art, with Indian commerce being informed by the practicalities of Indian affairs. Prior to and even concurrent with the Constitution's enactment, "Indian affairs" was a thriving area of federal and royal administration that was distinct from Indian trade or commerce.<sup>43</sup> Before 1789, while Indian affairs and trade fluctuated between local and centralized control, the two bodies of law were often addressed and administered by the same personnel but treated separately based on their distinct concerns.<sup>44</sup> During the earlier colonial period in the seventeenth and early eighteenth centuries, the local colonial government—under loose and sporadic oversight from the London Board of Trade and other European epicenters with colonies in North America—managed transacting with Natives, whether through learning new agricultural techniques, conducting land acquisitions, or waging war and peace.<sup>45</sup> Here, the London Board of Trade's

---

<sup>42</sup> Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 11, 25, 37, 58–63 (2002); see also Nell Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 197 (1984) (tracing the origins of congressional plenary power over tribes and concluding that the initial reasons for plenary power are "no longer applicable"); Robert Laurence, *Learning to Live with the Plenary Power of Congress over Indian Nations: An Essay in Reaction to Professor Williams' Algebra*, 30 ARIZ. L. REV. 413, 418–30 (1988) (accepting plenary power with all its historical flaws because it is not "absolute," because it is "counterbalanced" by inherent tribal sovereignty, because of the author's faith in the discretion of Congress, and because of his lack of faith in public international law to protect indigenous rights).

<sup>43</sup> See Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1064–89 (1995).

<sup>44</sup> See *id.*

<sup>45</sup> *Id.* at 1066–67; see also RUSSELL SHORTO, *THE ISLAND AT THE CENTER OF THE WORLD* 42–66 (2005) (narrating the history of other North American colonizers, particularly the Dutch in New Holland and New Amsterdam). Such occasional direction was exercised in response to Native petitions, such as the 1665 instruction from King Charles II's royal commissioners that colonists could not deprive Natives of their land, including hunting lands and other uncultivated areas, unless acquired with a just conquest and within the remit of the colonial charter. See COMMISSIONERS' DECLARATION ABOUT SQUAMACUCK LANDS (Apr. 4, 1665), reprinted in 4 RECORDS OF THE GOVERNOR

governance role indicates that the administration of Indian affairs grew out of the need to compete with the French and regulate the fur trade with the Natives, which was conducted by licensed and independent private traders.<sup>46</sup>

Beginning in the early 1700s, the British Crown exercised increasing control over Indian affairs, climaxing with its Proclamation of 1763 and waning thereafter due to an excess of efficient administration.<sup>47</sup> Land disputes—the most famous of them being the Mohegan’s seventy-year suit filed in 1703 with the Privy Council against Connecticut for violations of aboriginal title granted under treaties and agreements dating between 1659 and 1681—gave rise to increasing control by the Crown.<sup>48</sup> Of equal importance to the British was competing with the French and Spanish for access to Indian trade routes,<sup>49</sup> which helped to spark the French and Indian War.<sup>50</sup> In response to disputes over Native land and trade, Archibald Kennedy, a New York Council member, recommended to the Board of Trade in 1751 that Indian affairs in the British North American colonies be overseen by a single superintendent.<sup>51</sup> This recommendation ultimately resulted in the Albany Congress of 1754,<sup>52</sup> wherein Benjamin Franklin reported a draft Plan of Union for the colonies, with Indian affairs featuring among the first topics addressed.<sup>53</sup>

---

AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 176, 176 (Nathaniel B. Shurtleff ed., Boston, Press of William White 1854) [hereinafter 4 RECORDS OF THE GOVERNOR]; HIS MAJESTY’S INSTRUCTION REQUIRING HIS COMMISSIONERS TO INFORM THEMSELVES OF THE INDIAN PRINCES (May 5, 1665), *reprinted in* 4 RECORDS OF THE GOVERNOR, *supra*, at 189, 189–90; COURT’S ANSWER TO THE SIXTH INSTRUCTION AND COMMISSIONERS’ PROPOSAL (May 11, 1665), *reprinted in* 4 RECORDS OF THE GOVERNOR, *supra*, at 198, 198–99.

<sup>46</sup> See HAROLD A. INNIS, *THE FUR TRADE IN CANADA* 38 (rev. ed. 1956). See also generally Mark K. Bauman, *Jews and the Fur Trade Along the Southern British Colonial Borderlands*, 102 *AM. JEWISH HIST.* 195 (2018) (detailing the history of private Jewish traders in colonial America and emphasizing fur traders’ importance to colonial governments).

<sup>47</sup> Clinton, *supra* note 43, at 1095–96.

<sup>48</sup> *Id.* at 1067–69.

<sup>49</sup> *Id.* at 1069–71 (noting that the Board of Trade stressed “the importance of a growing and coordinated trade with the Indians to combat French influence”).

<sup>50</sup> R.R. PALMER, *A HISTORY OF THE MODERN WORLD* 289–90 (10th ed. 2007).

<sup>51</sup> ARCHIBALD KENNEDY, *THE IMPORTANCE OF GAINING AND PRESERVING THE FRIENDSHIP OF THE INDIANS TO THE BRITISH INTEREST CONSIDERED* 15 (London, St. John’s Gate 1752).

<sup>52</sup> The Congress was attended by representatives from New York, New Hampshire, Massachusetts Bay, Connecticut, Rhode Island, Maryland, and Pennsylvania, as well as by representatives from the Six Nations, the Scaakticook, and the Stockbridge Indians. Clinton, *supra* note 43, at 1077–79.

<sup>53</sup> LIEUTENANT-GOVERNOR DE LANCEY TO THE LORDS OF TRADE (July 22, 1754), *reprinted in* 6 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW

Under this plan, it was proposed that the “President General” would

hold or direct all Indian Treaties . . . and make peace or declare War with the Indian Nations. That they make such Laws as they judge necessary for the regulating all Indian Trade. That they make all purchases from Indians for the Crown, of lands [now] not within the bounds of particular Colonies, or that shall not be within their bounds when some of them are reduced to more convenient dimensions. That they make new settlements on such purchases by granting Lands, [in the King’s name] reserving a Quit rent to the Crown, for the use of the General Treasury.<sup>54</sup>

Franklin thus laid out all that was later comprehended by Indian “Trade” and “Affairs” under the Articles of Confederation, while also highlighting the complicated and delicate balance of power between central authorities and the colonies-cum-states.

The draft plan was accompanied by a report on the state of Indian affairs for the Board of Trade that complained of corruption and private gain, land fraud (or inadequate consideration for land sales), and the illegal sale of rum to the Natives.<sup>55</sup> Colonel William Johnson authored a parallel report recommending more coordination “between the several [colonial] Govern[ments] . . . in regard to Indian affairs” to combat the French.<sup>56</sup> Almost simultaneously, the Board of Trade recommended to the Crown that management of Indian affairs be brought under one head (Johnson’s) and, after reviewing the Albany reports, emphasized the importance of separating private trading interests and the public administration of Indian affairs.<sup>57</sup> Other than Johnson’s appointment to superintend Indian affairs with the Six Nations in the North and West and, later, Edmond Atkin’s and then John Stuart’s appointments to administer affairs in the South, any action on the foregoing reports was scuttled by the outbreak

---

YORK 850, 850 (E.B. O’Callaghan ed., Albany, Weed, Parsons & Co. Printers 1855) [hereinafter 6 DOCUMENTS RELATIVE TO NEW YORK]; PROCEEDINGS OF THE COLONIAL CONGRESS HELD AT ALBANY (July 25, 1754), *reprinted in* 6 DOCUMENTS RELATIVE TO NEW YORK, *supra*, at 853, 889–92.

<sup>54</sup> PROCEEDINGS OF THE COLONIAL CONGRESS HELD AT ALBANY, *supra* note 53, at 890 (alterations in original).

<sup>55</sup> Clinton, *supra* note 43, at 1079–80.

<sup>56</sup> COLONEL JOHNSON’S SUGGESTIONS FOR DEFEATING THE DESIGNS OF THE FRENCH (July 1754), *reprinted in* 6 DOCUMENTS RELATIVE TO NEW YORK, *supra* note 53, at 897, 898.

<sup>57</sup> REPRESENTATION TO THE KING WITH PLAN OF GENERAL CONCERT (Aug. 9, 1754), *reprinted in* 6 DOCUMENTS RELATIVE TO NEW YORK, *supra* note 52, at 901, 902.

of war with the French.<sup>58</sup> The tide had turned, however, and the British were more active in managing Indian affairs, including proscribing private land acquisitions.<sup>59</sup> Indian trade was left more to local colonial management.<sup>60</sup>

After the war, to secure its peace, Britain emphasized the importance of Indian trade as a means to improve general affairs. Emphasizing that “a well Regulated Trade with the Indians is and ever will be the most natural and the most efficacious means to improve and extend His Majesty’s Indian Interest” and that treaties regarding native lands should be “religiously observed,” Johnson recommended expanding the Crown’s management of both “Indian Affairs *and* Trade” through the establishment of an office in the North American colonies.<sup>61</sup> Further Anglo-American settlement was halted and centralized under the Board of Trade, whereupon applications for trading outposts and settlements near French-controlled Canada (and in formerly French-controlled areas) poured in.<sup>62</sup> British encroachment fomented Native rebellion in the form of Pontiac’s War,<sup>63</sup> which prompted the creation of new boundary lines that featured in King George III’s Proclamation of 1763.<sup>64</sup> The Proclamation also treated land acquisitions and trade separately, with the former to be managed by London, and the latter by both colonial governors—who issued trading licenses to all British subjects—and the Crown’s “Commissaries,” who regulated the trade.<sup>65</sup> The Board of Trade thereafter recommended a comprehensive plan to effectuate the Proclamation,<sup>66</sup> but it was stillborn. The plan failed due to high marginal costs and the lowered threat posed by the French and Native tribes made possible by the very efficiency that produced the plan.<sup>67</sup>

---

<sup>58</sup> Clinton, *supra* note 43, at 1082, 1086–87.

<sup>59</sup> *Id.* at 1082–83.

<sup>60</sup> *Id.*

<sup>61</sup> SIR WILLIAM JOHNSON TO THE LORDS OF TRADE (May 17, 1759), *reprinted in* 7 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 375, 377 (E.B. O’Callaghan ed., Albany, Weed, Parsons & Co. Printers 1856) [hereinafter 7 DOCUMENTS RELATIVE TO NEW YORK] (emphasis added).

<sup>62</sup> Clinton, *supra* note 43, at 1088.

<sup>63</sup> *Id.* at 1088–89.

<sup>64</sup> PROCLAMATION BY KING GEORGE III (1763) (transcript available in the Gilder Lehrman Collection).

<sup>65</sup> *Id.*

<sup>66</sup> PLAN FOR THE FUTURE MANAGEMENT OF INDIAN AFFAIRS (1764), *reprinted in* 7 DOCUMENTS RELATIVE TO NEW YORK, *supra* note 61, at 637, 637–41.

<sup>67</sup> Clinton, *supra* note 43, at 1095–96.

British understanding became American, and affairs and trade with Natives were treated as distinct concerns and even administered separately. During the Revolution, Indian affairs reached war and peace, land acquisitions, and powers incidental to these main headings: protection, border policing, and gift giving. Almost immediately after Lexington and Concord, American commissioners set out to persuade the Six Nations and other tribes to enter the war on their side.<sup>68</sup> Throughout the war, the thrust of Indian affairs continued to be war and peace,<sup>69</sup> but any attempts to convince Natives to side with the rebels were largely futile, with tribes opting for the familiar and stronger British ally.<sup>70</sup> Beyond cultivating them as allies, Congress also attempted to devise a plan for “carrying on trade with the Indians,” designating a separate committee for the purpose.<sup>71</sup>

Congressional powers of treaty-making and trade with Native tribes informed the language of the Articles of Confederation, as did the confederated structure wherein states still held the balance of power. Benjamin Franklin, who had authored the Albany Plan, dealt with Native Nations in two parts of his draft of the Articles of Confederation, reported on July 21, 1775.<sup>72</sup> Article X proscribed colonies (soon to be states) from waging war *sua sponte*, and Article XI dealt with land disputes and acquisitions and ensured the presence of agents to protect and regulate trade.<sup>73</sup> No mention was made of state regulation. A later draft

---

<sup>68</sup> CHARLES PAGE SMITH, JAMES WILSON: FOUNDING FATHER 69–72 (1956); *see, e.g.*, A SPEECH TO THE SIX CONFEDERATE NATIONS, MOHAWKS, ONEIDAS, TUSCARORAS, ONONDAGAS, CAYUGAS, SENEKAS, FROM THE TWELVE UNITED COLONIES, CONVENEED IN COUNCIL AT PHILADELPHIA (July 13, 1775), *reprinted in* 2 JOURNALS OF THE CONTINENTAL CONGRESS 178, 178–83 (Worthington Chauncey Ford ed., 1906) [hereinafter 2 J.C.C.]; Documents 3–31, *reprinted in* 18 EARLY AMERICAN INDIAN DOCUMENTS 8, 8–277 (Alden T. Vaughan ed., 1979); Debates (Dec. 28, 1775), *reprinted in* 3 JOURNALS OF THE CONTINENTAL CONGRESS 462, 462 (Worthington Chauncey Ford ed., 1906) [hereinafter 3 J.C.C.] (“That an order be drawn on the treasurers in favor of Mr. [George] Wythe, | | one of the committee appointed to confer with the Indians, | | for the sum of £5 [=13 1/3 dollars.] as a present to the Indians.” (alterations in original)).

<sup>69</sup> *See* Documents 3–31, *supra* note 68, at 8–277.

<sup>70</sup> *See* Adam F. Kinney, *The Tribe, the Empire, and the Nation: Enforceability of Pre-Revolutionary Treaties with Native American Tribes*, 39 CASE W. RES. J. INT’L L. 897, 908 (2008) (describing how many Native American tribes aligned with the British out of fear that independent colonies would disrupt their political security).

<sup>71</sup> Debates (Nov. 23, 1775), *reprinted in* 3 J.C.C., *supra* note 68, at 364, 366; *see also generally* REPORT OF THE COMMITTEE ON TRADE WITH THE INDIANS (Dec. 29, 1775), *reprinted in* 3 J.C.C., *supra* note 68, at 465.

<sup>72</sup> FRANKLIN’S ARTICLES OF CONFEDERATION (July 21, 1775), *reprinted in* 2 J.C.C., *supra* note 68, at 195, 195–99.

<sup>73</sup> *Id.* at 197–98.

also treated the two related areas of law individually, giving the central government the sole and exclusive power of “[r]egulating the ~~Indian~~ Trade, and managing all ~~Indian~~ Affairs with the Indians.”<sup>74</sup> The final version of the Articles of Confederation contained less detail, but also treated trade and affairs individually. Penned by John Dickinson in 1776,<sup>75</sup> passed by Congress on November 15, 1777, and finally ratified by all states on March 1, 1781, Article IX read in relevant part:

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.<sup>76</sup>

Treaty-making and legislation under the Articles followed suit. As they were not mentioned in the 1783 Treaty of Paris, Congress set about to make peace with tribes who had allied with the British in the Revolution.<sup>77</sup> After lengthy discussion based on Pennsylvania’s petition to treat with western tribes in purchasing lands for war veterans, Congress approved a treaty conference with northern and western district tribes on October 15, 1783, to which Pennsylvania commissioners would be invited and provided “every assistance” in promoting state interests consistent with the “general interest of the Union.”<sup>78</sup> This authorization resulted in the Treaty at Fort Stanwix with the Six Nations on October 22, 1784, which dealt with hostages, the establishment of a western boundary, land guarantees to Natives, and a cession of land to the United States.<sup>79</sup> A similar treaty was entered into at Fort M’Intosh with the Wiandot, Delaware, Chippewa, and Ottawa on January 21, 1785, adding that Natives murdering or robbing a citizen of the United States would be delivered up for punishment by the same.<sup>80</sup> These treaties were thus limited to nontrade matters.

---

<sup>74</sup> ARTICLES OF CONFEDERATION AND PERPETUAL UNION (July 12, 1776), *reprinted in* 5 JOURNALS OF THE CONTINENTAL CONGRESS 546, 550 (Worthington Chauncey Ford ed., 1906) (alterations in original).

<sup>75</sup> *Id.* at 546 n.1 (identifying the original manuscript as in the writing of John Dickinson).

<sup>76</sup> ARTICLES OF CONFEDERATION of 1781, art. IX, ¶ 4.

<sup>77</sup> Clinton, *supra* note 43, at 1105.

<sup>78</sup> *See generally* Debates (Oct. 30, 1783), *reprinted in* 25 JOURNALS OF THE CONTINENTAL CONGRESS 767 (Gaillard Hunt ed., 1922) [hereinafter 25 J.C.C.].

<sup>79</sup> *See generally* Treaty with the Six Nations, Oct. 22, 1784, 7 Stat. 15.

<sup>80</sup> Treaty of Fort M’Intosh art. IX, Jan. 21, 1785, 7 Stat. 16, 17.

In 1785, Congress issued authorization for commissioners in the South to conduct treaty conferences to establish land boundaries, regulate fair trade with Natives, and notify the governors of the affected states.<sup>81</sup> This authorization resulted in three successive treaties at Hopewell with the Cherokee, Choctaw, and Chickasaw. These treaties reflected similar provisions to their predecessors, but added that tribes could send delegations to Congress and assured the liberty of traders while guaranteeing that “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.”<sup>82</sup> A final treaty was entered into with the Shawnee on January 31, 1786, without the trade provisions;<sup>83</sup> all four southern treaties were approved by Congress on April 17, 1786, a year before the convening of the Constitutional Convention.<sup>84</sup>

In the aftermath of this treaty-making with the various regions, Congress turned its attention to comprehensive legislation regulating Indian trade in “An Ordinance for [R]egulating the Indian Department.”<sup>85</sup> Whereas states still vied for a role in treating over Native lands, debate over the proposed statute revealed a consensus in favor of centralized Indian trade regulation.<sup>86</sup> Delegates of Georgia and North Carolina, where Cherokee

---

<sup>81</sup> REPORT ON THE STATE OF SOUTHERN INDIAN AFFAIRS (Mar. 4, 1785), *reprinted in* 28 JOURNALS OF THE CONTINENTAL CONGRESS 118, 118–20 (John C. Fitzpatrick ed., 1933); COMMISSION FOR PERSONS TO NEGOTIATE WITH THE INDIANS (Mar. 12, 1784), *reprinted in* 26 JOURNALS OF THE CONTINENTAL CONGRESS 134, 134–35 (Gillard Hunt ed., 1928).

<sup>82</sup> Treaty of Hopewell art. IX, Cherokee-U.S., Nov. 28, 1785, 7 Stat. 18, 20; Treaty of Hopewell art. VIII, Choctaw-U.S., Jan. 3, 1786, 7 Stat. 21, 22; Treaty of Hopewell art. VIII, Chickasaw-U.S., Jan. 10, 1786, 7 Stat. 24, 25.

<sup>83</sup> *See generally* Treaty at the Mouth of the Great Miami, Shawnee-U.S., 7 Stat. 26 (1786).

<sup>84</sup> 30 JOURNALS OF THE CONTINENTAL CONGRESS 185–95 (John C. Fitzpatrick ed., 1934) [hereinafter 30 J.C.C.]; Clinton, *supra* note 43, at 1120.

<sup>85</sup> *See* PROPOSED ORDINANCE FOR REGULATING THE INDIAN DEPARTMENT (June 28, 1786), *reprinted in* 30 J.C.C. at 368, 368–72:

[Regional commissioners] shall superintend such regulations as Congress shall from time to time establish respecting the Indian trade. They shall have Authority to place deputies among the several tribes and to remove all or either of them for misbehavior. To grant licenses to the traders, to regulate the advance on Articles of the first Necessity. . . .

<sup>86</sup> MOTION BY WILLIAM FEW TO AMEND THE ORDINANCE ON INDIAN AFFAIRS (July 20, 1786), *reprinted in* 30 J.C.C., *supra* note 84, at 418, 418–19; MOTION BY WILLIAM HOUSTON TO AMEND THE ORDINANCE ON INDIAN AFFAIRS (July 21, 1786), *reprinted in* 30 J.C.C., *supra* note 84, at 420, 420–21 (accepting an amendment to strike the granting of licenses by federal commissioners); MOTION BY CHARLES PINCKNEY TO AMEND THE



and other southern tribes (with whom those states had separately treated) resided, repeatedly sought without success to secure a role for states in regulating Indian trade.<sup>87</sup> Yet even New York, normally opposed along with Pennsylvania and Virginia to national regulation of land cessions and border disputes, was firm in recognizing national authority to regulate trade.<sup>88</sup>

Now that a consensus appeared to have congealed around federal trading power with Native Nations, the next year, in 1787, efforts were made to secure another major piece of legislation. This sought to shore up confederated power over both Indian trade and affairs after attacks by Natives on Virginian frontiers and land disputes between Creeks and Georgians threatened open hostilities.<sup>89</sup> Ironically, this act was discussed in the Continental Congress even while the Convention sat, forgetting and then omitting Indian affairs.<sup>90</sup> The disparity in treatment between the two bodies is highlighted by the overlap in membership between Congress and the Convention. In fact, at least three members of the Constitutional Convention—William Few of Georgia, William Blount of North Carolina, and Pierce Butler of South Carolina<sup>91</sup>—used the break allotted for the work of drafting the Constitution by the Committee of Detail from July 24 to August 6, 1787, to travel to New York and attend to their congressional duties. Four days before the Committee of

---

ORDINANCE ON INDIAN AFFAIRS (July 24, 1786), *reprinted in* 30 J.C.C., *supra* note 84, at 424, 424–28; Debate (Aug. 4, 1786), *reprinted in* 31 JOURNALS OF THE CONTINENTAL CONGRESS 485, 485 (John C. Fitzpatrick ed., 1934) [hereinafter 31 J.C.C.]; MOTION BY EDWARD CARRINGTON TO AMEND THE ORDINANCE ON INDIAN AFFAIRS (Aug. 7, 1786), *reprinted in* 31 J.C.C., *supra*, at 488–90; AN ORDINANCE FOR THE REGULATION OF INDIAN AFFAIRS (Aug. 7, 1786), *reprinted in* 31 J.C.C., *supra*, at 490–93.

<sup>87</sup> Clinton, *supra* note 43, at 1120–24.

<sup>88</sup> *Id.* at 1123 (“Even the delegates from New York were apparently unwilling to abandon national coordination of trade with the Indians.”).

<sup>89</sup> See VOTE REGARDING THE VIRGINIA EXPEDITION AGAINST THE INDIANS (Aug. 2, 1787), *reprinted in* 33 JOURNALS OF THE CONTINENTAL CONGRESS 449, 449–50 (Roscoe R. Hill ed., 1936) [hereinafter 33 J.C.C.] (refusing to reimburse Virginia for expenses incurred in the “late expedition against the Indians” conducted without the direction or knowledge of the United States); REPORT OF THE COMMITTEE ON INDIAN AFFAIRS IN THE SOUTHERN DEPARTMENT (Aug. 3, 1787), *reprinted in* 33 J.C.C., *supra*, at 455, 456 (“[T]here is reason to apprehend the Creek Indians are meditating a serious blow against the Inhabitants of Georgia.”).

<sup>90</sup> See THE NORTHWEST ORDINANCE (July 13, 1787), *reprinted in* 32 JOURNALS OF THE CONTINENTAL CONGRESS 334, 334–43 (Roscoe R. Hill ed., 1936) (prescribing rules for the settlement of western lands and promising “utmost good faith” toward Natives days before the Convention let out for its singular recess); see also Clinton, *supra* note 43, at 1124–28.

<sup>91</sup> See Debate (Aug. 2, 1787), *reprinted in* 33 J.C.C., *supra* note 89, at 449–54.

Detail reported a draft of the Constitution that contained no mention of Indian trade or affairs, Nathan Dane of Massachusetts reported for the congressional committee on Indian affairs in New York.<sup>92</sup> Responding to Henry Knox's July 10 and 18, 1787, reports on the Virginia border and Georgia-Creek disputes, Dane identified the ambiguous language respecting Indian affairs in the Articles as "embarrassing" having set federal efforts at odds with the states.<sup>93</sup> A correct interpretation of the Articles' language, Dane maintained, was based on long-standing precedent:

The committee conceive that . . . in managing affairs with [the Natives], the principal objects have been those of making war and peace, purchasing certain tracts of their lands, fixing the boundaries between them and our people, and preventing the latter settling on lands left in possession of the former. *The powers necessary to these objects appear to the committee to be indivisible*, and that the parties to the confederation must have intended to give them entire to the Union, or to have given them entire to the State.<sup>94</sup>

Power over Indian affairs, including power over Indian trade (but which was treated individually), was indivisible due to its very nature. Dane's argument was ultimately successful: on October 26, 1787, five weeks after the Convention adjourned (with the absent congressmen from Philadelphia again attending), the Continental Congress authorized solely northern and southern Indian commissioners to treat with tribes.<sup>95</sup>

This history demonstrates that both Indian affairs and trade were preconstitutional powers as articulated by Fletcher.<sup>96</sup> The two bodies of law were closely related and often (but not always) administered together, but treated separately and distinctly within the law. The law of Indian trade related to the private conduct of Indian traders, including licensing; banning unethical practices such as selling firearms, rum and other spirits, and other prohibited items to Natives; and establishing or

---

<sup>92</sup> REPORT OF THE COMMITTEE ON INDIAN AFFAIRS IN THE SOUTHERN DEPARTMENT (Aug. 3, 1787), *reprinted in* 33 J.C.C., *supra* note 89, at 455, 455.

<sup>93</sup> *Id.* at 457.

<sup>94</sup> *Id.* at 458 (emphasis added).

<sup>95</sup> RESOLUTION ON HOLDING TREATIES WITH NORTHERN AND SOUTHERN INDIANS (Oct. 3, 1787), *reprinted in* 33 J.C.C., *supra* note 89, at 706, 707–14.

<sup>96</sup> *See supra* note 19 and accompanying text.

protecting trading posts and routes.<sup>97</sup> The law and administration of Indian affairs related to intergovernmental relationships between various levels of government and Native Nations, including identifying boundaries, preserving Native land and the ability to purchase it by particular governments, and maintaining legal relations between Natives and non-Natives.<sup>98</sup> Indian affairs, a matter of public law, could but did not always embrace Indian trade, a matter of private law.<sup>99</sup> Thus, according to Fletcher, the Indian Commerce Clause embraced all of preconstitutional Indian trade—but not all of Indian affairs.<sup>100</sup>

Fletcher's remaining arguments do not hold together as well. Fletcher maintains that the Constitution's deficient statements regarding Indian Affairs give rise to a necessity that Congress, and perhaps the president, must derive power over Indian affairs from preconstitutional arrangements.<sup>101</sup> Yet even despite the glaring textual problem with Fletcher's argument, it should not end here. As explained below, preconstitutional federal powers over Natives were contested, or at least states made claims to having overlapping powers.<sup>102</sup>

Professor Frickey expands on Fletcher's pragmatist theme, but ties power over Natives more directly to the Constitution in a generalist way via international law: "[I]nherent in the Constitution, not outside the Constitution, are all those notions of inherent sovereignty under international law that are not inconsistent with constitutional text, structures, or institutional relationships."<sup>103</sup> International law, rather than direct constitutional grants, provides content for managing Native relations and guarantees to them human rights via international standards regarding indigenous peoples.<sup>104</sup>

---

<sup>97</sup> The *law* of Indian trade may be distinguished from the *objects* of that trade, which, as Professor Gregory Ablavsky articulates, included a wide range of goods, from traditional items (blankets and furs) to Native and European slaves, "paying" goods to murder victims, and the most valuable form of payment, land. Ablavsky, *supra* note 21, at 1029–32.

<sup>98</sup> *Id.* at 1042.

<sup>99</sup> *Id.* at 1032.

<sup>100</sup> Fletcher, *supra* note 19, at 522 ("The text of the Indian Commerce Clause suggests (perhaps) that congressional authority in the field of Indian affairs is less than plenary, if one accepts the argument that 'commerce' does not include the entire field.").

<sup>101</sup> *Id.* at 555.

<sup>102</sup> See *infra* notes 154–66 and accompanying text.

<sup>103</sup> Frickey, *supra* note 20, at 68.

<sup>104</sup> *Id.* at 74–75; see also Pearl, *supra* note 21, at 326–27 (noting that this conception is in conflict with the originalist position that government action can only arise from an enumerated power).

## B. The Holists and the Washington Settlement

A more moderate approach is Professor Gregory Ablavsky's carefully crafted holistic and intratextual reading of the Constitution's treatment of Indian affairs in *Beyond the Indian Commerce Clause*.<sup>105</sup> There, Ablavsky also focuses on the role of the supra- and preconstitutional law of nations, particularly on those international legal principles from the law of nations that influenced the Washington administration's interpretation and implementation of the Constitution, in deducing plenary power.<sup>106</sup> Implicitly acknowledging that affairs and commerce are not coterminous, this holistic interpretation asserts that congressional plenary power later asserted over Indian affairs did not necessarily derive from the Indian Commerce Clause, but had alternate sources of power in the Treaty, War Powers, Property, and Supremacy Clauses, as well as the extraconstitutional law of nations.<sup>107</sup>

Ablavsky relies heavily on Secretary Henry Knox's administration of Indian affairs both before and after the Constitution's ratification.<sup>108</sup> A month before the reinstitution of Indian affairs within the War Department under the new Constitution,<sup>109</sup> Knox, the unexpectedly effective Revolutionary War artillery officer who carried over as Secretary of War,<sup>110</sup> was advising President

---

<sup>105</sup> See Ablavsky, *supra* note 21, at 1043 (“[A] holistic reading of the Constitution makes the Indian Trade and Intercourse Act of 1790 more intelligible.”). For a definition of “intratextualism,” see Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (“[V]arious words and phrases recur in the [Constitution]. This feature gives interpreters yet another set of clues as they search for constitutional meaning and gives rise to yet another rich technique of constitutional interpretation. I call this technique intratextualism.”).

<sup>106</sup> See generally Ablavsky, *supra* note 21.

<sup>107</sup> See *id.* at 1053–82.

<sup>108</sup> *Id.* at 1041–42.

<sup>109</sup> Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49, 50 (investing the Secretary of War with “such duties as shall . . . be enjoined on, or entrusted to him by the President of the United States . . . relative to Indian affairs”).

<sup>110</sup> Henry Knox, bookish and muscular as the shop-boy-turned-proprietor of the London Bookstore, popular with the loyalist elite, possessed no military background other than that he drew from the military books he read, participating in local company drills, and observing those of the British in Boston. MARK PULS, HENRY KNOX: VISIONARY GENERAL OF THE AMERICAN REVOLUTION 4–7, 12–13 (2008). His rise within Washington's inner camp circle was assured due to his tremendous feat in proposing and then commanding the transport of sixty tons of Ticonderoga cannon across three hundred miles of frozen rivers and snowcapped mountains to reinforce the Boston siege at Dorchester Heights, which cannon brought about the withdrawal of British ships. *Id.* at 30, 34–45.

Washington of the state of tribal affairs.<sup>111</sup> Importantly, Knox made a recommendation that would effectively ensure to the federal government the sole regulation of Indian affairs. After lamenting over past and ongoing state interference and Congress's own botched tribal treaty negotiations, Knox suggested that

[t]he independent nations and tribes of indians ought to be considered as *foreign nations*, not as the subjects of any particular state—each individual State indeed will retain the right of pre-emption of all lands within its limits, which will not be abridged. But the general Sovereignty must possess the right of making all treaties on the execution or violation of which depend peace or war.<sup>112</sup>

Establishing such a precedent, Knox continues, should be done via a “declarative Law” that would “reflect honor on the new government.”<sup>113</sup> If tribes were treated as other nations, by implication, other aspects of the Constitution—the treaty power, and, Ablavsky adds, war and peace powers and the Territory and Supremacy Clauses<sup>114</sup>—could be brought to bear on the federal government's dealings with Native tribes.

Surprisingly, Ablavsky does not highlight President Washington's response, which adopted Knox's recommendations wholesale. On this issue, President Washington initially availed himself of the advice and consent of the Senate in person, with Knox at his side, regarding a treaty with the Choctaw and Chickasaw.<sup>115</sup> A month later, in a statement prepared by Knox and read by then–Vice President John Adams as Senate president on September 17, 1789,<sup>116</sup> President Washington recommended that Indian tribes be treated as foreign nations:

It is said to be the general understanding and practice of nations, as a check on the mistakes and indiscretions of ministers or Commissioners, not to consider any treaty,

---

<sup>111</sup> See LETTER FROM HENRY KNOX TO GEORGE WASHINGTON (July 6, 1789), *reprinted in* 3 THE PAPERS OF GEORGE WASHINGTON 123, 123–28 (W.W. Abbot ed., 1989) [hereinafter 3 WASHINGTON PAPERS]; LETTERS FROM HENRY KNOX TO GEORGE WASHINGTON (July 7, 1789), *reprinted in* 3 WASHINGTON PAPERS, *supra*, at 134–45.

<sup>112</sup> LETTERS FROM HENRY KNOX TO GEORGE WASHINGTON (July 7, 1789), *supra* note 111, at 134–41 (emphasis added).

<sup>113</sup> *Id.*

<sup>114</sup> See Ablavsky, *supra* note 21, at 1043–45.

<sup>115</sup> 1 ANNALS OF CONG. 67 (1789) (Joseph Gales ed., 1834); *id.* at 69–70; see also PULS, *supra* note 110, at 205.

<sup>116</sup> PULS, *supra* note 110, at 205.

negotiated, and signed by such officers, as final and conclusive untill ratified by the sovereign or government from whom they derive their powers. [T]his practice has been adopted by the United States, respecting their treaties with european nations; and I am inclined to think it would be adviseable to observe it in the conduct of our treaties with the Indians: for tho' such Treaties, being on their part made by their chiefs or rulers, need not be ratified by them, yet being formed on our part by the agency of subordinate officers, it seems to be both prudent and reasonable, that their acts should not be binding on the nation untill approved and ratified by the government. It strikes me that this point should be well considered and settled, so that our national proceedings in this respect may become uniform, and be directed by fixed and stable principles.<sup>117</sup>

The Senate consented to President Washington's request, and their "advice" came in the exact form Knox had anticipated: an Indian Trade and Intercourse Act passed in the summer of 1790, reflecting in modified format the "trade and affairs" language of the Articles.<sup>118</sup> As a temporary act, it was reinstated in 1793,<sup>119</sup> 1796,<sup>120</sup> and 1799,<sup>121</sup> with permanent versions enacted in 1802 and 1834.<sup>122</sup> Acting through what the Senate considered as part of its executive powers under the Advice and Consent Clause,<sup>123</sup> these early Congresses effectuated a legislative sleight of hand that skirted any contemporary textual qualms later raised by Justice Breyer in *Lara*—that the treaty power was lodged in the executive and that implementing legislation should follow ratification.<sup>124</sup> Perhaps viewed as enacting legislation of the preconstitutional treaties, they incorporated language from the Hopewell Treaties<sup>125</sup> into the initial 1790 legislation,

---

<sup>117</sup> *From George Washington to the United States Senate (Sep. 17, 1789)*, FOUNDERS ONLINE, <https://perma.cc/A4P9-P8EN>.

<sup>118</sup> Act of July 22, 1790, ch. 33, 1 Stat. 137.

<sup>119</sup> Act of Mar. 1, 1793, ch. 19, 1 Stat. 329.

<sup>120</sup> Act of May 19, 1796, ch. 30, 1 Stat. 469.

<sup>121</sup> Act of Mar. 3, 1799, ch. 46, 1 Stat. 743.

<sup>122</sup> Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; Act of June 30, 1834, ch. 161, 4 Stat. 729.

<sup>123</sup> U.S. CONST. art. II, § 2, cl. 2. Throughout the First Congress, the Senate referred to the process of responding to President Washington's frequent queries soliciting their advice and appropriations on tribal matters as "Executive business." *E.g.*, 1 ANNALS OF CONG., *supra* note 115, at 69.

<sup>124</sup> *See Lara*, 541 U.S. at 201 (quoting *Missouri v. Holland*, 252 U.S. 416 (1920)).

<sup>125</sup> *Supra* note 82 and accompanying text.

albeit applying it to all tribes rather than just the Cherokee and other southern tribes.<sup>126</sup>

Although the executive continued to treat with tribes,<sup>127</sup> the Trade and Intercourse Acts set a precedent of Congress legislating outside the scope of treaty negotiations, passing, in 1817 and again in 1819, acts decoupled from treaties regulating all Native Nations.<sup>128</sup> The approach was also blessed by Chief Justice Marshall in *Worcester v. Georgia*:<sup>129</sup> “From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate.”<sup>130</sup> Chief Justice Marshall’s majority opinion reinforced the gloss that Congress had a concomitant legislative treaty power to match the president’s executive treaty power:

[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.<sup>131</sup>

---

<sup>126</sup> TREATY WITH THE CHEROKEE (Nov. 28, 1785), *reprinted in* 2 INDIAN AFFAIRS: LAWS AND TREATIES 8, 8–11 (Charles J. Kappler ed., 1904) [hereinafter 2 INDIAN AFFAIRS].

<sup>127</sup> *See generally id.*

<sup>128</sup> *See generally, e.g.*, Act of Mar. 3, 1817, ch. 43, 3 Stat. 363 (authorizing continuation of a 1811 statute establishing trading houses with Indian tribes); Act of Mar. 3, 1817, ch. 92, 3 Stat. 383 (authorizing federal courts to try persons, including Natives, for crimes punishable by death committed in Native territory); Act of Mar. 3, 1817, ch. 104, 3 Stat. 393 (appropriating funds for carrying into effect treaties with various tribes); Act of Feb. 20, 1819, ch. 28, 3 Stat. 484 (authorizing the president to purchase lands from the Creek nation); Act of Mar. 3, 1819, ch. 85, 3 Stat. 516 (authorizing the president to employ instructors to teach Natives reading, writing, arithmetic, and agricultural techniques and appropriating funds for this purpose); Act of Mar. 3, 1819, ch. 87, 3 Stat. 517 (appropriating funds for carrying into effect treaties with various tribes).

<sup>129</sup> 31 U.S. (6 Pet.) 515 (1832).

<sup>130</sup> *Id.* at 556–57. *Worcester*, along with *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 567 (1823), and *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 22 (1831), was one part of the “Marshall Trilogy” of early Native American cases wherein Chief Justice Marshall upheld the Washington administration’s interpretation of Indian affairs by recognizing the “doctrine of discovery,” empowering the United States to exclude European sovereigns from acquiring Native lands without disturbing aboriginal title, and that the Constitution governed the relationship between the United States and Native Nations. *Blackhawk*, *supra* note 26, at 1801, 1809.

<sup>131</sup> *Worcester*, 31 U.S. (6 Pet.) at 559 (emphasis in original).

Chief Justice Marshall's decision proved durable. No new major legislation was enacted regarding Indian affairs until 1874,<sup>132</sup> and the executive branch negotiated 348 treaties with Indian Tribes through 1868.<sup>133</sup> Yet during Reconstruction, in 1871, Congress, through a House appropriations bill, annulled the president's ability to treat with Native tribes, stripping them of Knox's recognition as "independent nation[s]" and therefore deeming them unfit parties "with whom the United States may [not] contract by treaty."<sup>134</sup> Thus ended the Knox-Washington-congressional pact regarding Indian affairs and the intratextual approach subscribed to by Ablavsky.

One problem with Ablavsky's holistic approach is his allusion to the Property Clause grounding the Washington administration's assertion of power to treat with the Natives, implicitly empowering further administrations (and Congresses) to do likewise.<sup>135</sup> Professor Saikrishna Prakash points to the practical impossibility of current Congresses regulating Indian affairs under this justification, in that the federal government owned only 0.7% of tribal land as of 2004.<sup>136</sup> Indeed, even when tribes did occupy expansive tracts of U.S. territories, an antebellum Congress rejected an attempt to confederate tribal governments and subject them to a federally appointed governor under a Western Territory bill.<sup>137</sup>

Prakash, like Ablavsky, also looks beyond the Commerce Clause for other textual sources from which to derive power over Natives, but unlike Ablavsky, he finds the sum of the parts to be less than the whole. Prakash concludes that no part of the Constitution provides *per se* plenary power, but that tribes must be treated with individually, based on consummated treaties, tribal composition, and location.<sup>138</sup>

---

<sup>132</sup> See THE REVISED STATUTES, *reprinted in* 1 INDIAN AFFAIRS: LAWS AND TREATIES 1–22 (Charles J. Kappler ed., 1904). The 1832 Law establishing the Commission of Indian Affairs was amended in minor ways by the Act of Feb. 27, 1851, ch. 14, 9 Stat. 574; Act of Mar. 3, 1863, ch. 92, § 9, 12 Stat. 765, 767; Act of Apr. 8, 1864, ch. 48 13 Stat. 39; Act of July 28, 1866, ch. 299, § 6, 14 Stat. 333, 333; and Act of Mar. 2, 1867, ch. 173, § 3, 14 Stat. 492, 492.

<sup>133</sup> See *generally* 2 INDIAN AFFAIRS, *supra* note 126.

<sup>134</sup> 25 U.S.C. § 71 (originally enacted as Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566); see also Speed, *supra* note 24, at 471 n.31.

<sup>135</sup> Ablavsky, *supra* note 21, at 1067.

<sup>136</sup> Prakash, *supra* note 22, at 1093–94.

<sup>137</sup> 10 REG. DEB. 4779 (1834).

<sup>138</sup> See Prakash, *supra* note 22, at 1072 ("To assess whether tribal differences are relevant to the scope of federal power, we must examine the various treaties and landholding



### C. Originalists and Semantics

In contrast to the pragmatist or holistic viewpoint, liberal originalists home in on the Indian Commerce Clause to find justification for plenary power. Professor Akhil Amar looks to draft language from the Committee of Detail, the first Indian Trade and Intercourse Act passed in 1790, contemporary texts, and broad dictionary definitions to surmise that the original understanding of commerce as it pertained to Indians (and interstate and international transactions) was broad enough to encompass “all forms of intercourse in the affairs of life.”<sup>139</sup> Professor Jack Balkin expands on this theme and highlights an amendment to the Virginia Plan submitted to the Committee of Detail—authorizing Congress to “legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent”—as a guiding principle in interpreting all Commerce Clause subparts broadly.<sup>140</sup> This Amar-Balkin interpretation squares with the Supreme Court’s holding in *Cotton Petroleum Corp. v. New Mexico*,<sup>141</sup> quoted by Justice Breyer in *Lara*, that “the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.”<sup>142</sup> However, this view is at odds with *Kagama*, wherein the Court found such a broad reading “strained,”<sup>143</sup> and whether implicitly conceding the point or not,

---

patterns of Indian tribes. After some tough slogging, it will become clear that the federal government likely has plenary power over some tribes and not others.”)

<sup>139</sup> AMAR, *supra* note 23, at 107–08, 542 n.16; cf. Akhil Reed Amar, *America’s Constitution and the Yale School of Constitutional Interpretation*, 115 YALE L.J. 1997, 2004 n.25 (2006) (arguing that narrow originalist interpretations of the Indian Commerce Clause are incompatible with the Indian Intercourse Act of 1790, which regulated noneconomic interactions with Natives).

<sup>140</sup> BALKIN, *supra* note 23, at 13, 144; Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 9–13, 24–25 (2010) (describing the implementation of an amendment into Resolution VI and then arguing for a broad reading of “commerce”). In *Living Originalism*, Balkin calls this emendation the Bedford Amendment. As incorporated into the Virginia Plan’s Resolution VI, the amended text read:

That the Legislature of the United States ought to possess the legislative Rights vested in Congress by the Confederation; and moreover to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.

COMMITTEE OF DETAIL DOCUMENT I, *reprinted in* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 129, 131–32 (Max Farrand ed., 1911) [hereinafter 2 FARRAND].

<sup>141</sup> 490 U.S. 163 (1989).

<sup>142</sup> *Id.* at 192; *Lara*, 541 U.S. at 200.

<sup>143</sup> *Kagama*, 118 U.S. at 378–79.

the *Lara* Court's decision seems to stand for the proposition that justifying full Indian affairs powers requires something more than just the Indian Commerce Clause.<sup>144</sup>

Other originalist scholars are not so permissive. Basing their interpretation largely on linguistics and on Professor Randy Barnett's comprehensive word study from contemporary texts, most other originalist scholars interpret commerce as synonymous with trade, and, with Justice Thomas, believe plenary power exercised over Native tribes by means of the Indian Commerce Clause to be illegitimate.<sup>145</sup> One study deals with the many iterations of the Indian Trade and Intercourse Acts and interprets each provision as falling short of recognizing a general plenary power over internal tribal relations.<sup>146</sup>

#### D. Field Preemption

Ablavsky's holistic and extraconstitutional approach leads him to conclude that federal power over Indian affairs precludes state action in this area.<sup>147</sup> This argument draws upon Professor Robert Clinton's extensive treatment of Indian Affairs history in *The Dormant Indian Commerce Clause*.<sup>148</sup> There, Clinton details the balance of power first between the British Crown and the colonials, and then between the Confederation Congress and the states. He asserts that after two centuries of controversy, a consensus arose in favor of plenary power and therefore national

---

<sup>144</sup> *Lara*, 541 U.S. at 200–01 (reasoning that the Indian Commerce Clause, in conjunction with history of the treaty power, authorizes Congress's plenary power).

<sup>145</sup> See BARNETT, *supra* note 24, at 281–97 (“So synonymous was ‘commerce’ with ‘trade’ that William Grayson worried that ‘the whole of commerce of the United States may be exclusively carried on by merchants residing within the seat of government.’”); Prakash, *supra* note 22, at 1088–89 (“[D]uring the Founding era, ‘commerce’ was a synonym for trade and did not encompass all gainful activity.”); Natelson, *supra* note 24, at 215–16 (performing an independent word study in eighteenth-century databases revealing that “commerce with Indian tribes” “almost invariably meant ‘trade with Indians’ and nothing more”); Clinton, *supra* note 24, at 115–16 (“[T]here is no acceptable, historically-derived, textual constitutional explanation for the exercise of any federal authority over Indian tribes without their consent manifested through treaty. . . . Consequently, neither Congress nor the federal courts legitimately can unilaterally adopt binding legal principles for the tribes without their consent.”).

<sup>146</sup> See Speed, *supra* note 24, at 467, 485 (“[T]he modern Court has reconnected the plenary power doctrine to the Constitution. These modern connections, however, are tenuous at best and disingenuous at worst.”); cf. Ablavsky, *supra* note 21, at 1043 (reading the criminal provisions of the Trade and Intercourse Act of 1790 as evidence of an expansive meaning).

<sup>147</sup> Ablavsky, *supra* note 22, at 1050–51.

<sup>148</sup> See *id.* at 1037.

supremacy over Indian Affairs in the immediate prelude to the Constitutional Convention that is reflected in the Constitution's text preempting state relations with Native Nations.<sup>149</sup> Indeed, Clinton focuses upon the primary point of concern for colonies-cum-states when it came to dealing with tribes as reflected in the confused text of the Articles of Confederation.<sup>150</sup> That nascent constitution recognized "sole and exclusive" power over Indian trade and affairs with two exceptions that seemed to swallow the rule: Natives who were "members" of the various states were excepted and the whole power was subject to the "legislative right[s]" of the individual states.<sup>151</sup> Indeed, Madison discussed the Article's befuddlement in *Federalist 42*, which "subvert[ed] a mathematical axiom, by taking away a part, and letting the whole remain."<sup>152</sup> The Confederation Congress was plagued by the controversy, and parallel vague language appeared in the 1786 Ordinance governing Indian affairs.<sup>153</sup>

The controversy was even more animated out-of-doors. Just as colonies rebuffed royal efforts to consolidate power over Indian affairs between 1720 and 1776,<sup>154</sup> states pushed back or wholly ignored asserted federal preeminence. In detailing the history of New York's independent relations with Native Nations, Abraham Yates, Jr.,<sup>155</sup> complained bitterly of the encroachment the federal Constitution imposed on state power to treat with Natives as New York had done at Fort Stanwix prior to the federal treaty conference with the Six Nations in 1784 and during the many previous decades.<sup>156</sup> Yates headed the local Indian affairs committee in Albany during the Revolution and personally treated with Native tribes in 1775.<sup>157</sup> After quoting Article XXXVII of

<sup>149</sup> See generally Clinton, *supra* note 43.

<sup>150</sup> *Id.* at 1103.

<sup>151</sup> ARTICLES OF CONFEDERATION of 1781, art. IX, ¶ 4.

<sup>152</sup> THE FEDERALIST NO. 42, at 269 (James Madison) (Clinton Rossiter ed., 1961).

<sup>153</sup> AN ORDINANCE FOR THE REGULATION OF INDIAN AFFAIRS (Aug. 7, 1786), *reprinted in* 31 J.C.C., *supra* note 86, at 490, 490.

<sup>154</sup> See Clinton, *supra* note 43, at 1096–97.

<sup>155</sup> Professor Robert Natelson incorrectly attributes authorship to Robert Yates, who boycotted the Convention early on, Natelson, *supra* note 24, at 247–48, as does Clinton, *supra* note 43, at 1160. Ablavsky corrects this error. Ablavsky, *supra* note 21, at 1023 n.48 (citing Sydney, TO THE CITIZENS OF THE STATE OF NEW-YORK (June 13–14, 1788), *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1153, 1156–67 (John P. Kaminski et al. eds., 2004)).

<sup>156</sup> Clinton, *supra* note 43, at 1116.

<sup>157</sup> CONFERENCE WITH THE SIX NATIONS AT ALBANY (1775), *reprinted in* 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 68, at 8, 26, 561 & n.52 ("Abraham Yates, Jr. (1724–1796) was chairman of the Albany committee [on Indian affairs] and an active

the New York Constitution, which provided that “no purchases or contracts for the sale of lands . . . with or of the Indians, within the limits of this State, shall be binding on the said Indians, or deemed valid, unless made under the authority and with the consent of the legislature of this state,”<sup>158</sup> Yates condemns “the measures taken by Congress respecting the Indian affairs in this state” as violative of the quoted provision of the New York Constitution and the Articles relating to Indian affairs.<sup>159</sup> Yates goes on to note the long history of New York individually treating with the “five nations” since 1664, and even earlier “whilst it was called New-Nederland under the Dutch” before quoting the language in the Articles that pertained to Indians “not members of any of the states” and listing grievances with treaties and the 1786 statute outlined above entered by Congress.<sup>160</sup>

Georgia had been particularly aggressive about abrogating the Hopewell Treaties, electing instead to treat separately with the Natives, ceding land to themselves, encouraging settlement on lands allotted to tribes by federal commissioners, bringing the state to the brink of war with the Creeks on the eve of the Constitutional Convention, and unilaterally declaring war at its close in September 1787.<sup>161</sup> The situation in North Carolina trailed close behind: in 1787, Henry Knox reported to Congress that unprovoked Anglo-American settlers seizing Native lands had attacked the Cherokees in that state.<sup>162</sup> Virginia, where speculators laid claim to vast tracts of privately purchased Native lands,<sup>163</sup> was not quite so aggressive when altercations over land broke out in its Kentucky regions, seeking the assistance of Congress before raising troops sufficient to launch their own attack.<sup>164</sup> Congress later ratified the conduct and sent reinforcements.<sup>165</sup>

---

member of New York’s revolutionary committees and conventions. He was a lawyer and state senator, and, from 1790 to 1796, he was mayor of Albany.”)

<sup>158</sup> N.Y. CONST. of 1777, art. XXXVII.

<sup>159</sup> Sydney, TO THE CITIZENS OF THE STATE OF NEW-YORK (June 13–14, 1788), reprinted in 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 155, at 1153, 1156.

<sup>160</sup> *Id.* at 1157.

<sup>161</sup> Clinton, *supra* note 43, at 1129–33.

<sup>162</sup> REPORT OF SECRETARY AT WAR ON LETTER OF COLONEL J. MARTIN (July 18, 1788), reprinted in 34 JOURNALS OF THE CONTINENTAL CONGRESS 342, 342–45 (Roscoe R. Hill ed., 1937).

<sup>163</sup> Peter Onuf, *Toward Federalism: Virginia, Congress, and the Western Lands*, 34 WM. & MARY Q. 353, 366–67, 370–73 (1977).

<sup>164</sup> Clinton, *supra* note 43, at 1125–27.

<sup>165</sup> *Id.* at 1126.

Pennsylvania also sought to treat with their western tribes in repaying veteran war debts with land, but first sought congressional approval, and respectfully demurred when its request was rebuffed.<sup>166</sup> Although Clinton's treatment of this history and that of the Convention in dealing with the Articles' states' rights language detailed below<sup>167</sup> is quite nuanced and careful, he unsatisfactorily brushes over the textual history (at times with confused sequencing) of, and the discrepancies between, Indian commerce and affairs. In so doing, he prematurely concludes that the Indian Commerce Clause "obviously was intended to accomplish the objectives" of the Indian affairs text proposed by Madison (but not adopted) late in the Convention, supporting congressional plenary power and therefore federal preemption.<sup>168</sup>

In contrast, Justice Thomas, relying on Professor Robert Natelson, reads concurrent state powers over all Native American relations outside of trade into the Indian Commerce Clause.<sup>169</sup> For support, Justice Thomas and Natelson point to the many state attempts both before and after the Constitution to manage tribal relations.<sup>170</sup> As will be seen, while states generally recognized Congress's power over treaties of war and peace, several tested the Articles to see how far Congress's power to treat with Natives over land claims extended. Virginia attempted to condition the cessation of their western lands on the abdication of any other claims to the land via Native purchase.<sup>171</sup> To this, Congress said such prejudgment would be "improper."<sup>172</sup> Pennsylvania requested time and again that Congress recognize their ability to treat with the Natives regarding land purchases "on their borders."<sup>173</sup> As many times as it importuned, Pennsylvania's

---

<sup>166</sup> *Id.* at 1108–11.

<sup>167</sup> *Infra* notes 278–299 and accompanying text.

<sup>168</sup> Clinton, *supra* note 43, at 1153.

<sup>169</sup> *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 658–65 (2013) (Thomas, J., concurring); Natelson, *supra* note 24, at 215–18.

<sup>170</sup> *Adoptive Couple*, 570 U.S. at 660–61 (Thomas, J., concurring); Natelson, *supra* note 24, at 223–25, 265.

<sup>171</sup> REPORT ON THE CESSION OF TERRITORY BY THE VIRGINIA LEGISLATURE (June 4, 1783), reprinted in 24 JOURNALS OF THE CONTINENTAL CONGRESS 381, 381 (Gaillard Hunt ed., 1922) [hereinafter 24 J.C.C.]; REPORT DETAILING CONDITIONS ON THE CESSION OF TERRITORY BY THE VIRGINIA LEGISLATURE (Sept. 13, 1783), reprinted in 25 J.C.C., *supra* note 78, at 559, 561–62.

<sup>172</sup> REPORT DETAILING CONDITIONS ON THE CESSION OF TERRITORY BY THE VIRGINIA LEGISLATURE, *supra* note 171, at 562–63.

<sup>173</sup> REPORT ON A CONFERENCE BETWEEN PENNSYLVANIA AND INDIANS (Sept. 20, 1783), reprinted in 25 J.C.C., *supra* note 78, at 591, 595–96; VOTE ON PENNSYLVANIA'S REQUEST TO TREAT FOR PURCHASE OF INDIAN LANDS (Oct. 22, 1783), reprinted in 25

entreaties were rebuffed.<sup>174</sup> New York also attempted to have Congress confirm its western land conveyances to soldiers in lieu of pay, unless such seemed to “irritate the Indians,” but in this it, too, was denied.<sup>175</sup> North Carolina took greater advantage of the distance from Congress and actually treated separately with the Natives over land within its contested borders without asking for congressional permission,<sup>176</sup> as did Georgia.<sup>177</sup> Thus while it is true that states attempted to take advantage of the Articles’ ambiguous language, these attempts were met with varying degrees of success, and therefore Justice Thomas and Natelson’s historical conclusions are not necessarily warranted.<sup>178</sup>

In another seminal article, *The Savage Constitution*, Ablavsky answers Clinton’s narrative identifying two competing national solutions to the federal-state contest as reflected in the Constitution: a paternalistic but diplomatic approach as executed by President Washington and an aggressive military solution expunging “savages” from coveted lands which eventually won the day under President Andrew Jackson.<sup>179</sup> Professor Maggie Blackhawk accepts Ablavsky’s telling of history in building out an alternative public law paradigm.<sup>180</sup> She categorizes those events that

---

J.C.C., *supra* note 78, at 717, 717–18; RECONSIDERATION OF PENNSYLVANIA’S REQUEST TO TREAT FOR PURCHASE OF INDIAN LANDS (Oct. 30, 1783), *reprinted in* 25 J.C.C., *supra* note 78, at 760, 762–64.

<sup>174</sup> REPORT ON A CONFERENCE BETWEEN PENNSYLVANIA AND INDIANS, *supra* note 173, at 592, 596; VOTE ON PENNSYLVANIA’S REQUEST TO TREAT FOR PURCHASE OF INDIAN LANDS, *supra* note 173, at 718–19; RECONSIDERATION OF PENNSYLVANIA’S REQUEST TO TREAT FOR PURCHASE OF INDIAN LANDS, *supra* note 173, at 762–64. Finally, Congress approved that the Indian affairs commissioners appointed by *Congress* should represent the interests of Pennsylvania on October 30, 1783. RECONSIDERATION OF PENNSYLVANIA’S REQUEST TO TREAT FOR PURCHASE OF INDIAN LANDS, *supra* note 173, at 764–65.

<sup>175</sup> DEBATES ON NEW YORK’S RELATIONS WITH THE INDIANS (Oct. 3, 1783), *reprinted in* 25 J.C.C., *supra* note 78, at 639, 642–43.

<sup>176</sup> REPORT ON INDIAN AFFAIRS IN THE SOUTHERN DEPARTMENT (Aug. 3, 1787), *reprinted in* 33 J.C.C., *supra* note 89, at 455, 457; *see also* FRANCIS G. HUTCHINS, *TRIBES AND THE AMERICAN CONSTITUTION* 55 (2000).

<sup>177</sup> TREATY BETWEEN THE CREEKS AND THE STATE OF GEORGIA (Nov. 12, 1785), *reprinted in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 17, 17 (Washington, Gales and Seaton 1832); *see also* REPORT OF THE COMMITTEE ON INDIAN AFFAIRS IN THE SOUTHERN DEPARTMENT, *supra* note 89, at 457.

<sup>178</sup> Among Natelson’s other historical errors, he claims that the Indian Commerce Clause preserved concurrent state power (when such was affirmatively rejected by the last Great Committee) and that Madison’s Indian affairs proposal was rejected by the entire Convention (when it was reviewed and amended only by the five-member Committee of Detail). *See infra* note 269 and accompanying text.

<sup>179</sup> Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1038–45 (2014).

<sup>180</sup> Blackhawk, *supra* note 26, at 1807–08.

play out the diplomatic vision of the “Savage Constitution”—such as recognition of native tribes as sovereign by Chief Justice Marshall and the empowerment of tribes to self-govern under the Indian Reorganization Act—in the canon,<sup>181</sup> and grounds “war powers doctrine [ ] in the Indian Wars” in the “anticanon.”<sup>182</sup>

Yet while the controversy between centralized and localized power to treat with Natives is important in understanding the broad arc of Indian affairs, it can also prove distracting. Focusing on the intense disputes over federal-state power to treat with tribes has distracted scholars away from the puzzle of the missing clause in their attempts to explain the incoherence of Native American law, pitting tribal sovereignty, unanimously recognized, against the majority position of congressional plenary power. As will be seen, it also distracted the Framers when attempting to fix the Committee of Detail’s oversight, and perhaps rendered them reluctant to address the initial scrivener’s error head-on.

\* \* \*

For all of the flailing, scholars are failing to pinpoint the true cause of confusion. Each Indian affairs scholar highlights certain periods of history to justify their philosophy and findings regarding plenary power, yet none has made sense of it as a whole and sought to explain its glaring inconsistencies. In contrast to the long prehistory of federal Indian affairs regulation and grant of explicit power via the Articles, no corollary power is found in any discrete text of the Constitution. Though the U.S. Constitution was ostensibly designed to enlarge and empower the new Congress, in this one unexplained instance,<sup>183</sup> the totality of federal powers shrank. No scholar has yet sought to synthesize and explain this historical puzzle.

Additionally, the efforts to find an alternative textual hook for plenary power and originalist backstepping demonstrate near consensus with the *Kagama* Court: situating plenary power in the Indian Commerce Clause strains credulity.<sup>184</sup> This strain

---

<sup>181</sup> *Id.* at 1863.

<sup>182</sup> *Id.* at 1829.

<sup>183</sup> The one exception that proves the rule of this statement is that Congress was stripped of its power to requisition the states for money, which proved highly unworkable under the Articles. See James Madison, *Vices of the Political System of the United States (April 1787)*, FOUNDERS ONLINE, <https://perma.cc/HWE7-XSP2>.

<sup>184</sup> *Kagama*, 118 U.S. at 378–79.

is exacerbated by the even higher stakes placed on the meaning of “commerce” in the interstate and international arenas. For, as Prakash has sought to demonstrate, the “presumption of intrasentence uniformity” means that the connotation of one portion of the Commerce Clause should translate into legal content for the other portions.<sup>185</sup> Here, if Indian commerce means Indian trade, applying the presumption would dictate that Congress could only regulate interstate and international trade, undermining entire swaths of federal regulation from *Gibbons v. Ogden*<sup>186</sup> to the present day.<sup>187</sup>

Resolution of the confused state of Indian affairs jurisprudence and federal policy regarding plenary power is clarified through a correct diagnosis of the historical puzzle. Although talented legal minds have talked around it, hinted at it, nudged it, and nearly bumped into it, none thus far has been able to recognize the true cause of woe bedeviling the practice and legal justification for federal plenary power. The historical lurching and disjuncture between practice and text (and the ensuing two centuries of confusion) stems from a simple, significant oversight made in the bowels of the Constitutional Convention’s Committee of Detail, to which this Article now turns.

## II. THE MISSING CLAUSE

Indian affairs should be a congressional power listed separately in Article I, § 8 of the Constitution. Though both Indian affairs and trade had long preconstitutional pedigrees and were unanimously required for inclusion by the Convention, the Committee of Detail left them out by mistake, and the Convention thereafter deigned to restore only the power over Indian trade by inserting tribes in the Commerce Clause, but this time intentionally determined to omit the Indian affairs power. The initial erratum came about through the misfeasance of more than one hand. Initially, Virginia Governor Edmund Randolph erroneously left out the clause in his sketch of the Constitution.<sup>188</sup>

---

<sup>185</sup> See generally Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149 (2003); see also Speed, *supra* note 24, at 485–90 (applying a limited reading of the Indian Commerce Clause to the Interstate Commerce Clause).

<sup>186</sup> 22 U.S. (9 Wheat.) 1 (1824).

<sup>187</sup> *Id.* at 189–90 (interpreting the Commerce Clause for the first time and holding that it embraces trade, intercourse, and navigation).

<sup>188</sup> See *infra* figs.1–2 (images of page 5 of Randolph’s sketch).



Thereafter, Committee of Detail Chair and South Carolinian John Rutledge scrawled “Indian Affairs” into the margin of Randolph’s sketch before James Wilson was tasked with producing a completed draft. The conscientious Wilson checked off the power as was his habit when working through elements of draft documents,<sup>189</sup> but simply missed including “Indian Affairs” in his final draft of the Constitution.<sup>190</sup>

Until now, no historian has caught the omission. The reasons are many, but, in part, the omission has eluded historians because Wilson’s check marks were inappropriately attributed to Rutledge until 2011,<sup>191</sup> and published transcriptions of the document excluded the check marks until that time.<sup>192</sup> Even then, binding tape on the left side of the paper obscured the particular check marks next to “Indian Affairs.”<sup>193</sup> It was only in preparation for this Article that William Meigs’s facsimile of Randolph’s sketch (produced in 1899 before binding tape was added), compared to 2019 forensic imaging by the Library of Congress of the page on which Rutledge’s “Indian Affairs” appears, confirmed that Wilson checked off this congressional power as he did other powers.<sup>194</sup> As newly published, analyzed, and demonstrated below, Rutledge’s marginalia was not a “proposal” or “suggestion” affirmatively rejected by the Committee of

---

<sup>189</sup> William Ewald & Lorianne Updike Toler, *Committee of Detail Documents*, 135 PA. MAG. HIST. & BIOGRAPHY 239, 263, 272–73 (2011); William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197, 217 n.51 (2012). That the check marks are Wilson’s can be ascertained by reviewing several other Wilson papers at the Historical Society of Pennsylvania. Specifically, identical check marks can be found in Volume 2 of the Wilson Papers. See generally *Wilson Papers v.2*, Historical Society of Pennsylvania (on file with author).

<sup>190</sup> See COMMITTEE OF DETAIL DOCUMENT IX, reprinted in 2 FARRAND, *supra* note 140, at 163, 163–75; Ewald & Updike Toler, *supra* note 189, at 321–65.

<sup>191</sup> Ewald & Updike Toler, *supra* note 189, at 263, 272–73; cf. COMMITTEE OF DETAIL DOCUMENT IV, reprinted in 2 FARRAND, *supra* note 140, at 137, 137 n.6 (failing to mention the check marks, only noting that the document “is in the handwriting of Edmund Randolph with emendations by John Rutledge”). A facsimile of the Randolph sketch was published by William Meigs in 1899, Scans I–IX, in WILLIAM M. MEIGS, *GROWTH OF THE CONSTITUTION* (Philadelphia, J.B. Lippincott Company 1899), following p.316, but this publication was quickly overshadowed by the publication of Professor Max Farrand’s comprehensive transcriptions of Convention documents in 1911, which excluded the check marks in his transcription and notes.

<sup>192</sup> Ewald & Updike Toler, *supra* note 189, at 263–85.

<sup>193</sup> *Id.* at 272–73; cf. *infra* figs.1–2 (image of page 5 of Randolph’s sketch).

<sup>194</sup> Scan V, in MEIGS, *supra* note 191, following p.316.

Detail,<sup>195</sup> but a command that was inadvertently missed by Wilson, who was personally motivated to comply with the directive.<sup>196</sup>

Later, when flagged by Madison, the Committee of Detail determined, now fully cognizant of the oversight, to reinstate the power over Indian trade by inserting tribes into the Commerce Clause.<sup>197</sup> However, this time the Committee intentionally omitted the Indian Affairs Clause, likely because of several factors—the lateness of the hour, the contentiousness of the underlying issues, and new reports of border skirmishes. The Committee punted, leaving it to later generations to work out the nettlesome issue as it did with the slavery question. The missing clause was never addressed by the Convention as a whole, and was passed over by the ratifiers.

#### A. Committee of Detail Documents

The Committee of Detail's formation was the point in the Convention when political machinations transformed into a first working draft of the Constitution.<sup>198</sup> The carefully selected five-member committee was tasked with adding “details” to the Convention's work up to that point: twenty-four rough resolutions based on the Virginia Plan.<sup>199</sup> For this, the Convention halted for ten days between July 26 and August 6, 1787.<sup>200</sup> There are nine extant documents from the Committee of Detail, eight of which appear in James Wilson's hand, and one in Virginia Governor Edmund Randolph's hand.<sup>201</sup> As discussed above, while a facsimile of the document in Randolph's hand was published in 1899 by William Meigs,<sup>202</sup> the entire collection of documents was not transcribed and published until 1911 by Professor Max Farrand and retranscribed by myself and Professor William Ewald (and published together with document images) in 2011.<sup>203</sup>

---

<sup>195</sup> Natelson, *supra* note 24, at 236 (“During committee deliberations, Rutledge suggested incorporating an Indian affairs power. . . . The panel's failure to include [an Indian Affairs Clause] may have been an oversight, although this seems unlikely because of the Rutledge proposal.”).

<sup>196</sup> *See infra* Part II.B.3.

<sup>197</sup> *See infra* Part II.C.

<sup>198</sup> *See generally* Ewald & Updike Toler, *supra* note 189; Ewald, *supra* note 189.

<sup>199</sup> COMMITTEE OF DETAIL DOCUMENT I, *supra* note 140, at 129–37.

<sup>200</sup> Madison's Notes (July 26, 1787), reprinted in 2 FARRAND, *supra* note 140, at 116, 128.

<sup>201</sup> *See generally* Ewald & Updike Toler, *supra* note 189.

<sup>202</sup> Scans I–IX, MEIGS, *supra* note 191, following p.316.

<sup>203</sup> *See generally* Ewald & Updike Toler, *supra* note 189.

Two early Committee of Detail documents refer to “Indian Affairs,” though it is implicated by at least two others. The first document in the set is James Wilson’s copy of the twenty-four amended Virginia Plan resolutions referred to the Committee on July 23, 1787.<sup>204</sup> Relevant to this inquiry is Resolution VI of the Virginia Plan as originally proposed by Edmund Randolph on the first day of the Convention’s substantive business, May 29, 1787.<sup>205</sup> It proposed “that the National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation.”<sup>206</sup> As anyone would have known (especially Convention delegates, many of whom had been or were concurrently serving in Congress<sup>207</sup>), these “Legislative Rights” under the Articles of Confederation included “regulating the trade and managing all affairs with the Indians” from Article IX, and thus required that both Indian trade and affairs appear in a draft text.<sup>208</sup> Though Resolution VI of the Virginia Plan was significantly amended on July 17,<sup>209</sup> this provision of the resolution remained uncontroversial, having passed unanimously without debate on July 16.<sup>210</sup> The language remained intact until the resolution was referred to the Committee of Detail on July 23, appearing as Resolution 8.2.<sup>211</sup>

The third document in the set appears to be James Wilson’s outline of the plan proposed by South Carolina delegate Charles Pinckney on May 29, 1787, the day the Virginia Plan was proposed.<sup>212</sup> Even though not discussed for over two months (or at all), it too was referred to the Committee of Detail with the Virginia resolutions (along with the Patterson Plan, a complete copy of which is not found among Wilson’s Papers).<sup>213</sup>

---

<sup>204</sup> Madison’s Notes (July 23, 1787), *reprinted in* 2 FARRAND, *supra* note 140, at 84, 95. Per motions from July 25, 1787, all Committee members were permitted to take down a copy of the resolutions (but no other Convention members). Madison’s Notes (July 25, 1787), *reprinted in* 2 FARRAND, *supra* note 140, at 108, 115.

<sup>205</sup> Madison’s Notes (May 29, 1787), *reprinted in* 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20, 21 (Max Farrand ed., 1911) [hereinafter 1 FARRAND].

<sup>206</sup> *Id.*

<sup>207</sup> *See supra* note 91 and accompanying text.

<sup>208</sup> ARTICLES OF CONFEDERATION OF 1781, art. IX, ¶ 4.

<sup>209</sup> Madison’s Notes (July 17, 1787), *reprinted in* 2 FARRAND, *supra* note 140, at 21, 25–27. For a discussion of amending the resolution, see BALKIN, *supra* note 23, at 144–45.

<sup>210</sup> Madison’s Notes (July 16, 1787), *reprinted in* 2 FARRAND, *supra* note 140, at 15, 16–17.

<sup>211</sup> COMMITTEE OF DETAIL DOCUMENT I, *supra* note 140, at 131.

<sup>212</sup> Ewald & Updike Toler, *supra* note 189, at 249.

<sup>213</sup> *Id.*; Madison’s Notes (July 26, 1787), *supra* note 200, at 128. Natelson asserts that the Committee “likely” had a copy of John Dickinson’s draft of a Constitution,

The document's brief listing of Congressional powers includes "the exclusive Power of regulating Trade and levying Imposts," without any mention of Indian affairs.<sup>214</sup>

The next document, Randolph's sketch of the Constitution,<sup>215</sup> is the second to cover Indian affairs within the series and the first wherein "Indian Affairs," without more, can be seen, scrawled in the margin by Rutledge, the Committee's chair,<sup>216</sup> next to the power to provide punishment for "offences against the law of nations."<sup>217</sup> Importantly, "Indian Affairs" does not seem connected to "Commerce" at this point of the drafting, which appears earlier on the page. To more effectively convey the workings of the Committee, three images follow of the page where "Indian Affairs" appears: Figure 1, a high-resolution image with the binding tape provided by the Library of Congress;<sup>218</sup> Figure 2, an image of Meigs's facsimile from 1899 without binding tape; and Figure 3, a transcription of the same.

---

Natelson, *supra* note 24, at 236, but as it was never proposed in Convention, it could not have been officially referred, as the Virginia, Patterson, and Pinckney Plans were. James Hutson transcribed and printed two Dickinson drafts in his bicentennial supplement to Farrand's *Records*. John Lansing, Notes on Debates, reprinted in SUPPLEMENT TO MAX FARRAND'S RECORDS OF THE FEDERAL CONVENTION OF 1787, at 82, 84–91 (James H. Hutson & Leonard Rapport eds., 1987) [hereinafter SUPPLEMENT].

<sup>214</sup> Ewald & Updike Toler, *supra* note 189, at 257.

<sup>215</sup> Although first called a "draft" by Meigs when he published the facsimile of the document in 1899, MEIGS, *supra* note 191, at 10, and more recently a "draft" by Ewald, *supra* note 189 at 220, I purposefully opt for the language of "sketch" over "draft" for the document in Randolph's hand. James Hutson, an early U.S. historian who served as chief of the Manuscript Division at the Library of Congress and in whose care this document was preserved for more than four decades, called the document a "Draft Sketch" when he included a transcript of it in his *Supplement*. SUPPLEMENT, *supra* note 213, at 183. Though nine pages in length and important for its innovations, it is not in prose format nor does it provide much text in draft format. Instead, it combines notes about what the text should contain and basic constitution-writing principles, along with lists and outlines for various sections of a constitution. A "draft" of a document is normally thought to be an early stage of a completed document, with language that can be edited, even heavily, but nevertheless used in some format in a final document. Such a document this is not. Important though it is, it is a first sketch of the Constitution, not a first draft.

<sup>216</sup> See Ewald & Updike Toler, *supra* note 189, at 263.

<sup>217</sup> *Id.* at 272–73.

<sup>218</sup> Image provided courtesy of the Manuscript Division, Library of Congress. George Mason's Papers, Misc. Letters, 1763–1791 (July 24–26, 1787), at 23d.

FIGURE 1

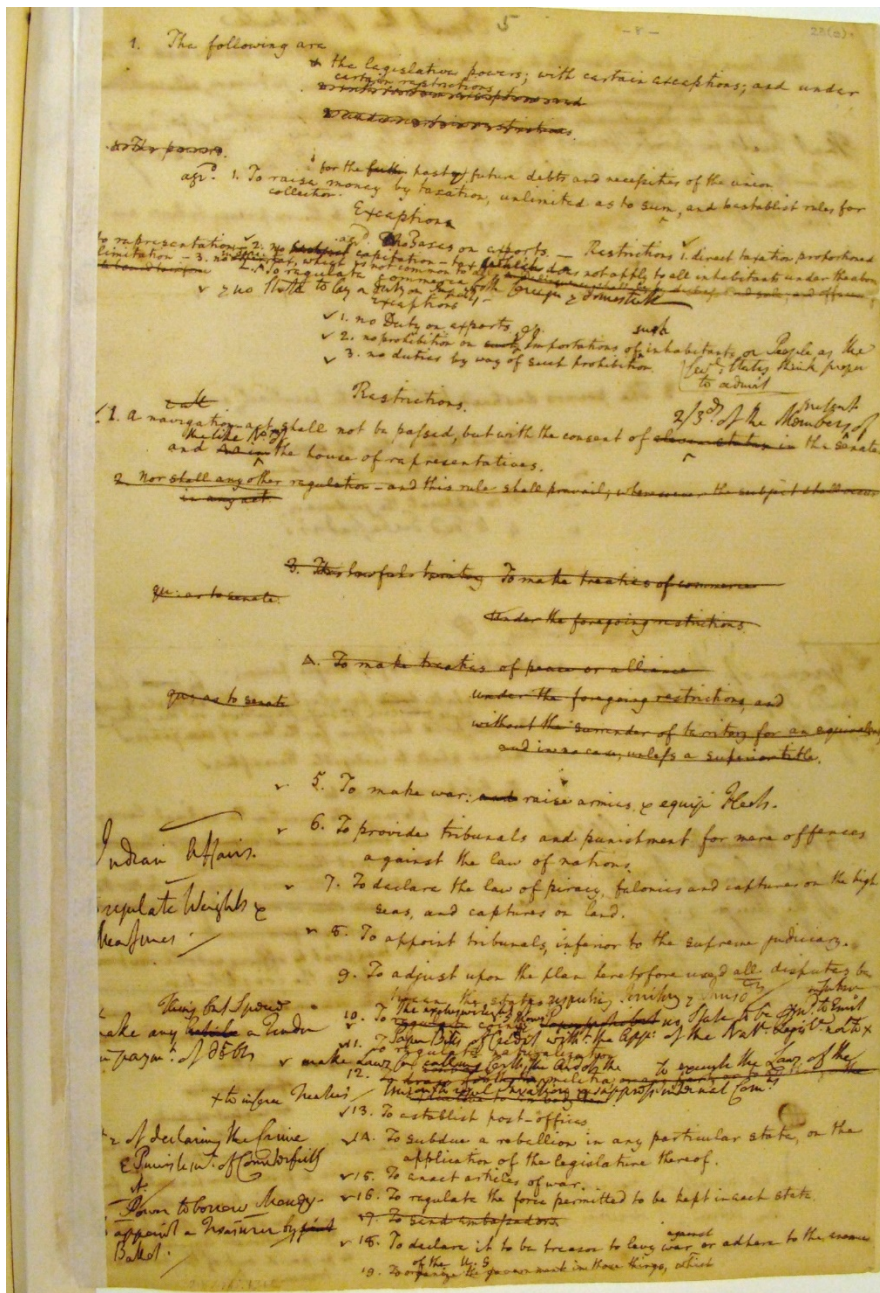
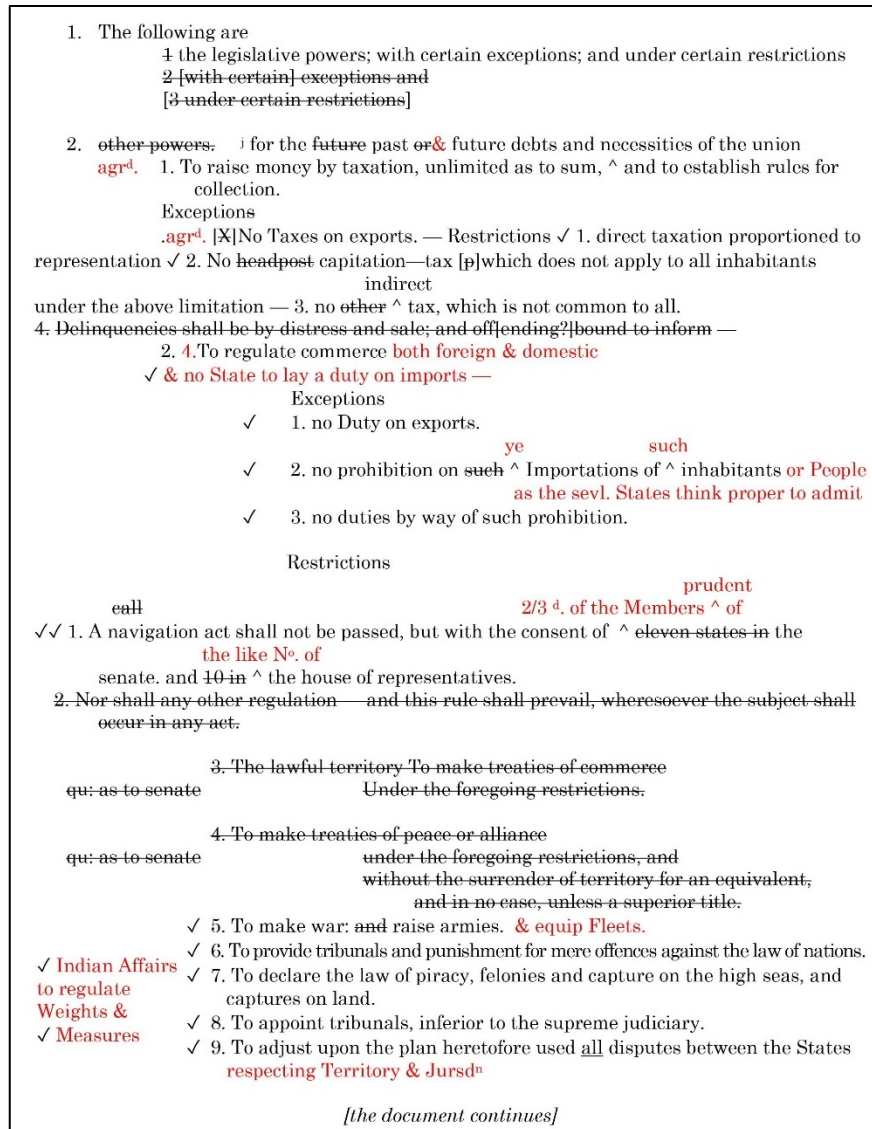






FIGURE 3<sup>219</sup>

<sup>219</sup> I note that this transcription as published in the *Pennsylvania Magazine of History and Biography's* 2011 special centenary edition of Farrand's *Records* was printed there without check marks next to "Indian Affairs" and "to Regulate the Weights & Measures," but comparison to the facsimile of the document published by Meigs in 1899 reveals that the check marks were indeed there, later hidden by binding tape as currently pictured in Figure 1. Ewald & Updike Toler, *supra* note 189, at 273; *cf.* Scan V, MEIGS, *supra* note 191, following p.316. The Conservation Department at the Library of Congress has taken forensic images and confirmed the existence of the check marks beneath the binding tape, and will remove the binding tape in time.

One can see here in the transcription the main text in Randolph's hand, emendations by Rutledge in red, and the check marks made by James Wilson as he later combed through the document in compiling his drafts.<sup>220</sup> We will come back to this working method later.

The next document where one would expect to find any of the two "Indian" powers is Wilson's first full draft of the Constitution. However, the folio page where all of the powers of Congress would have been mentioned is missing.<sup>221</sup> Whether this page was lost whilst the Committee of Detail sat or at a later stage when Wilson organized his papers, Wilson here substituted excerpts he copied from the Patterson and Pinckney Plans in place of the missing folio.<sup>222</sup> This inserted composite document proposes to provide Congress with the following powers:

[O]f raising a military Land. Force—of equipping a Navy—of rating and causing public Taxes to be levied—*of regulating the Trade of the several States as well with foreign Nations as with each other*—of levying Duties upon Imports and Exports—of establishing Post-Offices, and raising a Revenue from them—*of regulating Indian Affairs*—of coining Money—fixing the Standard of Weights and Measures—of determining in what Species of Money the public Treasury shall be supplied.<sup>223</sup>

As with Randolph's sketch plus Rutledge's marginal note, the nascent Commerce Clause with its three parts—states, foreign nations, and Indians—are here found in two separate clauses. Commerce is not even mentioned, but "trade" is specified in relation to states and foreign nations, and "affairs" as pertaining to Indians. It is important to note that this document

---

<sup>220</sup> Ewald & Updike Toler, *supra* note 189, at 263, 273.

<sup>221</sup> *Id.* at 295–303, 311–19. As noted above, the Historical Society of Pennsylvania, where Wilson's Committee of Detail documents reside, labeled this document "Wilson's First Draft of the Constitution" during conservation and preparation for bicentennial displays. See *supra* note 219.

<sup>222</sup> Lorianne Updike Toler, *Addendum*, 135 PA MAG. HIST. & BIOGRAPHY 367, 370–74 (2011) (tracing the provenance of the Wilson Papers in the possession of the Historical Society of Pennsylvania to determine how the current placement of the Committee of Detail came about and concluding that Wilson himself placed the documents in their current order, including and particularly Documents VI–VIII). Farrand also evidenced a belief that the ordering of the documents was intentional: in the explanatory note to Document VII, Farrand writes that Document VII was "placed" between Documents VI and VIII. COMMITTEE OF DETAIL DOCUMENT VII, *reprinted in* 2 FARRAND, *supra* note 140, at 157, 157.

<sup>223</sup> Ewald & Updike Toler, *supra* note 189, at 309 (emphasis added).



is not necessarily sequential, as it featured in earlier plans submitted to the Convention and was merely copied by Wilson.<sup>224</sup> When the middle portion of the draft document was lost, Wilson presumably placed the excerpts from the Patterson and Pinckney Plans there to show what he drew upon in creating the lost section of his draft.

Document IX, Wilson's second draft of the Constitution and the final document in the Committee of Detail series, looks most like our final Constitution and identifies congressional powers in more recognizable ways. Notably, Indian affairs was entirely left out of the document:

8

The Legislature of the United States shall have the ~~Right and~~ Power to lay and collect Taxes, Duties, ~~Imposts and Excises;~~ to regulate ~~Naturalization and~~ Commerce; <sup>^</sup> to coin Money; to regulate the ~~Alloy and~~ Value of Coin; to fix the Standard of Weights and Measures; to establish Post-Offices; to borrow Money, and emit Bills on the Credit of the United States; to appoint a Treasurer by Ballot; to constitute Tribunals inferior to the supreme ~~national~~ Court; to make Rules concerning Captures on Land or Water; to declare the Law and Punishment of Piracies and Felonies committed on the high Seas, and the ~~the~~ Punishment of counterfeiting <sup>^</sup> Coin, ~~and~~ <sup>of the U.S & —</sup> of Offences against the Law of Nations;

The text in black is in Wilson's hand, whereas the text in red is in Rutledge's. After incorporating all of the edits to the document, the draft was published for internal circulation and reported out of committee.<sup>225</sup> Though he caught the omission the first time, Rutledge missed it the second time around, and the draft Constitution submitted to the Convention did not include

<sup>224</sup> See *supra* note 222 and accompanying text.

<sup>225</sup> To view the final Committee of Detail report published for internal circulation, see Madison's Notes (Aug. 6, 1787), 2 FARRAND, *supra* note 140, at 177, 177–89.

“Indian Affairs” or “Indian Trade” as required by the Virginia Plan resolutions.

From these documents, we see that the Committee of Detail was compelled to incorporate Indian trade *and* Indian affairs as part of the “Legislative Rights vested in Congress by the Confederation.”<sup>226</sup> However, neither was included in the initial sketch of the Constitution by Randolph.<sup>227</sup> This was not Randolph’s only mistake: for instance, Randolph set the minimum age for senators as 25, though the Convention had approved a minimum age of 30.<sup>228</sup> As Ewald points out, this was clear error, as Randolph partook of the Aristotelian view that an ideal Senate would be “august,” and thus would have preferred the older minimum age as required by the Convention.<sup>229</sup> This error was later corrected,<sup>230</sup> as John Rutledge attempted to do for the “Indian Affairs” omission. Rutledge inserted “Indian Affairs” (and other missing congressional powers) into the margins of Randolph’s sketch.<sup>231</sup> Though it may have been included in the missing middle section of his first draft and lost even while working on it, Wilson then failed to include either “Indian Affairs” or “Indian Trade” in his final draft. Despite having Rutledge’s marginal note and the excerpts from the Patterson and Pinckney Plans to draw from (and the powers listed in the Articles of Confederation, which Resolution VI of the Virginia Plan required to be incorporated<sup>232</sup>) in writing his final draft, Wilson very clearly missed “Indian Affairs.”

#### B. Wilson’s Mistake

That such was a mistake and not an intentional omission is buttressed by three historical factors: (1) the remit, structure, and working method of the Committee of Detail, (2) Wilson’s check marks, and (3) Wilson’s personal history and interest in lodging power over Indian affairs in the central government. Each will be addressed in turn.

---

<sup>226</sup> Madison’s Notes (May 29, 1787), *supra* note 205, at 21; COMMITTEE OF DETAIL DOCUMENT I, *supra* note 140, at 131.

<sup>227</sup> See *supra* figs.1–2 (images of page 5 of Randolph’s sketch).

<sup>228</sup> Ewald, *supra* note 189, at 227 n.78.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> See Ewald & Updike Toler, *supra* note 189, at 263–85.

<sup>232</sup> See *supra* notes 205–07 and accompanying text.

1. Remit, structure, and working method of the Committee of Detail.

First, let us consider the charge, structure, and method of the Committee of Detail. As outlined above, the Committee of Detail was commissioned by the Convention to “prepare & report the Constitution,”<sup>233</sup> not from whole cloth, but from nine weeks’ worth of work, a period of time that had witnessed the near complete dissolution of the Convention and the country’s hope for a workable Constitution over both representation in the Senate and the slave question. The gridlock had finally been broken over representation on July 16, and thus the memory of the rancorous debate was still fresh in the minds of Committee members when they convened on July 26, just over a week later.<sup>234</sup> Indeed, on the eve of the Convention’s ten-day recess for the Committee of Detail’s work, Charles Cotesworth Pinckney “reminded the Convention that if the Committee should fail to insert some security to the Southern States agst. an emancipation of slaves, and taxes on exports, he shd. be bound by duty to his State to vote agst. their Report.”<sup>235</sup> They were not there to invent a constitution but, as the uncontroversial name of the Committee dictated, to provide “Detail.”<sup>236</sup> Their commission in the form of the twenty-four resolutions referred to them by the Convention was thus paramount. If they strayed too far, they knew that the risk of dissolution was all too real. Possibly the most uncontroversial requirement of the Convention was found in Resolution 8.2: the requirement to incorporate the congressional powers enjoyed under the Articles of Confederation, including the power over

---

<sup>233</sup> Madison’s Notes (July 26, 1787), *supra* note 200, at 128.

<sup>234</sup> Madison’s Notes (July 16, 1787), *supra* note 210, at 15–16. Emotions ran so high, and the large states were so aghast at the small states’ unexpected win, that, after the vote affording states equal representation in the Senate, when Edmund Randolph proposed to adjourn “that the large States might consider the steps proper to be taken in the present solemn crisis of the business, and that the small States might also deliberate on the means of conciliation,” William Patterson, from the small state of New Jersey, urged Randolph to “reduce to form his motion for an adjournment sine die,” disbanding the Convention. *Id.* at 17–18.

<sup>235</sup> Madison’s Notes (July 23, 1787), *supra* note 204, at 95 (citation omitted).

<sup>236</sup> See Washington’s Diary (July 27, 1787), *reprinted in* 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65, 65 (Max Farrand ed., 1911) [hereinafter 3 FARRAND]:

In Convention, which adjourned this day, to meet again on Monday the 6th. of August that a Comee. which had been appointed (consisting of 5 Members) might have time to arrange, and draw into method & form the several matters which had been agreed to by the Convention, as a Constitution for the United States.

Indian trade and affairs.<sup>237</sup> That it was uncontroversial made it no less important, though perhaps not as fresh in their minds as the vivid scenes of heated debate that threatened dissolution. Despite that they might personally disagree with one or more provisions (and did), Randolph or Wilson would not have intentionally disregarded such directives.<sup>238</sup>

The structure of the Committee and Wilson's relationship to the "Indian Affairs" marginalia's author also underscores his oversight. As mentioned above, the Committee was chaired by John Rutledge.<sup>239</sup> This is nowhere specified in the records of the Constitutional Convention, yet such attribution is based upon convention and common practice of the age.<sup>240</sup> As seen throughout the Journal of the Continental Congress, it was standard practice to list committee chairs first when they were chosen by voice vote, as Rutledge was, and then for these individuals to report for the committee, as Rutledge did.<sup>241</sup> Committee reports were usually in the hand of the chair,<sup>242</sup> and Rutledge's chairmanship is confirmed by edits in his hand upon documents authored by two members, Randolph and Wilson.<sup>243</sup> That Rutledge was the Committee's chair meant his edits and marginal notes carried special weight. The "Indian Affairs" marginal edit was not, as indicated by Natelson, a "suggestion" or "proposal" that

---

<sup>237</sup> COMMITTEE OF DETAIL DOCUMENT I, *supra* note 140, at 131–32.

<sup>238</sup> Ewald, *supra* note 189, at 228, 232–35 (identifying that Wilson disagreed with giving the Senate any powers over foreign affairs and any supermajority requirements, and that Randolph disagreed with the prohibition on restricting the slave trade and a solitary executive).

<sup>239</sup> See generally Ewald & Updike Toler, *supra* note 189. See also text accompanying note 216.

<sup>240</sup> Ewald, *supra* note 189, at 249 ("It is often said that Rutledge served as the Committee's chairman, but the evidence is not conclusive.").

<sup>241</sup> See, e.g., REPORT ON PENNSYLVANIA'S PEACE WITH THE INDIANS (Apr. 21, 1783), reprinted in 24 J.C.C., *supra* note 171, at 264, 264 (identifying Alexander Hamilton as a committee chair); REPORT ON A BALANCE OWED TO THOMAS EDISON (Apr. 22, 1783), reprinted in 24 J.C.C., *supra* note 171, at 265, 265 (identifying Daniel Carroll as a committee chair); see also Madison's Notes (July 24, 1787), reprinted in 2 FARRAND, *supra* note 140, at 99, 106 (listing Rutledge first among members of his committee); Madison's Notes (Aug. 6, 1787), *supra* note 225, at 177 (noting that Rutledge delivered his committee's report).

<sup>242</sup> See, e.g., REPORT ON PENNSYLVANIA'S PEACE WITH THE INDIANS, *supra* note 241, at 264 n.1 (identifying a committee report as "in the writing of Alexander Hamilton").

<sup>243</sup> Ewald, *supra* note 189, at 244 ("[Rutledge's] handwriting appears on the Randolph draft and on the last of the Wilson drafts; this is compatible with his having presided over Committee meetings in which the drafts were discussed."); see Ewald & Updike Toler, *supra* note 189, at 263–85, 321–65.

was affirmatively rejected by Wilson.<sup>244</sup> Instead, it was a directive or, more simply, a command by a superior that created a duty Wilson would have been remiss to ignore. Wilson did not ignore other such edits by Rutledge,<sup>245</sup> and it would be highly unlikely that he would have altered course for this uncontroversial congressional power.

The working method of the Committee of Detail, as made evident through the extant documents, also confirms Wilson's mistake. For reasons beyond the scope of this Article, the Committee of Detail has been underdiscussed and undertheorized in the literature of the Constitutional Convention.<sup>246</sup> Thus, few have analyzed the workflow of the Committee as suggested in the documents, and some fairly commonsense observations have heretofore been missed. To begin, committees are universally multimember bodies that meet to discuss one or more proposals. This must have been true of the Committee of Detail; its members would have met together, most likely more than once, to discuss the Convention's proposals and to review internal work. Additionally, as it is difficult to coherently write anything in a crowd, individual Committee members would likely have worked on their own. Thus, there would have been times when the Committee worked in concert and times when members worked in secluded cloisters. Though they feasibly could have met in smaller subcommittees,<sup>247</sup> given the already intimate nature of the five-member committee, this is unlikely.

Overlaying these common attributes of committees (both of committees generally and this *particular* committee) onto the extant documents,<sup>248</sup> the workflow of the Committee and its

---

<sup>244</sup> Natelson, *supra* note 24, at 236.

<sup>245</sup> In addition to directing Wilson to add Indian affairs as a congressional power, Rutledge's notes to include power to regulate weights and measures, to borrow money, and to enforce treaties were all incorporated by Wilson. See Ewald, *supra* note 189, at 229; cf. Ewald & Updike Toler, *supra* note 189, at 338–41.

<sup>246</sup> For more on the topic, see generally William Ewald & Lorianne Updike Toler, *Early Drafts of the U.S. Constitution*, 135 PA. MAG. HIST. & BIOGRAPHY 227 (2011). See also Ewald, *supra* note 189, at 201–02.

<sup>247</sup> But see Ewald's suggestion that Randolph and Rutledge worked together separate from the Committee. Ewald, *supra* note 189, at 244.

<sup>248</sup> We know that at least a portion of Wilson's first draft is missing, but there must be other missing documents. For instance, the Convention approved each Committee member to have his own copy of the Convention's resolutions, so there likely would have been copies of the resolutions in each Committee member's hand. Madison's Notes (July 25, 1787), *supra* note 204, at 115. There were likely also other documents in Gorham and Ellsworth's and possibly Rutledge's hand that have since been lost to history. See Ewald,

implications for the missing Indian Affairs Clause comes into sharper focus. Of the nine Committee of Detail documents, those that would most likely be the product (or show the markings) of group discussions or meetings would logically be those with the imprints of multiple members. Here, those documents include Document IV (Randolph's sketch with Rutledge's emendations and Wilson's check marks), and Document IX (Wilson's second draft, again with Rutledge's emendations). The likelihood that these documents witnessed or were partial products of group discussion is underscored by the presence of "agr<sup>d</sup>" twice scrawled by Rutledge next to the tax power and the prohibition on export taxes on page five of Randolph's sketch.<sup>249</sup> That contemporaneous committee reports from the Continental Congress were normally found in the handwriting of the chair<sup>250</sup> indicates that, as a matter of course, committee chairs would preside over committee meetings with quill in hand. As he had many times before for committees he chaired in the Continental Congress,<sup>251</sup> Rutledge indeed presided over the Committee of Detail sessions with quill in hand, and evidence of these sessions is found in the many emendations he made to Randolph's initial sketch and Wilson's final draft (both likely prepared alone on assignment from the Committee<sup>252</sup>). These were not Rutledge's personal edits

---

*supra* note 189, at 203–04 (referencing the "loose scraps of paper" that William Jackson, secretary of the Convention, burned in a fire after the Convention adjourned sine die).

<sup>249</sup> See *supra* figs. 1–2 (images of page 5 of Randolph's sketch). Although Ewald hints that "agr<sup>d</sup>" next to the import prohibition favored by the deep South could indicate Randolph and Rutledge working to the exclusion of the rest of the Committee, Ewald, *supra* note 189, at 231, 244, this is unlikely, as the same also appears next to the tax provision, which was not necessarily favored by the deep South.

<sup>250</sup> See *supra* note 242 and accompanying text.

<sup>251</sup> See, e.g., DEBATES ON MEANS OF OBTAINING FUNDS FROM THE STATES (Feb. 11, 1783), reprinted in 24 J.C.C., *supra* note 171, at 124, 124 (identifying Rutledge as the first selected of a committee of three); REPORT ON MEANS OF OBTAINING FUNDS FROM THE STATES (Feb. 17, 1783), reprinted in 24 J.C.C., *supra* note 171, at 133, 135 n.1 (identifying the Committee's report as being in his hand).

<sup>252</sup> Ewald presents compelling evidence that Randolph worked alone in preparing his sketch. Ewald, *supra* note 189, at 242–44. Strongest among these proofs is the word "I" in the last sentence of the sketch, *id.* at 242, and that Randolph was absent from plenary discussions after his appointment to the Committee. Madison's Notes (July 26, 1787), *supra* note 200, at 121 ("Mr. Randolph happened to be out of the House."). Similarly, Wilson's copy of Convention Resolutions adopted up until July 24—what Farrand labels as Document I—was likely the only copy (the Convention not having quite yet approved individual copies for Committee members, which would not come until July 25). Madison's Notes (July 25, 1787), *supra* note 204, at 115. It is likely this document was prepared by Wilson working alone in anticipation of a first Committee session after the five members were "ballot[ed]" on July 24 but before the Convention broke on July 26, as it did not include resolutions from those days (and Farrand had to reconstruct

(though he certainly had great influence, especially upon the “deep South” provisions<sup>253</sup>), but reflected committee discussions and agreements in accord with standard forms of parliamentary procedure.<sup>254</sup> For the instant inquiry, this standard working method translated into Indian affairs taking on the imprimatur not just of Rutledge in his personal capacity, but Rutledge acting as the Committee chair, as the product of Committee discussion and, likely, a Committee vote.

Humble though the marginalia may appear, when analyzed within the Committee of Detail’s probable workflow as reflected by extant documents and dictated by standard committee operating procedures of the time, “Indian Affairs” had the weight of the Committee of Detail behind it, and such a command compelled a duty in the Committee member tasked with the next stage of drafting: James Wilson. He would have been untoward to shrug off this duty, and he appears at least initially to have complied, as evidenced by the check mark appearing next to “Indian Affairs,” discussed next.

---

Convention resolutions from those days to fill the void). 2 FARRAND, *supra* note 140, at 95, 97, 115, 134. There are also no Rutledge emendations on any Wilson Committee of Detail documents apart from his final draft, indicating that these, too, were prepared alone. *See generally* Ewald & Updike Toler, *supra* note 189. That Randolph and Wilson were likely assigned their individual tasks is illustrated by again applying standard committee procedures for the Convention. At Committee sessions, standard committee rules of procedure would have applied, and work would have been assigned (and all substantive decisions made) by committee vote as it was when the Convention met as a Committee of the Whole. A first Committee meeting is not precluded by Randolph’s working before the Convention broke. As was true for all committees except the Committee of Detail, the Convention did not break from their grueling, daily ten-to-five schedule, excepting Sundays, until they adjourned sine die. The Committee of Detail could and likely did meet after or before hours immediately upon being impaneled by the Convention on July 24, and then gave Randolph his assignment. Wilson was given his assignment after Randolph reported and his sketch was discussed and worked through via normal committee parliamentary procedure.

<sup>253</sup> For further discussion, see Ewald, *supra* note 189, at 231, 244. After all, it was Rutledge’s fellow South Carolinian delegate who had threatened boycotting the Convention if slavery were not protected days before. *See supra* text accompanying note 235.

<sup>254</sup> *See generally* JOHN HATSELL, PRECEDENTS OF PROCEEDINGS IN THE HOUSE OF COMMONS; WITH OBSERVATIONS (1776–1796). That Hatsell predominated in promulgating rules of parliamentary procedure in the fledgling United States is confirmed by Thomas Jefferson, who compiled a parliamentary procedure manual for the Senate as its president during his vice presidency, published in 1801. In his preface, he writes, “I could not doubt the necessity of quoting the sources of my information, among which Mr. Hatsel’s [sic] most valuable book is preeminent.” JEFFERSON’S MANUAL OF PARLIAMENTARY PRACTICE, *reprinted in* CONSTITUTION, JEFFERSON’S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 105, 105 n.a (Lewis Deschler ed., 1941).

## 2. Wilson's check marks.

Wilson's mistake is also laid bare by the breadcrumb trail he left in his check marks. A classic Wilson working method found in many of his other papers was to review earlier material for inclusion in later material and check items off, much the way a modern task list would be checked off.<sup>255</sup> Check marks appear on the Randolph Sketch for other powers, including one next to Rutledge's "Indian Affairs" in the margin.<sup>256</sup> The presence of the check mark here and the omission of the Clause in Wilson's final draft is curious. If checked off, consistent with Wilson's working method, the congressional power would presumably be found in the next document. Yet the section on congressional powers that would have included "Indian Affairs" in the next document is missing.

It might be tempting to explain the omission by postulating that Wilson included "Indian Affairs" in accord with his check mark in Randolph's sketch in this first draft, but then the Clause was rejected by the Committee in full session. However, such is improbable if not impossible for at least three reasons. First, the Convention's instruction to the Committee to include the Clause, as found in the unanimous July 16 vote on Resolution VI of the Virginia Plan to include "the Legislative Rights vested in Congs. by the Confederation" and the long prehistory of "Indian Trade and Affairs" regulation by Congress that antedated it, were uncontroversial.<sup>257</sup> Second, as shown above, Rutledge's directive to include "Indian Affairs" was almost certainly a Committee decision, and reversals of this kind were not otherwise found in the Committee's work.<sup>258</sup> Third, no Rutledge emendations were found on Wilson's first draft, which points to this not being a document reviewed by the full Committee. More likely, Wilson either transposed the Committee's requirements into a separate list no longer extant and then missed "Indian Affairs" when composing his first draft, or included "Indian Affairs" in the first draft and missed including it in the second.

---

<sup>255</sup> See Wilson Papers, *supra* note 189; Ewald & Updike Toler, *supra* note 189, at 263 (attributing the check marks to James Wilson based on a comparison of his check marks on many Wilson manuscripts).

<sup>256</sup> See *supra* note 219.

<sup>257</sup> For the unanimous vote, see Madison's Notes (July 16, 1787), *supra* note 210, at 16–17. For the prehistory of Indian affairs, see *supra* Part I.A. Though the federal split of power over Indian affairs was controversial, see *supra* note 159 and accompanying text, that Congress had some power over Indian affairs was not.

<sup>258</sup> See *supra* note 254.



Of the two options, the latter is more probable, as the document elected to fill the void, the composite of Patterson and Pinckney Plans, included the Legislative power “of regulating Indian Affairs.”<sup>259</sup> It is also possible that Wilson lost the relevant section even while preparing his final draft, which could be one reason why he missed including “Indian Affairs.”

3. Wilson’s vested interests in a federal Indian affairs power.

The final historical factor underscoring Wilson’s scrivener’s error comes from his personal vested interests. As confirmed by evidence extrinsic to the Committee of Detail, the absence of “Indian Affairs” in the Constitution ultimately affected Wilson personally—even, perhaps, fatally. The same day that then-Colonel Washington was appointed commander of the revolutionary forces, June 16, 1775, the Continental Congress appointed a committee “relative to Indian affairs” that included the intrepid Wilson.<sup>260</sup> A month later, Wilson was appointed one of the first Indian affairs commissioners<sup>261</sup> and, that fall, witnessed one of the first postcolonial treaties being made with the Six Nations at Fort Pitt.<sup>262</sup> Possibly through this exposure to the wide-open spaces of tribal territory, Wilson—then a frontier lawyer in Carlisle, Pennsylvania, when not serving in Congress<sup>263</sup>—became seized with a vision of western White settlement, wherein European riches and labor could combine with the vast expanses in the American West.<sup>264</sup>

While riding circuit and ostensibly serving as Indian affairs commissioner and an Indian trade committeeman in the late

---

<sup>259</sup> COMMITTEE OF DETAIL DOCUMENT VII, *supra* note 222, at 157, 159.

<sup>260</sup> FORMATION OF A COMMITTEE RELATIVE TO INDIAN AFFAIRS (June 13, 1775), *reprinted in* 2 J.C.C., *supra* note 68, at 91, 93.

<sup>261</sup> REPORT OF THE COMMITTEE ON INDIAN AFFAIRS (July 12, 1775), *reprinted in* 2 J.C.C., *supra* note 68, at 174, 175; ORDER TO PREPARE A PEACE TALK TO INDIAN NATIONS (July 13, 1775), *reprinted in* 2 J.C.C., *supra* note 68, at 177, 183.

<sup>262</sup> SMITH, *supra* note 68, at 69–72.

<sup>263</sup> *Id.* at 43.

<sup>264</sup> ON THE IMPROVEMENT AND SETTLEMENT OF LANDS IN THE UNITED STATES (CIRCA MID-1790S), *reprinted in* 1 COLLECTED WORKS OF JAMES WILSON 372, 372–86 (Kermit L. Hall & Mark David Hall eds., 2007); Prospectus for an Association for the Promotion of Immigration from Europe, v.2, and Advertisement for the Sale of Land, Wilson Papers v.10, f.117, MS, Historical Society of Pennsylvania (on file with author); *see also* Heads of a Plan Concerning the New States, Wilson Papers v.2, f.132, Historical Society of Pennsylvania (on file with author).

1770s,<sup>265</sup> Wilson began buying up vast tracts of tribal lands, eventually becoming president of the ill-fated Illinois-Wabash Company.<sup>266</sup> Congress later indirectly censured Wilson's self-dealing (and did not reappoint him as an Indian affairs commissioner).<sup>267</sup> The weight of western land debt ultimately proved his political downfall and contributed to his untimely death.<sup>268</sup> To his credit, Wilson abstained from compounding his self-dealing by absenting himself not only from the committee making recommendations on Virginia's western land cessions—to much of which he, through the Illinois-Wabash Company, also had claim—but also from congressional discussions and votes on the same.<sup>269</sup> However, in July 1776, John Adams noted that, as a

---

<sup>265</sup> A new Indian trade committee was established on November 23, 1775, that included Wilson. MOTION TO FORM A COMMITTEE ON TRADE WITH INDIANS (Nov. 23, 1775), reprinted in 3 J.C.C., *supra* note 68, at 366.

<sup>266</sup> SMITH, *supra* note 68, at 159–68. After decades attempting to secure good title to their 60 million acres of land purchased from Natives, the fate of the Illinois-Wabash Company was finally decided in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), wherein the Supreme Court determined that the private purchase of lands directly from Natives was invalid. *Id.* at 568; *see also* Two Land Deeds, Wilson Papers v.3, f.1, Historical Society of Pennsylvania (on file with author); Land Loan Receipts and Payment Receipts, Wilson Papers v.3, f.42, 49 & 52 Historical Society of Pennsylvania (on file with author); For the Surveyor General, Wilson Papers v.10, f.116, MS, Historical Society of Pennsylvania (on file with author).

<sup>267</sup> RESOLUTION TO FORM A COMMITTEE TO REGULATE TRADE WITH INDIANS (Oct. 15, 1783), reprinted in 25 J.C.C., *supra* note 78, at 680, 693 (instructing a committee to prepare an ordinance “with a clause therein strictly prohibiting all civil and military officers, and particularly all commissioners and agents for Indian affairs, from trading with the Indians, or purchasing, or being directly or indirectly concerned in purchasing lands from Indians”).

<sup>268</sup> The Wilson Papers at the Historical Society of Pennsylvania are littered with promissory notes and land titles purchased by Wilson. *See supra* note 266. His chief biographer attributed President Washington's denying Wilson the chief judgeship on the Supreme Court, despite his superior legal resume, to the embarrassment of his great land debt. SMITH, *supra* note 68, at 373. Wilson was not the only founder who speculated in western land, with President Washington and Robert Morris being first among the nation's landholders, but he was likely the most indebted. *See id.* at 160, 163, 168. Though his tracts later became “among the most valuable in America,” *id.* at 402 n.11, Wilson's immediate financial woes in the later 1790s caused him to run from creditors while still serving on the Supreme Court and become ensconced in Edmonton, South Carolina, where he contracted malaria. *Id.* at 386. Although he seemed to recover, he rallied only to attempt to settle his land debts, from which he refused to retract in the interest of his creditors. *Id.* at 388. He then relapsed, suffered a stroke, and, in the feverish state leading up to his death, railed about his debts while his second wife, Hannah, looked on helplessly. *Id.*

<sup>269</sup> Wilson was initially assigned to the committee “to whom was referred a motion . . . for accepting the cession of territory” by Virginia. REPORT ON THE CESSION OF TERRITORY BY THE VIRGINIA LEGISLATURE, *supra* note 171, at 381. The seventh section of this motion stipulated that

Pennsylvania Congressman, Wilson “argued eloquently for exclusive congressional jurisdiction over all Indian affairs.”<sup>270</sup> Unfortunately, as Natelson writes, Wilson lost the point.<sup>271</sup> As a congressman, Wilson voted to maintain federal power to treat with Native tribes and control land sales even in preference to his home state of Pennsylvania.<sup>272</sup> He voted against every state attempt to individually treat with tribes, and not just when his contested titles were implicated.<sup>273</sup> Wilson favored congressional control of western territory and its ability to directly treat with Native tribes.<sup>274</sup> As later proved by his failed petition to Congress

---

all purchase and deeds from any Indian or Indians, or from any Indian nation or nations, for any lands within any part of the said territory which have been or should be made for the use or benefit of any private person or persons whatsoever, and royal grants within the ceded territory, inconsistent with the chartered rights, law and customs of Virginia, should be deemed and declared absolutely void and of no effect.

REPORT DETAILING CONDITIONS ON THE CESSION OF TERRITORY BY THE VIRGINIA LEGISLATURE, *supra* note 171, at 559, 561–62 (quoting “the act of the legislature of Virginia, of the 2d of January, 1781”). Wilson was absent and manually removed from the committee on June 20, 1783. REPORT ON THE CESSION OF TERRITORY BY THE VIRGINIA LEGISLATURE (June 20, 1783), *reprinted in* 24 J.C.C., *supra* note 171, at 406, 406. Though Wilson remained absent and unable to defend his interests, Congress nonetheless accepted the September 13 report of the Committee, headed by John Rutledge, that recommended against accepting the condition of the seventh section voiding alternative claims such as Wilson’s, as it would be “improper” for Congress to prejudice such claims. REPORT DETAILING CONDITIONS ON THE CESSION OF TERRITORY BY THE VIRGINIA LEGISLATURE, *supra* note 171, at 562–63. On accepting the report, Congress rejected the language “as they ought not to prejudice the claims of individuals or others, but ought to leave them to be determined according to the principles of equity and the Constitution” as the *de jure* reason for rejecting the clause. *Id.* at 563 (alterations omitted).

<sup>270</sup> Natelson, *supra* note 24, at 228; *see also* Debates (July 26, 1776), *reprinted in* 6 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 1077–79 (Worthington Chauncey Ford ed., 1906).

<sup>271</sup> Natelson, *supra* note 24, at 228.

<sup>272</sup> Wilson maintained his position through the 1780s, as evidenced by the April 1783 committee report on which he served recognizing Congress’s “general superintendence of Indian affairs” under the Articles. REPORT ON PENNSYLVANIA’S LETTER RESPECTING A PEACE WITH THE INDIANS (Apr. 21, 1783), *reprinted in* 24 J.C.C., *supra* note 171, at 262, 264.

<sup>273</sup> *See, e.g.*, VOTE ON PENNSYLVANIA’S REQUEST TO TREAT FOR PURCHASE OF INDIAN LANDS, *supra* note 173, at 717–19.

<sup>274</sup> Wilson’s fixation on land wealth generally and western land in particular extended to the optimal method for collecting revenues for war debts. Though he ultimately conceded the point in favor of the infamous Three-Fifths Compromise as a means for measuring state wealth (and which he later proposed as the basis for taxation and representation under the Constitution), in order to ensure equal representation in the Senate, Wilson was the Continental Congress’s primary proponent of maintaining the Articles’ land-based wealth assessment as the basis for state requisitions. *See, e.g.*, VOTE ON MEANS OF OBTAINING FUNDS FROM THE STATES (Mar. 28, 1783), *reprinted in* 24 J.C.C., *supra* note 171, at 214, 214–16; *see also* Madison’s Notes (June 11, 1787), *reprinted in* 1 FARRAND,

on behalf of the Illinois-Wabash company,<sup>275</sup> this was because Wilson believed the best chances of validating his western claims lay with his many friends and connections in federal power. As shown by collective compromises in both the Continental Congress and in the constitutional texts he drafted,<sup>276</sup> he was also scrupled enough to be ruled by the majority despite personal differences.

In sum, both the Convention (via its general directive to incorporate congressional powers found in the Articles) and Committee Chairman John Rutledge (via his marginal note) commanded Wilson's obedience. Wilson would not have taken either command lightly, his check marks evince his unconsummated intention to comply, and his vested interests left him with a strong preference for federal power over Indian affairs. Wilson's oversight in leaving out Indian affairs from the Committee of Detail's report was therefore not intentional—at least, not at this stage of the Constitution's history.

### C. The Convention's Partial Resurrection

Wilson's oversight was noticed. After Wilson's final draft was reported out of committee by Rutledge on August 6,<sup>277</sup> the omission was not mentioned for ten days. However, on August 16, with only a month remaining before the final Constitution was reported to Congress, Madison proposed to refer to the same Committee of Detail nine congressional powers, including "[t]o regulate affairs with the Indians as well within as without the limits of the U. States."<sup>278</sup> By this proposal, Madison sought to correct the Committee of Detail's oversight and the ambiguous states' rights language of the Articles of Confederation that had

---

*supra* note 205, at 196, 201; DAVID O. STEWART, *THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION* 75–81 (2007).

<sup>275</sup> Report of the Committee to Whom Was Referred, on the 13th Ultimo, the Memorial of the Illinois and Wabash Land Company, by James Wilson, Their President (House of Representatives, Feb. 3, 1797), Wilson Papers v.2, f.119, Historical Society of Pennsylvania (on file with author).

<sup>276</sup> See *supra* note 274; see also Ewald & Updike Toler, *supra* note 246, at 235–36 (“A careful examination [of Committee of Detail documents and drafts] shows that on many important questions—especially the provisions concerning slavery, but on others as well—Wilson was outvoted by his colleagues . . . and may well have found himself in a minority of one.”).

<sup>277</sup> Madison's Notes (Aug. 6, 1787), *supra* note 225, at 177.

<sup>278</sup> Madison's Notes (Aug. 18, 1787), reprinted in 2 FARRAND, *supra* note 140, at 321, 324–25.

caused so much trouble.<sup>279</sup> The Committee of Detail rejected Madison's language and instead grafted "Indians" into the Commerce Clause, adding in a clause that partially reflected the states' rights language of the Articles. Its updated report of August 22 indicates that the Committee decided on the following wording of the clause: "[To regulate commerce with foreign nations, and among the Several States] and with Indians, within the Limits of any State, not subject to the laws thereof."<sup>280</sup> By whatever hand the change was made,<sup>281</sup> the Committee had reintroduced some of the ambiguity of the Articles into the Constitution, and resurrected its "Indian trade" language. It thereby converted its oversight into a sin of omission and created a new problem: by electing to restore the power over Indian trade but not affairs, it effectively shrank congressional power from affairs to merely commerce as respecting tribes.

The Convention did not discuss the provision, nor did it take any formal action on this latter report, having postponed the session so members could take down a copy.<sup>282</sup> The language was instead taken up and amended further by a Committee of Eleven<sup>283</sup> to deal with "such parts of the Constitution as have been postponed, and such parts of Reports as have not been acted on, to a Committee of a member from each State," to which Madison had finally been appointed (after being overlooked for the Committee of Detail and the previous two "grand" committees of eleven) on August 31.<sup>284</sup> Reporting on September 4, this

---

<sup>279</sup> See ARTICLES OF CONFEDERATION of 1781, art. IX, ¶ 4:

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.

This is discussed in note 151 and accompanying text. For a discussion of the national-state power struggle, see *supra* notes 155–66 and accompanying text.

<sup>280</sup> Convention Journal (Aug. 22, 1787), reprinted in 2 FARRAND, *supra* note 140, at 366, 367. To view the version of the Committee of Detail draft the delegates would have been working from, see *Session 3478*, QUILL PROJECT AT PEMBROKE COLL., OXFORD (Kieran Hazzard, Lauren Davis, Grace Mallon & Nicholas Cole eds., 2019 edition), <https://perma.cc/7PG2-5SY5>. This and previous Quill Project–reconstructed drafts of the Constitutions drive home the point that the Indian Commerce Clause was never approved as a discrete text, but as part of the very last draft approved on the eve of adjournment.

<sup>281</sup> See *supra* note 191 and accompanying text.

<sup>282</sup> Madison's Notes (Aug. 22, 1787), reprinted in 2 FARRAND, *supra* note 140, at 369, 376.

<sup>283</sup> Madison's Notes (Aug. 18, 1787), *supra* note 278, at 328.

<sup>284</sup> Madison's Notes (Aug. 31, 1787), reprinted in 2 FARRAND, *supra* note 140, at 475, 481. The committees of eleven, representing all states attending the Convention in August, were called "grand." See, e.g., *id.* at 480; Madison's Notes (Aug. 18, 1787), *supra* note

committee removed the offensive states' rights language, but left power to legislate over Indians saddled to the Commerce Clause.<sup>285</sup> The Commerce Clause now read, "Congress shall have power . . . to regulate commerce with foreign nations, and among the several States and with the Indian tribes."<sup>286</sup>

The language was never approved as a discrete text, but was adopted without any comment or debate as part of the near-final text of the Constitution on September 10 and referred to the Committee of Style and Arrangement.<sup>287</sup> Other than varying the punctuation and capitalization,<sup>288</sup> this final committee made no edits to the clause, and it was approved as part of the final, unratified Constitution on September 17, 1787, when the Convention adjourned. As finally approved, the full Commerce Clause read as follows: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."<sup>289</sup>

These critical changes to what was once "Indian Affairs" happened where the record is most sparse: Madison's notes, traditionally the most reliable source of the Convention,<sup>290</sup> became quite thin after the Committee of Detail reported for the first time, and even more sparse after August 22.<sup>291</sup> At this time, Madison was tired,<sup>292</sup> sick,<sup>293</sup> working around the clock on after-hour

278, at 328. This was in keeping with the practice of the Continental Congress for similar committees comprising a representative from each state. *See, e.g.*, REPORT ON REDUCING EXPENSES IN THE WAR DEPARTMENT (Apr. 7, 1783), *reprinted in* 24 J.C.C., *supra* note 171, at 230, 230 (appointing a "Grand Committee" consisting of one member from each of the eleven states in attendance).

<sup>285</sup> Convention Journal (Sept. 4, 1787), *reprinted in* 2 FARRAND, *supra* note 140, at 493, 493.

<sup>286</sup> PROCEEDINGS OF CONVENTION REFERRED TO THE COMMITTEE OF STYLE AND ARRANGEMENT, *reprinted in* 2 FARRAND, *supra* note 140, at 565, 569; *see also* Madison's Notes (Sept. 4, 1787), *reprinted in* 2 FARRAND, *supra* note 140, at 496–97.

<sup>287</sup> Madison's Notes (Sept. 10, 1787), *reprinted in* 2 FARRAND, *supra* note 140, at 557, 564, 569.

<sup>288</sup> Madison's Notes (Sept. 17, 1787), *reprinted in* 2 FARRAND, *supra* note 140, at 641, 655.

<sup>289</sup> U.S. CONST. art. I, § 8.

<sup>290</sup> *See* James H. Hutson, *Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 24 (1986) ("[A]t once," wrote Farrand, "all other records [apart from Madison's notes] paled into insignificance.").

<sup>291</sup> *See generally* 1 FARRAND, *supra* note 205; 2 FARRAND, *supra* note 140.

<sup>292</sup> JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 82 (1997).

<sup>293</sup> MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION 141–42 (2015); *see also* LETTER FROM JAMES MADISON TO THOMAS JEFFERSON (July 18, 1787), *reprinted in* 3 FARRAND, *supra* note 236, at 60; LETTER FROM JAMES MADISON TO JAMES MCCLURG (Aug. 25, 1787), *reprinted in* 10 THE PAPERS OF

committee assignments,<sup>294</sup> and, likely, depressed.<sup>295</sup> All of this combined to greatly reduce the volume of his note-taking and thus the material from which any legal inferences could be made about the provenance of the Indian Commerce Clause.<sup>296</sup>

Despite the lack of conclusive proof from Madison's notes or other documents, his background and vocalized concerns make him the likely antagonist for the correction of the confused states' rights language. Madison had been invited by the Marquis de Lafayette to attend U.S. peace negotiations with the Iroquois Six Nations in the fall of 1784 at Fort Stanwix, and was not likely to forget this firsthand experience with Indian affairs.<sup>297</sup> In preparation for the Convention, he had outlined the flaws of the Confederation for himself, listing "the wars and Treaties of Georgia with the Indians" as the prime example of state encroachments on federal authority.<sup>298</sup> It was he who first noticed the Committee of Detail's oversight, and it is he who should likely be credited for spearheading removing the offensive states' rights language.<sup>299</sup> It disappeared, after all, only once Madison had been appointed to the final Committee of Eleven that proposed the ultimate text.

And it is he we have to thank for the insertion of "tribes" into the Commerce Clause. Reserving for another time a full discussion of the distinctions between commerce and trade, it is

---

JAMES MADISON 157, 157–58 (Robert A. Rutland ed., 1977) [hereinafter 10 MADISON PAPERS]; LETTER FROM JAMES MCCLURG TO JAMES MADISON (Sept. 5, 1787), *reprinted in* 10 MADISON PAPERS, *supra*, at 162, 162.

<sup>294</sup> BILDER, *supra* note 293, at 142–44.

<sup>295</sup> After losing the great contest over representation in the Senate, failing to secure his pet provision of a national veto over state laws, and being passed over for a seat on the prestigious Committee of Detail, Madison's depression can be read between the lines in his letters to Jefferson in Paris, to whom he candidly communicates his discontent over the Constitution's "embarrassment[s]." LETTER FROM JAMES MADISON TO THOMAS JEFFERSON (Sept. 6, 1787), *reprinted in* 10 MADISON PAPERS, *supra* note 293, at 163–64; LETTER FROM JAMES MADISON TO THOMAS JEFFERSON (Oct. 24, 1787), *reprinted in* 10 MADISON PAPERS, *supra* note 293, at 206, 214–15.

<sup>296</sup> Even though Farrand included other notes and the official journal in his *Records*, a rough page comparison of the first two volumes before and after August 6 reveals the brevity of Madison's note-taking during this five-week interval. The number of pages devoted to predraft discussion is 606, compared to 474 pages postdraft. *See generally* 1 FARRAND, *supra* note 205; 2 FARRAND, *supra* note 140. This also despite the fact that fifty-seven pages of the postdraft space are consumed by further reports and the final Constitution's text. 2 FARRAND, *supra* note 140, at 176–667.

<sup>297</sup> *See* JAMES R. GAINES, *FOR LIBERTY AND GLORY: WASHINGTON, LAFAYETTE, AND THEIR REVOLUTIONS* 202–03 (2007); HUTCHINS, *supra* note 176, at 45–46.

<sup>298</sup> Madison, *supra* note 183.

<sup>299</sup> HUTCHINS, *supra* note 176, at 69.

possible to say that commerce is more like trade than it is the broader connotation of affairs. As has been shown, Indian affairs sometimes embraced Indian trade and could presumably also embrace commerce within its capaciousness. Thus as Fletcher has shown, “Commerce” does not capture all that the preconstitutional “Affairs” entailed. Whereas simply incorporating “Indian Affairs” (as directed by Rutledge in his marginal note) could have supplied power over trade, providing for “Indian Commerce” supplied, at most, for no more than half of the powers vis-à-vis tribes reserved to Congress under the Articles. Thus, including “Indian Tribes” into the Commerce Clause was, at best, solving the missing Indian Affairs Clause only in part.

What is to be made of this half resurrection and the unrecorded committee discussions that must have surrounded it? Did it absolve the Committee of Detail’s former mistake? Did those few Framers mean to restore power over Indian trade and disdain including Indian affairs, contracting the scope of congressional power in this one regard?

Justice Thomas and at least two legal historians suggest that the Convention’s limiting of federal Indian authority to commerce, in the words of Professor Francis Hutchins, “could be interpreted as sanctioning state power over any and all matters relating to ‘Indians’ within state bounds other than the narrow federal power here acknowledged.”<sup>300</sup> For support, one historian proffers that soon after the Convention, Nathaniel Gorham, one of the Committee of Detail’s five members, purchased preemption rights to Iroquois lands in New York State from the Bay State and negotiated a state treaty “acquiring some of these rights from the Iroquois.”<sup>301</sup> Yet Gorham, though past president of Congress, was “not much improved in his education” and unlikely to be the intellectual heavyweight among the five-member committee, which contained political and legal lights Edmund Randolph, Virginia governor and sponsor of the Virginia Plan; James Wilson, who “rank[ed] among the foremost in legal and political knowledge”; John Rutledge, former first governor of South Carolina and legally trained in England; and Oliver Ellsworth, a Princeton-trained judge from Connecticut who shepherded the Great Compromise through the Convention, winning an equal vote for the small states in the Senate over the

---

<sup>300</sup> See *id.* at 68–69; see also *supra* note 154 and accompanying text.

<sup>301</sup> HUTCHINS, *supra* note 176, at 69.



strong objection of the more populous states, and who was “much respected for his integrity.”<sup>302</sup> Even if Gorham’s later actions were premeditated in the Convention and he actively sought to limit congressional power over Indians in both resurrecting the unworkable language from the Articles of Confederation and limiting congressional power over Natives to commerce, it was unlikely Gorham would have an outsized influence on his peers, let alone that he would draft any text, as his hand is not present on any other Committee of Detail documents.

Despite all this, it is also unlikely that Gorham, if he had authored the Committee’s language limiting the Indian Commerce Clause to Natives “not subject to the laws” of individual states, meant for it to have the cramped reading attributed it by Justice Thomas and others. After all, he and two other members of the Committee of Detail—Ellsworth and Rutledge (the chair)—had served on the Continental Congress committee that had rejected Virginia’s limit on their western land cession, negating alternative claims by individuals (such as Wilson) who had directly purchased land from Native tribes.<sup>303</sup> Rejecting Virginia’s limitation in this way expanded congressional hegemony over tribal affairs. Gorham may have dissented from this earlier Committee’s recommendation (and later acted in his own self-interest), but it is more than likely that he and the other two members of the Congressional Committee who also served on the Committee of Detail, plus Wilson, would have, at the very least, seen Madison’s proposed language as an improvement on the Articles by omitting the obscuring language limiting congressional power over Indian affairs and trade, “provided that the legislative right of any State within its own limits be not infringed or violated,” and providing only a slim caveat to federal power for Natives who had become citizens.<sup>304</sup> The language moved in the direction of federal power, and the further edits by the Grand Committee moved the dial toward federalizing Native powers over Indian commerce and trade even more.<sup>305</sup>

---

<sup>302</sup> WILLIAM PIERCE’S CHARACTER SKETCHES OF THE DELEGATES TO THE FEDERAL CONVENTION, *reprinted in* 3 FARRAND, *supra* note 236, at 87–97.

<sup>303</sup> *See* REPORT ON THE CESSION OF TERRITORY BY THE VIRGINIA LEGISLATURE, *supra* note 171, at 381; REPORT ON THE CESSION OF TERRITORY BY THE VIRGINIA LEGISLATURE, *supra* note 269, at 406; REPORT DETAILING CONDITIONS ON THE CESSION OF TERRITORY BY THE VIRGINIA LEGISLATURE, *supra* note 171, at 559–64.

<sup>304</sup> ARTICLES OF CONFEDERATION of 1781, art. IX, ¶ 4.

<sup>305</sup> *See supra* note 285.

And yet, the Indian Affairs Clause still went missing. Unlike with Madison, the omission of “Indian Affairs” escaped the Convention’s notice or comment in full Convention. Other than the mention of Madison’s motion in the sparse official journal and his own notes on August 18,<sup>306</sup> the Indian Commerce Clause and its radical departure from the Articles’ provision of power over both Indian trade and affairs received no attention by Convention members in any extant records.<sup>307</sup> At most, if noted by all members of both the Committee of Detail and the final Grand Committee,<sup>308</sup> only sixteen of the Convention’s fifty-five members realized the mistake.

Conjuring meaning from such silence is difficult at best, troublesome at worst. Although it is impossible to know with certainty, two explanations for partial restoration of Indian powers seem likely. First, the delegates may have been distracted from the larger issue at hand—the radical power shrinkage—by the nettlesome federal-state power struggles that seems to have been solved by Madison’s removal of any states’ rights language. Perhaps in their minds, the worst problem with the Articles’ treatment of tribes was solved, and in the rush of the final weeks of the Convention, half begun was well-enough done. More likely, however, especially for those involved in the text’s minutia, was a more thoughtful approach. The opening passages of Randolph’s sketch (containing Rutledge’s “Indian Affairs” marginal note) contain a guiding philosophy on the importance of textual brevity in constitution writing:

In the draught of a fundamental constitution, two things deserve attention:

1. To insert essential principles only; lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be accommodated to times and events[.] [A]nd
2. To use simple and precise language, and general propositions, according to the example of the (several) constitutions of the several states. (For the construction

---

<sup>306</sup> See *supra* note 278.

<sup>307</sup> See *generally* 2 FARRAND, *supra* note 140, at 197–650.

<sup>308</sup> There was no overlap on the two committees. The Committee of Detail included Messrs. Wilson, Gorham, Rutledge, Randolph, and Ellsworth. Madison’s Notes (July 24, 1787), *supra* note 241, at 106. The final Grand Committee included Messrs. Gilman, King, Sherman, Brearley, Morris, Dickinson, Carrol, Madison, Williamson, Butler, and Baldwin. Madison’s Notes (Aug. 31, 1787), *supra* note 228, at 473.

of a constitution necessarily differs from that of law)[.]<sup>309</sup>

In this first sketch of the Constitution, Randolph had therefore established the Committee of Detail's guiding lights: to include only essential principles, general propositions, and simple and precise language. Although the Committee was not always to follow this principle,<sup>310</sup> it reigned in its August 6 report. Perhaps it also continued to guide in its decision about restoring "Indian Commerce," but not "Indian Affairs." Committee members might have looked at other provisions of the draft Constitution—including the treaty powers (then lodged in the Senate)<sup>311</sup> and war powers—and thought such were sufficient to supply all that was needed for Indian affairs. After all, but for Natives committing crimes against non-Natives, the Continental Congress had thus far not directly legislated for Natives, but treated with them on a tribal level.<sup>312</sup> Under the guiding lights of Randolph, who himself had been visited by a Cherokee chief during the Convention,<sup>313</sup> "Indian Affairs" was already embraced in more general provisions of the Constitution, and was therefore no longer needed.

Additionally, as has been discussed, it is possible that "Indian Commerce" was used as a surrogate for "Indian Trade," which committee members knew had garnered a supermajority of support in Congress. Committee members Gorham and Wilson had been present in the Confederation Congress in 1786 when national regulation of Indian trade had achieved a supermajority.<sup>314</sup> These committee members therefore knew that incorporating some derivation of "Indian Trade" would likely be uncontroversial. Contrariwise, they would have been all too familiar that the broader "Affairs" language, embracing competing claims to native lands, could potentially stir up the controversy then fomenting in

---

<sup>309</sup> COMMITTEE OF DETAIL DOCUMENT IV, *supra* note 191, at 137 (alterations omitted).

<sup>310</sup> See, for example, Wilson's proposed senatorial power to hear interstate disputes. COMMITTEE OF DETAIL DOCUMENT VIII, *reprinted in* 2 FARRAND, *supra* note 140, at 159–62.

<sup>311</sup> As reported on August 6, the Senate had sole power to enter into treaties. Committee of Detail Report (Aug. 6, 1787), *reprinted in* 2 FARRAND, *supra* note 140, at 177, 183. The Senate's sharing the treaty power with the president was not proposed until September 4 (after Madison's proposal of "Indian Affairs" was considered by the Committee of Detail). Madison's Notes (Sept. 4, 1787), *supra* note 286, at 498–99.

<sup>312</sup> See *supra* notes 128–31 and accompanying text.

<sup>313</sup> LETTER FROM EDMUND RANDOLPH TO BEV. RANDOLPH, LIEUTENANT GOVERNOR (July 12, 1787), *reprinted in* 4 CALENDAR OF VIRGINIA STATE PAPERS AND OTHER MANUSCRIPTS 315, 315 (William P. Palmer ed., Richmond, R.U. Derr 1884).

<sup>314</sup> See *supra* note 153 and accompanying text.

the halls of Congress in neighboring New York and threatening war in Georgia and North Carolina.<sup>315</sup> Whereas federal power over Indian trade had achieved supermajority status by the time the Convention sat, the concomitant federal power over Indian affairs had not.

Yet all of this calculus was at play when the Committee of Detail first sat. Sometime around July 26, they had agreed to include “Indian Affairs” in the Constitution.<sup>316</sup> What had changed? Only time.<sup>317</sup> At this late stage of the Convention, delegates, most especially chairman John Rutledge, were anxious to return home.<sup>318</sup> Nine of the fifty-five delegates had already left.<sup>319</sup> By August 18 when Madison made his proposed insertion of “Indian Affairs” coupled with language intended to solve the states’ rights issue, the wheels of the Convention were running efficiently, and controversial matters were postponed or relegated to committees (as Madison’s was) to keep momentum going.<sup>320</sup> Core provisions, such as selection of the president, were yet to be worked out.<sup>321</sup> It is very likely that, once its mistake was pointed out by Madison, the Committee determined that most powers comprising Indian affairs were essentially already provided to Congress via broad strokes in the current draft. Leaving the clause out would sidestep gridlock when the Convention most required forward progress. Such was also consistent with the Committee’s guiding light of brevity. Instead, they opted to enshrine the more narrow Articles of Confederation power that would likely be (and was) noncontroversial: Indian trade via the Indian Commerce Clause. Half done was left well enough alone.

The Committee of Detail’s failure to restore both Indian Trade and Affairs proved no expiation for the original sin of omission. As history has shown, this area of law has led a

<sup>315</sup> See *supra* notes 155–66 and accompanying text.

<sup>316</sup> See *supra* note 190 and accompanying text.

<sup>317</sup> It is possible that those delegates who had attended Congress during the recess reported back the state of imminent war in Georgia, but such news would have likely inclined them to include an Indian Affairs Clause rather than leave it out. See *supra* note 161 and accompanying text.

<sup>318</sup> STEWART, *supra* note 274, at 178 (“[I]n mid-July, Rutledge had despaired that he already had been in Philadelphia twice as long as he expected.”).

<sup>319</sup> On August 18, 1787, based on recorded delegate arrivals and departures, forty-six members were present. *Session 3384, U.S. Constitutional Convention 1787*, QUILL PROJECT AT PEMBROKE COLL., OXFORD (Kieran Hazzard, Lauren Davis, Grace Mallon & Nicholas Cole eds., 2019 edition), <https://perma.cc/9CFL-JVRW>.

<sup>320</sup> STEWART, *supra* note 274, at 179.

<sup>321</sup> This was done between August 24 and September 7, 1787. *Id.* at 207–16.

torturous existence ever since, likely impacting the lives of millions of Native Americans for the worse. The sum of the parts of the Constitution has possibly proved greater than the whole when applied to Indian affairs, in that the power's lack of discrete textual boundaries has led, inexorably, toward plenary power. If the Committee of Detail did refrain from restoring Indian affairs power for the sake of expediency, it was a different kind of mistake which, though less sinister than the Three-Fifths Clause, also compounded itself over time<sup>322</sup> and papered over what was otherwise an innocent oversight. Yet, as I show, the omission of the Indian Affairs Clause may actually work to the tribes' benefit.

In the end, no one caught the cover-up,<sup>323</sup> and the broader power of "managing all affairs with the Indians" was forgotten.<sup>324</sup> If delegates did catch the mistake, such conversations were had apart from the recording pen of history. What began as a scrivener's error was only half restored, and preconstitutional powers shrank.

#### D. The Ratifiers' Oversight

The Convention was not alone in its oversight. The missing clause seems also to have been overlooked by the ratifiers, too. As already discussed, although Native allies, lands, and trade were frequent and important topics of state and federal legislative debates,<sup>325</sup> "We the People" as convened in state ratifying conventions missed the new disparity between governmental practice and fundamental law (and tribes were omitted from the discussion altogether). True, as mentioned above, Federalists were unlikely to criticize the Constitution, especially for having too few powers. Notwithstanding this, Federalists implicate the Indian Commerce Clause only twice, both in Federalist Papers authored by Madison. In *Federalist 40*, Madison obliquely mentions the Clause as one of few instances wherein

---

<sup>322</sup> For a discussion of the compounding problem of the Three-Fifths Clause that led to proslavery Congresses, presidents, and Supreme Courts, see AMAR, *supra* note 23, at 97–98.

<sup>323</sup> No one, that is, except for probably Madison, who had proposed including "Indian Affairs" and later likely held the quill that tidied up the states' rights language in the Committee on Postponed Parts. Although he likely noted the incomplete power respecting Natives, he did nothing further, at least in recorded session, to resolve the deficiency.

<sup>324</sup> ARTICLES OF CONFEDERATION of 1781, art. IX, ¶ 4.

<sup>325</sup> See *supra* notes 85–88 and accompanying text.

the federal government might directly act upon an individual.<sup>326</sup> The other was a lengthier passage in *Federalist 42*, already mentioned.<sup>327</sup> There, Madison proclaimed victory because the Clause eradicated the limitations and confusions of the Articles' verbiage, and because Congress (not the States) had power to regulate trade with the Indians.<sup>328</sup> No mention of the awkward partial restoration is made.

Yet Madison—or any other Federalist, for that matter—was unlikely to fault the Constitution openly for any reason, let alone for conferring too few powers on Congress. It was all they could do to overcome Anti-Federalist concerns without introducing some of their own. Surprisingly, in the following passages, Madison discusses the congressional power to regulate weights and measures that is “transferred from the Articles of Confederation,”<sup>329</sup> and likely would have brought to his reader's attention that another congressional power from the Articles, Indian affairs, had not been imported from the former document. The silence regarding the power shrinkage is highlighted and reflected in *Federalist 24*, where Alexander Hamilton discusses the threat on western borders posed by “savage tribes” who could join with European allies in menacing settlers from the East.<sup>330</sup> If Natives posed a threat of war, by implication, they could also pose the need for less hostile forms of action, including diplomacy with its gift giving, coming to agreements regarding disputed lands, settling of Native-settler disputes, and on and on. Though Hamilton raised the specter of the necessity of noncommercial federal power to treat with Natives, he declined to address or acknowledge the problem it posed—perhaps, by implication, prefiguring the liquidation later achieved by Knox to treat tribes as foreign nations and thus activate the president's treaty-making and foreign-relations powers.<sup>331</sup> In this, Hamilton joined Madison and other Federalists who remained silent regarding the Constitution's glaring omission.

---

<sup>326</sup> THE FEDERALIST NO. 40, at 250 (James Madison) (Clinton Rossiter ed., 1961) (“In some instances, also, those [powers] of the existing government act immediately on individuals. In cases of capture; of piracy; of the post office; of coins, weights, and measures; of trade with the Indians. . .”).

<sup>327</sup> *Supra* note 152 and accompanying text.

<sup>328</sup> THE FEDERALIST NO. 42, at 269 (James Madison) (Clinton Rossiter ed., 1961).

<sup>329</sup> *Id.*

<sup>330</sup> THE FEDERALIST NO. 24, at 161 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>331</sup> *Supra* note 112 and accompanying text.

Anti-Federalists, like Federalists, were unlikely to complain of the Constitution providing too few powers to Congress, and thus the only mention of the clause by Anti-Federalists was by Abraham Yates, Jr., discussed above.<sup>332</sup> Without noting that Indian commerce is quite different and a separate power from Indian affairs, Yates queries:

If this was the conduct of Congress and their officers, when possessed of powers which were declared by them to be insufficient for the purposes of government, what have we reasonably to expect will be their conduct when possessed of the powers “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes,” when they are armed with legislative, executive and judicial powers, and their laws the supreme laws of the land[?] <sup>333</sup>

It could be argued that Yates was equating commerce with affairs as some scholars are wont to do,<sup>334</sup> but considering his intimacy with this domain of government, that is unlikely.<sup>335</sup> Yates, along with other Federalists and Anti-Federalists, missed the true significance of the restoration of Indian trade via “Indian Commerce” but not “Indian Affairs.”

\* \* \*

In all, several factors demonstrate that leaving out Indian affairs as a distinct congressional power was a mistake turned intentional omission: the long preconstitutional history of Indian affairs as a distinct area of law from Indian trade and a choate federal structure, the Convention’s directive to include the Articles’ legislative powers, the presence of two draft texts including “Indian Affairs,” the missed insertion of the clause by Randolph and later Wilson, the partial restoration by committees on the eve of the Convention, and the lack of general debate on the federal or state convention floors. The error was first Randolph’s, then Wilson’s, then the Committee of Detail’s twice—the first time innocently, the second, intentionally—and was then passed over by the Constitutional Convention and the ratifying conventions. When Madison caught the mistake, the Committee of

---

<sup>332</sup> *Supra* note 159 and accompanying text.

<sup>333</sup> Sydney, *supra* note 159, at 1158.

<sup>334</sup> See, e.g., AMAR, *supra* note 23, at 107–08.

<sup>335</sup> It is more probable he anticipated the more holistic view of the Constitution adopted by President Washington. See Ablavsky, *supra* note 21, at 1041.

Detail addressed the lapse and determined to provide a partial restoration of one of the two Indian powers, and no one thereafter commented on the lapse. The Constitution is thus missing an Indian Affairs Clause.

### III. SIGNIFICANCE AND THE FIX

A constitutional omission of this magnitude is novel. It thus raises a myriad of unprecedented and pressing questions: What does the omission of an Indian Affairs Clause mean for Congress's tribal plenary power, for tribal sovereignty, and for the meaning of the Commerce Clause as a whole? How does it impact state-tribal relationships? What are the implications for the scope of the treaty power? These and other important questions will not be addressed here but will provide the basis for further fruitful research and scholarship. Instead, this Article concludes by discussing the significance of omitting an Indian affairs power for congressional plenary power over tribes and suggesting a practical fix to the constitutional power gap: reinitiating tribal treaty-making.

#### A. Significance for Plenary Power

This history demonstrates that the Constitution as finalized—without an Indian Affairs Clause—was almost assuredly intentional. This has major significance for congressional plenary power. Without an Indian affairs power, plenary power is constitutionally wanting and fails. In addressing the significance of the missing Indian Affairs Clause, this Section first deals with the issue of intent, differentiating between intent on a high level of generality versus its more fine-grained variants. Second, it proposes that omission of the Indian Affairs Clause split the preconstitutional Indian affairs powers between the executive and Congress, leaving the residue to the sovereign tribes and operating as a limit if not a bar on congressional plenary power over tribes.

##### 1. The universality of broad intent.

Currently, all theories of constitutional or statutory interpretation assume that what is included and omitted in a text are results of intentional drafting processes in the broad sense. Mistakes inhere the lack of intent, and herein lies a problem: most constitutional theorists, including originalists, disfavor intent.



Determining the mind and will of one individual at any given point in time is difficult. Adding the dimension of time and the complexity of a multimember drafting process (not to mention multiple multimember bodies) and determining collective intent approaches the impossible. As Professor Paul Brest said in his seminal article *The Misconceived Quest for the Original Understanding*:

[A]n intention can only become binding—only become an institutional intention—when it is shared by at least the same number and distribution of adopters. . . .

If the only way a judge could ascertain institutional intent were to count individual intention-votes, her task would be impossible even with respect to a single multimember law-making body, and a fortiori where the assent of several such bodies were required.<sup>336</sup>

Intentionalism, Brest posits, is thus “problematic” when narrowly applied.<sup>337</sup>

However, central to the concept of law, especially fundamental law, is intent on a very high level of abstraction: the law was meant to be law, and interpreters assume intent for what is included and excluded in a text.<sup>338</sup> Coherence and thinking are necessary predicates to legal text. It is not poetry or history or soliloquy, but law *because it was meant to be law*. This kind of intent—that it is an intentional law—does not pertain to or partake of individual thought processes per se, but it requires that any thought process or coherence preceded the text. The centrality of broad intentionalism is underscored by the persistent presence of interpretive canons of construction.<sup>339</sup>

---

<sup>336</sup> Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 214 (1980); see also ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 31–37 (1997) (criticizing use of legislative history as an interpretive tool); RAKOVE, *supra* note 292, at 6–7 (arguing that trying to understand the “true intentions” of the Framers can introduce problems of “bias, perspective, and [ ] intelligibility”).

<sup>337</sup> Brest, *supra* note 336, at 220.

<sup>338</sup> This canon is referred to as *expressio unius est exclusio alterius*, meaning that expression of one is exclusion of another. SCALIA, *supra* note 336, at 25; see also WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON STATUTORY INTERPRETATION 638 (2012).

<sup>339</sup> See Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 730 (2014) (criticizing the sticking force of “the menagerie of canons currently beloved by interpreters of all stripes”).

Thus broad intent is assumed for law, especially constitutional law. Yet what if this generalized intent is missing? What if the law was incoherent, or unintentional? What if what was meant to be law was left out not by virtue of this generalized intent, but because of its lack? Such a mistake is a particular form of lack of intent that is different in kind from evidence of little or no discussion, rejection of a proposal, or some other form of negative intention. It is closer to the species of unintended consequences of otherwise intentional texts,<sup>340</sup> but differs still in that there are unintended consequences of unintentional texts, similar to scribes' errors. Had Madison not caught the Committee of Detail's mistake, new theory of this ken would be required to supplement the missing Clause, including any analogies to the mistake doctrine for a possible *sub silentio* judicial fix.

Yet this is not the case here. As has been shown, there was intention—of the broad variety—in the determination to omit the Indian Affairs Clause. Even if the doctrine were to apply, recent case law demonstrates that Madison's flagging of the omission would prevent application of the mistake doctrine.<sup>341</sup> Thus intent is relevant, as is the lack thereof. Meaning can appropriately be derived from the intentional omission of the Indian Affairs Clause without implicating the same theoretical concerns as intent on a more finite level.<sup>342</sup>

---

<sup>340</sup> See, e.g., Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 3 (2011) (citation omitted):

[E]ven if one accepts that legislative history has some value—and we do—it does not follow that the original meaning of a clause or text is defined by the Framers' original expected applications. We contend that it is not, because original expected applications are not enacted by the text, and legislators are often unaware of the implications of laws they enact.

<sup>341</sup> At least one Supreme Court statutory interpretation case is directly on point. In *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004), text from the Bankruptcy Code allowing a debtor's attorneys to collect fees was deleted in an amended version of the law. *Id.* at 530. The National Association of Consumer Bankruptcy Attorneys raised the deletion in two sentences of a 472-page report submitted to the relevant House subcommittee. *Id.* at 541–42. The Court found that “[t]his alert, followed by the Legislature's nonresponse, should support a presumption of legislative awareness and intention.” *Id.* at 541. Although the Court later indicated that the alert “cannot bear too much weight” as Congress did not attend to it in their deliberations, they nonetheless chose not to smooth over the unintentional omissions and barred debtors' attorneys from a fee award. *Id.* at 541–42. Thus, even if the Court were to apply the same analysis to the unintentional omission of the Indian Affairs Clause, to which Madison alerted the inattentive Convention, it is unlikely they would deign to correct the Committee of Detail's error.

<sup>342</sup> In circumventing these discussions, this Article does not delve into Founding-era intent, original expectations, or original public meaning to any extent, even though analyses of that kind would likely support the analysis here. Assuming that Indian affairs

## 2. Splitting the Indian affairs power.

Assuming that the Indian Affairs Clause was intentionally omitted and that such broad intent permits constitutional meaning, where did the preconstitutional Indian affairs power go? It must yield to the Constitution's other enumerated powers and external Indian affairs powers are therefore split between the executive and the legislature, with the residue of internal affairs powers reverting to the sovereign tribes.

The Indian affairs powers held by the president are limited to the treaty power and, by analogy, the historical gloss of the president's international relations powers.<sup>343</sup> Under Article II, § 2, the treaty power is shared with "the Advice and Consent of the Senate . . . provided two thirds of the Senators present concur."<sup>344</sup> Although this could ostensibly have been liquidated in different fashion by early practice, this clause has come to mean that the president must gain consent of the Senate through ratification.<sup>345</sup> Consent may be conditional and require implementing legislation,<sup>346</sup> but, until the late nineteenth century, tribal treaties were considered self-executing without such.<sup>347</sup> Under a strict interpretation of the treaty power, if treaties require implementing legislation, such legislation would postdate the treaty.<sup>348</sup>

As far as the executive's international relations powers, there remains the possibility that the president may deal with tribes via sole executive agreement or congressional-executive agreements, rather than treaties. Historically, the president has entered into sole executive agreements only where he has

---

could be read into the Constitution as a mistaken omission and that intent could appropriately be discussed on a finite level, plenary power would still fail, as it is inconceivable that the Framers intended Congress to legislate for individual tribal members as it does today, barring plenary power in any event. Without delving into intent, the arguments made here are in harmony with original public meaning on a textual level.

<sup>343</sup> See generally Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

<sup>344</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>345</sup> Stephen P. Mulligan, *International Law and Agreements: Their Effect upon U.S. Law*, CONGRESSIONAL RSCH. SERV. 4 (Sept. 19, 2018), <https://perma.cc/ZEM8-ABAC>.

<sup>346</sup> *Id.*

<sup>347</sup> Blackhawk, *supra* note 26, at 1811.

<sup>348</sup> The first Trade and Intercourse Act may be interpreted loosely as ratification of the preconstitutional Hopewell Treaties, but later renditions of the Act and their additions were increasing departures from whatever textual conformance there initially may have been. *Supra* notes 134, 137 and accompanying text.

concurrent statutory or constitutional power.<sup>349</sup> In the tribal context, assuming congressional plenary power is unfounded, the statutory power authorizing sole executive agreements must relate to one of Congress's enumerated powers vis-à-vis tribes—spending, war, property, or commerce powers.<sup>350</sup> The president could also feasibly enter into a sole executive agreement with tribes where he has concurrent and independent constitutional power as the commander in chief or via the historical ability of the president to resolve private international claims<sup>351</sup> or, in the tribal context, hear Native claims brought in the Court of Federal Claims.<sup>352</sup> Although there has been a rise in nontreaty congressional-executive agreements in recent years,<sup>353</sup> applying such to tribes would prove problematic: as history has shown, this is an area of law where colonialism's shelf life has yet to expire, and, given the power disparity vis-à-vis tribes and federal organs, the use of executive-congressional agreements would invariably prove an exception that would swallow the constitutional rule, proving yet another detriment to long-suffering tribal sovereignty. Instead, this is an area of law that would benefit from the application of clear constitutional rules: unless the president acts under his limited statutory or constitutional powers in executing sole executive agreements, or Congress exercises concurrent power under the War, Spending, Property, or Commerce Clauses in executing congressional-executive agreements, treaties should be the exclusive means of sovereign-to-sovereign negotiation.

In a similar vein, without an Indian Affairs Clause, Congress's power over external tribal affairs is limited by those powers touching Native Nations referenced above—via the War, Spending, Property, or Commerce Clauses, and all things necessary and proper thereto.<sup>354</sup> In this, there is an apt analogy in the

---

<sup>349</sup> Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1581–84 (2007).

<sup>350</sup> U.S. CONST. art. I, § 8.

<sup>351</sup> U.S. CONST. art. I, § 8.

<sup>352</sup> See Indian Claims Commission Act of 1946, Pub. L. No. 79-726, § 12, 60 Stat. 1049, 1052. The Commission was terminated and all such claims were transferred to the Court of Federal Claims, see generally Act of July 20, 1977, Pub. L. No. 95-69, 91 Stat. 273, but Natives' claims against the Federal Government can now be heard in any federal court. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.06[3] (Nell Jessup Newton ed., 2017) [hereinafter COHEN'S HANDBOOK].

<sup>353</sup> Clark, *supra* note 349, at 1584–91.

<sup>354</sup> U.S. CONST. art. I, § 8; see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

immigration-law context, wherein the Supreme Court has begun chipping away at Congress's once-exceptional plenary power over immigration by applying the Due Process and Equal Protection Clauses and the naturalization and other powers.<sup>355</sup>

The residue of Indian affairs power as to internal relations reverts to the sovereign tribes. Natives were excluded procedurally and textually from the Constitution. Tribal members, considered noncitizens at the time, did not take part in ratification,<sup>356</sup> and thus did not bind themselves under the Constitution as states and the people did by participating in and submitting to it. The Constitution also made explicit reference to excluding "Indians not taxed" in the Apportionment Clause.<sup>357</sup> Although this arrangement was later altered in 1924 when U.S. citizenship was granted to all Indians born in the United States,<sup>358</sup> this did not alter the fact that tribal governments were not parties to the Constitution. If popular sovereignty as enshrined in the concept of "We the People" means anything, it requires that "just powers" derive "from the consent of the governed."<sup>359</sup> Thus, by not yielding any powers to the federal (or state) governments by participating in the Constitution's process, tribes retained their powers and sovereignty over internal affairs.

This conclusion departs sharply from that of Justice Thomas in *Lara* and Natelson in his scholarship,<sup>360</sup> who assume that if Congress is without plenary power, the residue is reserved to the states under the Tenth Amendment.<sup>361</sup> Yet the Tenth Amendment does not reserve all "powers not delegated to the United States by the Constitution" to the "States respectively, or to the people"; only those not also "prohibited by [the Constitution] to the States."<sup>362</sup> Here, there is a limit. The doctrine of popular sovereignty enshrined in the Constitution's essential structure

---

<sup>355</sup> See David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 596–98 (2017). See generally, e.g., *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017); *Kerry v. Din*, 576 U.S. 86 (2015); *Arizona v. United States*, 567 U.S. 387 (2012); *Zadvydas v. Davis*, 533 U.S. 678 (2001).

<sup>356</sup> See generally PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788* (2010) (making no mention of Native Americans playing any part in the ratification contest).

<sup>357</sup> U.S. CONST. art. I, § 2.

<sup>358</sup> See generally Indian Citizenship Act of 1924, Pub. L. No. 68-176, 43 Stat. 253; COHEN, *supra* note 352, at § 14.01[1].

<sup>359</sup> THE DECLARATION OF INDEPENDENCE ¶ 2 (U.S. 1776).

<sup>360</sup> *Supra* note 24 and accompanying text.

<sup>361</sup> See *supra* note 18; U.S. CONST. amend. X.

<sup>362</sup> U.S. CONST. amend. X.

as articulated above is also preserved in the background principles of the Ninth and Tenth Amendments themselves: undelegated powers are reserved, and unenumerated rights are retained by those who decline to yield them,<sup>363</sup> and the tribes yielded nothing except as specified by treaties to which they were willing parties. Thus these amendments do not magically operate as springing rights à la property law for the states with respect to tribes that have otherwise retained their powers. Instead, they preserve tribal sovereignty and limit state power. Additionally, once Indians also became U.S. citizens, the final phrase of the Tenth Amendment applied, in that they became “people” (rather than states) to whom such unenumerated powers were reserved, and possibly even before citizenship was recognized. Internal Indian affairs powers thus reverted to the tribes.

The end result of the above is that the intentional omission of the Indian Affairs Clause split the preconstitutional power between Executive and Legislative Branches, returning the residue to the sovereign tribes. Splitting the baby in this manner acts either as a limit or a complete bar to congressional plenary power over tribes.

#### B. The Fix: Re-treating with Tribes

With Congress’s Indian affairs powers limited to war, spending, territory, and commerce powers, and the executive’s treaty power preempted by the 1871 absolution statute, the federal government is left without any effective means of managing Indian affairs. Rescinding the 1871 statute and reinitiating tribal treaty-making as started by the Washington administration and continued for nearly a century thereafter provides a way forward. This approach, so long as any implementing legislation antedates tribal treaties, is consistent with the text and history of the Constitution as outlined above. Further, it is also supported by the Constitution’s structure and precedent, as well as many timely prudential arguments.

Re-treating with tribes restores the careful checks and balances set forth in the Constitution’s structure, requiring consent of two-thirds of the members present in the Senate.

Although reinstating tribal treaty-making would unpick a hundred and fifty years of statutory precedent, the 1871 statutory

---

<sup>363</sup> U.S. CONST. amends. IX–X.

policy was on shaky constitutional footing from inception. In siding with Justice Thomas, Professor Alexander Pearl insists that the 1871 act is unconstitutional because Congress does not have the power “to decide which groups are, or are not, sovereign enough to engage in treaty-making with the United States.”<sup>364</sup> Further, the act revoked a constitutional executive power for a certain class of treaty makers. Though there is arguably constitutional space for all three branches to interpret the Constitution vis-à-vis their own remits, the 1871 act is a far cry further: it involved one branch enforcing their interpretation of the Constitution as against another, generally thought to be the province of the judiciary.<sup>365</sup> Revoking the statute and reinstating executive treaty-making with Natives, especially that which anticipates legislation, would moot the constitutional questionability of the act and reintroduce a balance and separation of powers among the three branches in this beleaguered area of law.

Re-treating with tribes is also consistent with several trends in Native American law. The first trend finds its origins in *Cherokee Nation v. Georgia*,<sup>366</sup> wherein Chief Justice Marshall recognized tribes as “domestic dependent nations.”<sup>367</sup> Though questioned at times, tribal sovereignty has never since been disannulled, and has been reaffirmed by the *Lara* Court and recent administrations.<sup>368</sup> Too, since the Indian Reorganization Act in 1934,<sup>369</sup> and especially since 1961, federal administrations have adopted a policy of self-determination and self-governance for tribes.<sup>370</sup> Treating with tribes recognizes their inherent sovereignty and allows them to self-determine. Additionally, there is a canon of construction for all sources of applicable Native

---

<sup>364</sup> Pearl, *supra* note 21, at 331.

<sup>365</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1804) (“It is emphatically the province and duty of [this Court] to say what the law is.”).

<sup>366</sup> 30 U.S. (5 Pet.) 1 (1831).

<sup>367</sup> *Id.* at 17.

<sup>368</sup> See *Lara*, 541 U.S. at 199; Ronald Reagan, *Statement on Indian Policy*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM (Jan. 24, 1983), <https://perma.cc/F87B-HYJX> (referring to “sovereign Indian nations” and the “right of each tribe to set its own priorities and goals”); *User Clip: George W. Bush on Tribal Sovereignty*, C-SPAN (2004), <https://perma.cc/36J6-G4VR> (recognizing tribes as sovereign); Nick Smith, *President Obama Visits Standing Rock*, BISMARCK TRIB. (June 13, 2014), <https://perma.cc/Q9VY-VLAW> (quoting President Obama as saying, “throughout history, the United States often didn’t give the nation-to-nation relationship the respect that it deserved . . . [s]o I promised that when I ran to be a president who’d change that—a president who honors our sacred trust, and who respects your sovereignty”).

<sup>369</sup> Pub. L. No. 73-383, 48 Stat. 984 (codified in scattered sections of 25 U.S.C.).

<sup>370</sup> COHEN, *supra* note 352, at § 1.07.

American law requiring that they be interpreted in the light most favorable for tribes.<sup>371</sup> Applying this canon to the Constitution writ large and interpreting it in a light most favorable to the tribes requires re-treating with tribes.

The importance of re-treating with tribes is also underscored by three reasons sounding in constitutional ethics. Recently, in *McGirt v. Oklahoma*,<sup>372</sup> *Herrera v. Wyoming*,<sup>373</sup> and *Nebraska v. Parker*,<sup>374</sup> the Court has emphasized the imperative to maintain historic agreements with tribes. The Knox-Washington congressional pact and the tribal treaty-making that endured for nearly a century thereafter represents a kind of founding compact or constitution with tribes. It was the manner in which White society interacted with them, liquidating the meaning of the Constitution, sans an Indian Affairs Clause. In conformance with the *McGirt* line of recent precedents, the United States is obligated to keep its historic agreements with tribes, including its original course-of-dealing compact with tribes to treat with them as sovereign nations. Further, the 1871 appropriations rider disannulling the president's ability to treat with tribes is a vestige of the era's colonialism, coming as it did during the federal government's paternalistic policy of allotment and assimilation between 1871 and 1928 when the federal government sought to do away with tribal governments altogether and Indians were made to assimilate into White society, with devastating effects.<sup>375</sup> This was a low moment in our history, one we would do well to rectify. The final ethical reason follows from the last: this is a moment of great societal disruption when Americans are called upon to think more deeply about those excluded from the constitutional process, whether because of skin color, national origin, or gender. Overturning 150 years of precedent is no small thing. Yet the time may be ripe to do just that and reverse a century and a half of paternalistic colonialism and eradicate a blight on collective constitutional consciousness. Doing so would provide Native American law its *Brown v. Board of Education*<sup>376</sup> moment and allow the vestiges of colonialism to be

---

<sup>371</sup> *Id.* at § 2.02[1]–[2].

<sup>372</sup> 140 S. Ct. 2452 (2020) (upholding historical treaties with the Creek Nation).

<sup>373</sup> 139 S. Ct. 1686 (2019) (upholding a treaty with the Crow Tribe).

<sup>374</sup> 136 S. Ct. 1072 (2016) (upholding a treaty with the Omaha Tribe).

<sup>375</sup> COHEN, *supra* note 352, at § 1.03[6][b], [9]; *id.* § 1.04.

<sup>376</sup> 347 U.S. 483 (1954).



thrown off entirely, providing cause for celebration in these dark times.

In conclusion, restoring treaty-making would elevate tribes to a more coequal status with those on the other side of the negotiating table (or circle, as it were), and restores languishing tribal sovereignty. As Pearl writes:

With a treaty, there is less discretion, less uncertainty, and less variability, from which all parties benefit. Revitalizing the constitutionally created right of the Executive to enter into treaties with Indian tribes simplifies the Federal-Tribal relationship while also adhering to fundamental principles of constitutional design and restoring order to separation of power principles.<sup>377</sup>

Treating with Native Tribes again as the Washington administration did celebrates and resolidifies tribal sovereignty—a crown jewel in the constitutional canon<sup>378</sup>—and is consistent with the Constitution’s text, history, and structure, and precedent, as well as constitutional ethics.

#### CONCLUSION

Indian affairs was initially intended for constitutional inclusion. As a long-held power of the British and the Confederation, the Constitutional Convention unanimously mandated the incorporation of Indian affairs with other congressional powers under the Articles of Confederation, and John Rutledge, acting as Committee of Detail chair and likely by their consensus if not vote, directed James Wilson to include it in the Committee’s reported draft. Duty bound and personally motivated to defend his own Native-acquired land through federal channels, James Wilson clearly meant to include the clause and even checked it off as if he had. And yet, it appears nowhere in his final draft of the Constitution, perhaps because it was lost along with the missing portion of Wilson’s first full draft. The Committee missed Wilson’s mistake, and reported their draft out of Committee without any mention of Indians—commerce, affairs, or otherwise. Madison caught the mistake, but his proposal was tabled and only discussed back in the Committee of Detail, which restored only the power over Indian trade. The Committee

---

<sup>377</sup> Pearl, *supra* note 21, at 333–34.

<sup>378</sup> *See id.*

inserted “Indians” into the Commerce Clause but failed to restore power over Indian affairs, this time intentionally. This change was adopted by the Convention and sent to the states as part of the Constitution for ratification, where the omission was overlooked. The Constitution is thus missing an Indian Affairs Clause.

Although over two centuries of confusion have ensued, the missing clause might redound to the benefit of the tribes. Such an omission is novel in constitutional theory and raises new and important questions that implicate theoretical creativity and experimentation. The omission of the clause was intentional, broadly speaking, and therefore meaningful: without an Indian Affairs Clause, constitutional authority for congressional plenary power collapses. The preconstitutional external Indian affairs power is therefore split between the executive and Congress via their respective enumerated powers touching tribes under the Constitution, with the residual internal affairs powers reverting to the tribes. The limit on Indian affairs power requires the resuscitation of tribal treaty-making, which will restore constitutional separation of powers, continue recent legal trends toward self-determination, overturn a hundred and fifty years of colonialism, and capture the present moment of creative disruption in racial relations by bequeathing to the tribes their own *Brown v. Board of Education* crowning achievement for tribal sovereignty.