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## Beyond the Indian Commerce Clause

**ABSTRACT.** The Supreme Court has described the Indian Commerce Clause as the primary constitutional basis for federal exclusive and plenary power over Indian affairs. Recently, Justice Clarence Thomas, citing current scholarship, has argued that the Clause's original understanding does not support this authority, with radical implications for current doctrine.

This Article uses unexamined historical sources to question this debate's fundamental premise. It argues that the Indian Commerce Clause, open-ended when written, was a minor component of eighteenth-century constitutional thought. This Article instead posits alternate sources for federal authority over Indian affairs, drawing particularly on the Washington Administration. Asserting federal power against the states, the Administration embraced a holistic constitutional reading akin to present-day field preemption. With respect to authority over Indians, the Administration, through law-of-nations interpretations, asserted ultimate U.S. sovereignty over tribes, while acknowledging Native autonomy beyond these limitations. Yet these supposedly narrow legal principles ultimately formed the basis for the later elaboration of plenary power over tribes.

On the one hand, this history provides a more solid foundation for doctrinal principles derided as incoherent. On the other hand, it suggests more cabined federal authority over Indians. Ultimately, the Article demonstrates the value of more historically grounded reconstructions of constitutional understandings.

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## INTRODUCTION

*“Federal Indian policy is, to say the least, schizophrenic.”*<sup>1</sup>

– Justice Clarence Thomas

*“You talk of the law of nature and the law of nations, and they are both against you.”*<sup>2</sup>

– Onitositah (Corn Tassel), Cherokee chief

For over a century, the Supreme Court has interpreted the Constitution to grant the federal government “plenary” power over “Indian Affairs”—the diplomatic, political, military, and commercial relationships between the United States and Native nations.<sup>3</sup> Plenary power, as used by the Court, has two distinct meanings.<sup>4</sup> Sometimes the Court uses the term interchangeably with “exclusive,” to describe federal power over Indian affairs to the exclusion of states. But the Court also uses the term to describe the doctrine that the federal government has unchecked authority *over* Indian tribes, including their internal affairs. The Court has ruled that federal plenary power authorizes the government to take Native land without compensation,<sup>5</sup> for instance, or to expand, contract, or even abolish tribal sovereignty at will.<sup>6</sup>

While gesturing to other constitutional provisions,<sup>7</sup> the Court has largely relied on the Indian Commerce Clause, which grants Congress the authority “[t]o regulate Commerce . . . with the Indian Tribes,”<sup>8</sup> to justify the federal government’s exclusive power against states and plenary power over tribes. “[T]he Indian Commerce Clause makes ‘Indian relations . . . the exclusive

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1. United States v. Lara, 541 U.S. 193, 219 (2004) (Thomas, J., concurring).

2. *Tatham’s Characters Among the North American Indians*, 7 TENN. HIST. MAG. 174, 177 (Sam’l C. Williams ed., 1921).

3. In this Article, I favor the term “Native,” but occasionally employ “Indian,” particularly when used as a term of art, to describe the indigenous peoples of North America. I also place words such as “Founder” and “Founding” in quotes. Though these terms are standard in legal scholarship, in my view they connote too much identification between present and past and provide little clarity about an individual’s particular historical role.

4. To avoid confusion between these two meanings, I use the term “exclusive” to refer to federal power over Indian affairs in exclusion of the states, and reserve “plenary” to refer to federal power over Native nations. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 5.02[1] (Nell Jessup Newton ed., 2012).

5. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 290-91 (1955).

6. *Lara*, 541 U.S. at 199-203.

7. In *Lara*, for instance, the majority briefly mentioned the Treaty Clause, as well as preconstitutional authority, as possible sources of federal plenary power. *Id.* at 200-01.

8. U.S. CONST. art. I, § 8.

province of federal law,”<sup>9</sup> the Court opined in *Seminole Tribe of Florida v. Florida*, precluding the exercise of “virtually all” state authority.<sup>10</sup> As for the extent of federal power over Indian tribes, “the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs,” the Court stated in *Cotton Petroleum Corp. v. New Mexico*.<sup>11</sup>

Both the exclusive and plenary power doctrines rest on unstable foundations. When the Court first enunciated the plenary power doctrine in 1886, it considered, and rejected, the Indian Commerce Clause as the doctrine’s source.<sup>12</sup> Since then, many scholars have questioned whether the Clause could be read to grant the federal government unbridled power to regulate tribes’ internal affairs.<sup>13</sup> More recently, a revisionist strand of originalist scholarship has challenged the long-received wisdom that the Clause grants the federal government authority to the exclusion of the states, arguing that the Clause’s original understanding supports a far narrower scope for federal power and a broader role for the states.<sup>14</sup>

The Court, however, has shied away from reexamining these doctrinal bases for nearly all federal Indian law – until recently. In two recent concurrences, Justice Clarence Thomas has subjected the Court’s Indian Commerce Clause jurisprudence to a wide-ranging originalist critique. In *United States v. Lara*, he questioned whether inherent tribal sovereignty and congressional plenary power can coexist.<sup>15</sup> And in the 2013 *Adoptive Couple v. Baby Girl* decision, Jus-

9. *Seminole Tribe v. Florida*, 517 U.S. 44, 60 (1996) (quoting *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985)).
10. *Id.* at 62.
11. *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 192 (1989).
12. *United States v. Kagama*, 118 U.S. 375, 378-79 (1886) (“[W]e think it would be a very strained construction of this clause, that a system of criminal laws for Indians . . . without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.”).
13. Some of the many works questioning federal plenary power’s constitutionality include T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 124-25 (2002); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 115-16, 133 (2002); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 55-56 (1996); and Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 AM. INDIAN L. REV. 57, 79 (1991).
14. Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 241-44, 250 (2007); Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1089 (2004); cf. Nathan Speed, Note, *Examining the Interstate Commerce Clause Through the Lens of the Indian Commerce Clause*, 87 B.U. L. REV. 467, 472-78 (2007) (arguing for a narrow reading of the Commerce Clause, given early Congresses’ narrow legislation under the Clause). Natelson and Prakash also question federal plenary power over Indian tribes. Natelson, *supra*, at 243-44, 247-48; Prakash, *supra*, at 1087-90.
15. *United States v. Lara*, 541 U.S. 193, 214-15, 224-25 (2004) (Thomas, J., concurring).

tice Thomas challenged congressional authority to enact the statute at issue, the Indian Child Welfare Act.<sup>16</sup> Drawing on the revisionist originalist scholarship, Justice Thomas argued that the Indian Commerce Clause provides federal authority only over Indian trade, narrowly defined.<sup>17</sup>

Justice Thomas's critique of the Court's Indian Commerce Clause jurisprudence has radical and largely unexplored implications,<sup>18</sup> and deserves to be taken seriously.<sup>19</sup> Because most federal statutes concerning Indians lack a nexus to Justice Thomas's definition of trade, they would be unlikely to survive the scrutiny he urges.<sup>20</sup> The result would be a wholesale reshaping of the law that has governed Indian affairs for the past century and a half: "an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized," as the Court stated in a challenge to a different federal Indian law statute.<sup>21</sup>

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16. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2570-71 (2013) (Thomas, J., concurring).

17. *Id.* at 2567-70 (citing Natelson, *supra* note 14; Prakash, *supra* note 14).

18. A number of scholars have recently explored *Adoptive Couple*, but largely in the context of equal protection and the Indian Child Welfare Act. See, e.g., Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 FLA. L. REV. (forthcoming 2015), <http://ssrn.com/abstract=2417444> [<http://perma.cc/5F3U-RTSR>]; Christopher Deluzio, *Tribes and Race: The Court's Missed Opportunity in Adoptive Couple v. Baby Girl*, 34 PACE L. REV. 509 (2014); Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537, 588-92 (2014); *Indian Child Welfare Act—Termination of Parental Rights—Adoptive Couple v. Baby Girl*, 127 HARV. L. REV. 368 (2013); Symposium, *Perspectives on Adoptive Couple v. Baby Girl*, 93 B.U. L. REV. ANNEX: PERSP. 45 (2013); Marcia A. Zug, *The Real Impact of Adoptive Couple v. Baby Girl: The Existing Indian Family Doctrine Is Not Affirmed, but the Future of ICWA's Placement Preferences Is Jeopardized*, 42 CAP. U. L. REV. 327 (2014).

19. As others have noted, Justice Thomas's willingness to question precedent often pressures the rest of the Court to respond, recasting the debate and potentially reshaping doctrine. RALPH A. ROSSUM, UNDERSTANDING CLARENCE THOMAS: THE JURISPRUDENCE OF CONSTITUTIONAL RESTORATION 214-21 (2014); Jeffrey Toobin, *Partners*, 87 NEW YORKER 40-51 (2011). Last Term, for instance, Justice Thomas secured the support of three other Justices in challenging the long-standing doctrine of tribal sovereign immunity. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2045-55 (2014) (5-4 decision) (Thomas, J., dissenting). Justice Thomas's *Bay Mills* dissent did not explicitly question federal authority, as his earlier concurrences did. Nonetheless, he invoked many of the same principles as in his *Lara* and *Adoptive Couple* concurrences, particularly solicitude for state sovereignty over tribal sovereignty. *Id.* at 2047.

20. Cf. Marcia Zug, *Adoptive Couple v. Baby Girl: Two-and-a-Half Ways to Destroy Indian Law*, 111 MICH. L. REV. FIRST IMPRESSIONS 46, 50-51 (2013) (observing, prior to the ruling, that "if the Court were to find that ICWA is unconstitutional because it exceeds Congress's authority under the Indian Commerce Clause, the impact of this decision on Indian tribes would be . . . devastating" and would "essentially destroy . . . the majority of Indian law").

21. *Morton v. Mancari*, 417 U.S. 535, 552 (1974). *Morton* arose as an equal protection and statutory challenge to a federal statute providing an employment preference to qualified Indians.

Justice Thomas's provocative claims provide an excellent opportunity to revisit fundamental principles of federal Indian law. Although Justice Thomas's historical analysis is unpersuasive—as this Article will argue—he captures a larger truth. As this Article explores, the history of the Indian Commerce Clause's drafting, ratification, and early interpretation does not support either “exclusive” or “plenary” federal power over Indians. In short, Justice Thomas is right: Indian law's current doctrinal foundation in the Clause is historically untenable.

Responding to Justice Thomas's revisionist critique requires moving beyond the widely accepted premise that federal power over Indian affairs must rise and fall with the Indian Commerce Clause.<sup>22</sup> This preoccupation with the Clause is an anachronism that reflects not the Constitution's eighteenth-century drafting but nineteenth-century doctrinal innovation. To determine the original constitutional Indian affairs power, this Article employs an alternate approach to reconstruct constitutional meaning. This approach uses heterodox methodologies and inclusive conceptions of constitutional actors and sources to challenge older histories centered on the Supreme Court.<sup>23</sup>

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For background, see Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958 (2011).

22. See 133 S. Ct. at 2566 (Thomas, J., concurring) (“The assertion of plenary authority must, therefore, stand or fall on Congress' power under the Indian Commerce Clause.”).
23. Though this is a new approach toward reconstructing the Indian Commerce Clause, it echoes legal historians' calls to move beyond conventional histories in exploring constitutional meanings. See, e.g., Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721, 725 (2013) (arguing for an intellectual history approach toward ideas as “embodied, embedded, and extended” instead of originalist methodologies); Risa Goluboff, *Lawyers, Law, and the New Civil Rights History*, 126 HARV. L. REV. 2312, 2326 (2013) (reviewing KENNETH W. MACK, *REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER* (2012)) (describing the “new civil rights history,” which “takes an expansive approach to the cast of historical actors, the arenas in which they acted, the types of sources that can provide information about them, and the questions one might ask about the past”); see also Alfred L. Brophy, *Introducing Applied Legal History*, 31 LAW & HIST. REV. 233 (2013) (discussing the promise and perils of “applied legal history”); Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75 (2013) (noting the challenge in discerning authoritative historical practice); Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575 (2011) (arguing against originalist methodologies for constructing historical textual meaning).

For examples of recent works on early constitutional history that employ a diverse range of sources, consider the Constitution in longer temporal perspective, and explore multiple perspectives within legal thought, see MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* (2004); DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830* (2005); and ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010) [hereinafter LACROIX, *THE IDEOLOGICAL ORIGINS*].

Employing this approach helps remedy two flaws that mar accounts of the Indian Commerce Clause specifically and much originalist scholarship generally.<sup>24</sup> The first is the focus on textual history divorced from historical experience. This approach is especially problematic for Indian law, which evolved not from abstract reasoning but from customary and shared practices developed over two centuries of cross-cultural encounter.<sup>25</sup>

The second flaw is reliance on a narrow set of sources, principally the records of the Constitutional Convention and the ratification debates. This approach ignores the construction of constitutional understandings elsewhere—in early federal and state practice, in broader public discussions, or, as this Article emphasizes, in diplomatic negotiations with other sovereigns. The problems posed by this blinkered focus are particularly salient for the Indian Commerce Clause. Substantive discussion of the Clause in the sources usually relied on by originalists is almost nonexistent.<sup>26</sup> This paucity of evidence has led commentators to draw drastically different conclusions based on arguments from silence, or to conjecture about the issues the Constitution’s drafters “were alert to,”<sup>27</sup> or to mention the Constitution only briefly before leaping forward to cases interpreting the Clause decades later.<sup>28</sup>

A large body of sources, however, documents late eighteenth-century understandings of federal authority over Indian affairs. The topic dominated early federal governance, particularly under the Washington Administration of 1789 to 1797,<sup>29</sup> when the United States entered into major treaties and land purchas-

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24. This Article does not address the issue of whether the constitutional text’s original public meaning is dispositive, the subject of an enormous body of scholarship. There may be particular reason to question whether fidelity to the Constitution’s original meaning is desirable in Indian law given the document’s imperialist origins. See Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999 (2014).
  25. The emergence of this shared legal culture is a central theme in RICHARD WHITE, *THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650-1815* (1991). See also *infra* text accompanying note 368.
  26. See *infra* Part I.
  27. *Adoptive Couple*, 133 S. Ct. at 2569 (Thomas, J., concurring).
  28. See, e.g., Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 200-02 (1984) (briefly discussing early history before turning to the Marshall “trilogy”).
  29. Strict originalists might query whether this post-adoption history is relevant for reconstructing “original understanding.” But see AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 307-32 (2012) (arguing that the practices of George Washington constitute part of the “unwritten Constitution” of the United States); Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 657 (2013) (“The practices of the Washington Administration immediately after adoption of the Constitution are generally thought relevant to understanding the original meaning of Article II.”); *id.* at 657 n.33 (collecting examples of originalist scholarship drawing on

es with Native nations, fought a lengthy and costly Indian war, and sought to end endemic cycles of frontier violence.<sup>30</sup> These issues implicated the era's pressing questions of western lands, international relations, military affairs, and national finance. Granted expansive discretion by Congress to govern Indian affairs,<sup>31</sup> the executive branch gave concrete meaning to the Constitution's sparse framework through extensive deliberations. These efforts to clarify Natives' constitutional status produced a considerable archive: correspondence and meetings among the President, his cabinet, and state executives; transcripts of treaty negotiations with Native nations; and a constant flow of letters, instructions, and intelligence to and from Indian agents, officials, and informants on the frontier. Using these vibrant discussions, this Article draws on, and extends into earlier periods, recent scholarship, particularly within administrative law, emphasizing the importance of constitutional understandings outside the courts.<sup>32</sup>

These sources reveal a very different story than that told by present-day scholars and judges preoccupied with the Indian Commerce Clause. The most pressing issue for early Americans was federalism: would the states or the national government possess authority over Indian relations? The Washington Administration insisted that the federal government enjoyed exclusive constitutional authority, and many state officials agreed. This claim rested not on the Indian Commerce Clause but on the broad panoply of diplomatic and military powers granted to the national government and denied to the states—a claim

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the Washington Administration). Other scholars have stressed the Washington Administration's importance for the constitutional status of foreign relations and international law. See, e.g., David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 1015-61 (2010); Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. RICH. L. REV. 373 (2012).

30. See generally DAVID ANDREW NICHOLS, *RED GENTLEMEN AND WHITE SAVAGES: INDIANS, FEDERALISTS, AND THE SEARCH FOR ORDER ON THE AMERICAN FRONTIER 98-189* (2008) (describing federal Indian policy under the Washington Administration).
31. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1299-1300 (2006) ("When Congress came to exercise its power to regulate commerce with the Indian tribes, for example, it basically ceded the regulatory authority to the President.").
32. For examples of explorations of "administrative constitutionalism," focusing particularly on the twentieth century, see Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799 (2010); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013); and Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314 (2012). Recent scholarship has emphasized Indian affairs in the construction of the early American administrative state. See STEPHEN J. ROCKWELL, *INDIAN AFFAIRS AND THE ADMINISTRATIVE STATE IN THE NINETEENTH CENTURY* (2010).

similar to the present doctrine of field preemption. Proponents of state power over Indian affairs, meanwhile, argued from inherent state sovereignty; only in the early nineteenth century, this Article will show, did they advance a narrow interpretation of federal power rooted in the Indian Commerce Clause.

The scope of federal power over Native nations presented a different set of questions. The diplomatic and military powers claimed by the federal government against the states did not imply that Natives were under U.S. jurisdiction; as in foreign relations, the question was which sovereign had the authority to negotiate, or fight, with Indians. But the Washington Administration nonetheless did not consider Native nations fully independent polities. Instead, it argued that the law of nations granted the United States, as territorial sovereign, limited authority over Natives – primarily the power to restrict Native international legal personality and, relatedly, to limit Native land sales. Building on recent scholarship underscoring the centrality of the Constitution’s international law context,<sup>33</sup> this Article suggests that the Washington Administration understood both these restrictions and Native autonomy as constitutional issues. Though the United States did not initially claim plenary power over Natives, the doctrine crafted by the Administration provided the intellectual antecedents for later, more aggressive assertions of authority.

Early Americans thus espoused legal theories similar to, but importantly distinct from, modern Indian law doctrines of exclusive and plenary federal power. These interpretations proved influential and durable, profoundly shaping the Supreme Court’s foundational decisions of the 1820s and ’30s. In key

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33. This literature’s central interpretive insight is that “[t]he fundamental purpose of the Federal Constitution was to create a nation-state that the European powers would recognize, in the practical and legal sense, as a ‘civilized state’ worthy of equal respect in the international community,” which required adherence to international norms. Golove & Hulsebosch, *supra* note 29, at 935; see also Daniel J. Hulsebosch, *The Revolutionary Portfolio: Constitution-Making and the Wider World in the American Revolution*, 47 SUFFOLK U. L. REV. 759 (2014). For historical works that similarly explore international law’s influence on early America, see ELIGA H. GOULD, *AMONG THE POWERS OF THE EARTH: THE AMERICAN REVOLUTION AND THE MAKING OF A NEW WORLD EMPIRE* (2012); DAVID C. HENDRICKSON, *PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING* (2003); PETER ONUF & NICHOLAS ONUF, *FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776-1814* (1993); and LEONARD J. SADOSKY, *REVOLUTIONARY NEGOTIATIONS: INDIANS, EMPIRES, AND DIPLOMATS IN THE FOUNDING OF AMERICA* (2009). A large legal literature explores this history to address the extent to which the Constitution incorporates the law of nations into constitutional or federal common law. See, e.g., Anthony J. Bellia, Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729 (2012); Lori Fisler Damrosch & Bernard H. Oxman, Editors’ Introduction, *Agora: The United States Constitution and International Law*, 98 AM. J. INT’L L. 42 (2004); see also Golove & Hulsebosch, *supra* note 29, at 936 n.7 (collecting sources). This Article does not explicitly engage these doctrinal questions, although it does emphasize the significance of the law of nations in late eighteenth-century constitutional interpretation.

respects, the Administration's views represent the forgotten origins of federal Indian law.

These historical precedents also provide a more solid foundation for the basic concepts of current federal Indian law and suggest that recent denunciations of Indian law as “incoherent” and “schizophrenic” stem from a failure to understand its history. But there are also important points of divergence between early understandings of Indian law and current doctrine. The legal positions of early Americans suggested a more limited role for states and a more modest scope of federal power over Indian nations than present law provides; these positions also suggest that the Court's doctrinal conclusions based on Native dependency, particularly limitations on tribal jurisdiction, are unsupported by early constitutional history.<sup>34</sup>

This Article proceeds in three parts. Part I provides a brief history of the drafting and ratification of the Indian Commerce Clause. Part II considers competing arguments over whether the Indian Commerce Clause supports broad federal power over Indian affairs exclusive of state authority. This Part first argues that the Clause itself is open-ended on this question, then moves beyond the Clause to argue that many early actors located supreme federal authority in Indian affairs in a holistic interpretation of the Constitution. Others disagreed and sought to cabin federal authority, but their arguments were based primarily on inherent state sovereignty. Part III turns to federal plenary power over Indian tribes. Rather than locating this power in the Indian Commerce Clause, early federal officials claimed—based on the law of nations and territoriality—limited sovereignty over Natives. These arguments laid the groundwork for the doctrine of plenary power, but they also acknowledged considerable Native autonomy. The Article concludes by exploring the consequences of this account for current doctrine and Indian law scholarship.

## I. A BRIEF HISTORY OF THE INDIAN COMMERCE CLAUSE

The Indian Commerce Clause originated with Article IX of the Articles of Confederation.<sup>35</sup> A compromise resulting from a vigorous debate over state authority,<sup>36</sup> Article IX granted Congress the “sole and exclusive right and power

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34. See *infra* text accompanying notes 399-400.

35. Like the Indian Commerce Clause in the Constitution, Article IX was the sole provision explicitly granting authority over Indian affairs in the Articles of Confederation. For that reason, beginning with James Madison and continuing with Chief Justice Marshall and Justice Thomas, scholars and judges have turned to Article IX to interpret the Indian Commerce Clause. See *infra* text accompanying notes 107-108, 123, 172-173.

36. 6 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 1077-79 (Worthington Chauncey Ford ed., 1906).

of . . . regulating the trade and managing all affairs with the Indians.”<sup>37</sup> It also imposed two important qualifications. First, the national government could only exercise authority over Indians who were “not members of any of the States.”<sup>38</sup> Second, “the legislative right of any State, within its own limits,” could not be “infringed or violated.”<sup>39</sup> These restrictions became a source of tension as the states and the national government vied for authority in negotiations with the Creeks, Cherokees, Six Nations of the Haudenosaunee (Iroquois), and other Native nations.

These controversies raged as the Constitutional Convention met in June 1787,<sup>40</sup> but no substantive discussion of Indian affairs occurred until August 18. On that day, James Madison proposed granting Congress the power to “regulate affairs with the Indians as well within as without the limits of the U[nited] States”—a clear effort to abrogate Article IX’s limitations.<sup>41</sup> The Committee of Detail proposed an alternative. It had previously drafted a clause giving Congress the authority “[t]o regulate commerce with foreign nations, and among the several States.”<sup>42</sup> It now suggested adding “and with Indians, within the Limits of any State, not subject to the laws thereof”<sup>43</sup> to this clause, partially preserving Article IX’s protection of state authority. Near the end of the Convention, the Committee on Postponed Parts instead eliminated all qualifiers and proposed adding only “and with the Indian tribes” to the end of the Commerce Clause.<sup>44</sup> The Convention accepted this provision unaltered in the final constitutional draft.<sup>45</sup> The final language granted Congress “Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>46</sup>

The ratification debates that followed ignored the Indian Commerce Clause. The only sustained discussion appeared in *Federalist No. 42*, where James Madison praised the change from Article IX, observing that the elimina-

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37. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4.

38. *Id.*

39. *Id.*

40. Ablavsky, *supra* note 24, at 1038-39.

41. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 324 (Max Farrand ed., 1911). An Indian affairs power appeared in the Pinckney plan, 3 *id.* at 607, and was referenced in marginal notes in drafts of the Committee of Detail, 2 *id.* at 143, but not in the Committee’s final draft, *id.* at 181-82.

42. 2 *id.* at 181.

43. *Id.* at 367.

44. *Id.* at 493, 497, 503.

45. *Id.* at 495.

46. *Id.* at 655.

tion of the earlier qualifiers resolved earlier contentions over the division of authority.<sup>47</sup> The only other recorded mention of the Clause in the debates came in a tract by Anti-Federalist Abraham Yates, Jr., who attacked the Clause along with other provisions that he claimed granted the federal government an improper supremacy over Indian affairs.<sup>48</sup>

The relative neglect of the Clause continued after ratification. The primary statutes governing Indian affairs until the 1830s were the Trade and Intercourse Act of 1790<sup>49</sup> and its successors.<sup>50</sup> These laws regulated Indian trade, banned state and private land purchases from Indians, and they extended federal criminal jurisdiction over non-Indians in Indian country. But these statutes were only ambiguously and partially exercises of the federal Indian commerce power.<sup>51</sup> The Supreme Court did not discuss the Indian Commerce Clause until 1824,<sup>52</sup> and it did not examine the Clause's implications for Indian affairs until *Cherokee Nation v. Georgia* in 1831.<sup>53</sup>

Unlike the robust debates around Article IX, then, the Indian Commerce Clause provoked little discussion either at the Convention or afterward. These traditional sources of original constitutional understanding give modern scholars very little clear evidence to ground present-day doctrine, a challenge addressed in the next Part.

## II. EXCLUSIVE FEDERAL POWER

Received wisdom in both doctrine and scholarship has long held that the federal government enjoys exclusive power over Indian affairs, displacing state authority.<sup>54</sup> Though the argument has a textual hook in the Indian Commerce

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47. THE FEDERALIST NO. 42, at 236-37 (James Madison) (Clinton Rossiter ed., 1961).

48. See Sydney, To the Citizens of the State of New York, N.Y. J., 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). Earlier scholarship attributed the Sydney essays to Robert Yates, but the recent scholarship on ratification has established that they were written by Abraham Yates, Jr. See *id.* at 1153; Sidney, N.Y. J., Oct. 18, 1787, reprinted in 19 *id.* at 115.

49. Act of July 22, 1790, ch. 33, 1 Stat. 137.

50. Act of June 30, 1834, ch. 161, 4 Stat. 729; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of Mar. 1, 1793, ch. 19, 1 Stat. 329.

51. This argument is developed *infra* in the text accompanying notes 168-171.

52. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 60 (1824).

53. 30 U.S. (5 Pet.) 1, 18-20 (1831).

54. See, e.g., *United States v. Lara*, 541 U.S. 193, 200 (2004) (“[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have con-

Clause, this conventional wisdom – which I will call the nationalist account – ultimately rests on precedent and practice.

Recent revisionist scholarship has challenged the conventional view, relying on textual arguments that “commerce” in the Indian Commerce Clause refers only to matters concerning trade. Though some of this scholarship has argued for expanded tribal autonomy,<sup>55</sup> other scholars have claimed that this argument supports expanded state authority over Indian affairs, a view that Justice Thomas adopted in his *Adoptive Couple* concurrence.

This Part argues that both the revisionist and nationalist accounts are inadequate, and it contends that the Clause’s meaning was open-ended when drafted: the terms “commerce” and “trade” had distinctive meanings in the Indian context that encompassed a broad range of interactions with Indians. But examining the Indian Commerce Clause in isolation is a mistake. During and after ratification, proponents of a stronger federal government located exclusive power over Indian affairs by adopting a holistic interpretation of the Constitution and its provisions on federal power; in contrast, opponents argued from inherent state sovereignty rather than relying on the text of the Indian Commerce Clause. Textualist arguments based on a narrow interpretation of commerce did not gain ascendance until a generation later, when these arguments were judicially rejected and lay quiescent until revived by current revisionist scholars and judges.

#### A. *The Vagueness of the Indian Commerce Clause’s Original Public Meaning*

Much of the revisionist scholarship on the Indian Commerce Clause has adopted the approach of the New Originalism: it asks what the “original public meaning” of the Clause was to a well-informed reader when adopted.<sup>56</sup> Justice

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sistently described as ‘plenary and exclusive.’” (quoting *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 470-71 (1979)); *Seminole Tribe v. Florida*, 517 U.S. 44, 62 (1996) (“[T]he States . . . have been divested of virtually all authority over Indian commerce and Indian tribes.”); 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 4, § 5.02[2] (“Even when unexercised, the [federal] power to regulate commerce with the Indian tribes precludes the exercise of most state authority in Indian country.”); *see also* Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1058 (1994) (arguing for federal supremacy over Indian affairs based on constitutional history).

55. I address the question of tribal sovereignty more fully in the subsequent Part. *See infra* text accompanying notes 214-215.

56. *See* Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 417 (2013) (noting that originalists, in establishing original public meaning, “are searching for an empirical fact: what information would these words on the page have conveyed to the reasonable speaker of English in the relevant audience at the time of enactment?”). I do not delve into the varieties of hypothetical readers that originalists have posited.

Thomas argues that the answer is clear. He relies on earlier Commerce Clause jurisprudence to argue that, in the eighteenth century, commerce consisted of “selling, buying, and bartering, as well as transporting for these purposes.”<sup>57</sup> He then turns to the specific issue in *Adoptive Couple*. “[T]he term ‘commerce with Indian tribes’ was invariably used during the time of the founding to mean ‘trade with Indians,’” he argues, citing the scholarship of Professor Robert Natelson.<sup>58</sup> The federal government thus lacks the power to regulate “noneconomic activity such as adoption of [Indian] children.”<sup>59</sup>

This section questions both premises of this argument. First, it challenges the assumption that commerce had identical meanings in the Interstate and Indian Commerce Clauses. Second, it argues that commerce with the Indians did not always denote trade, and, when it did, trade with the Indians had a broader historical meaning than either Justice Thomas or Natelson acknowledges. “Commerce” as used in the Indian Commerce Clause is therefore, in New Originalist parlance, a “vague” term, which cannot alone resolve the Clause’s proper interpretation.<sup>60</sup>

### 1. *Indian and Interstate Commerce*

Recent scholarly interest in the Indian Commerce Clause is in part a spillover from the heated debates over the Interstate Commerce Clause. Proponents of expansive federal commerce power have long cited early federal Indian policy to claim a broad meaning for “commerce.”<sup>61</sup> In *Adoptive Couple v. Baby Girl*, Justice Thomas takes the reverse approach: he references the narrow definition of “commerce” he advanced in *United States v. Lopez* to contend for a similarly constrained meaning of commerce with Indian tribes.<sup>62</sup>

Both positions start from the assumption of what Saikrishna Prakash calls “intrasentence uniformity”: commerce must mean the same thing in the Foreign, Interstate, and Indian Commerce Clauses, which is why the interpreta-

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57. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2567 (2013) (Thomas, J., concurring) (quoting *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring)).

58. *Id.* (citing Natelson, *supra* note 14, at 215-16 & n.97).

59. *Id.*

60. See, e.g., Barnett, *supra* note 56, at 419 (“[L]anguage is *vague* insofar as it has a core meaning that is clear, but it has a penumbral meaning where it may not be clear whether or not it applies to a particular object. . . . With respect to vagueness, . . . the original meaning of the text can run out . . .”).

61. See, e.g., AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 107-08 (2005); Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 24-25 (2010).

62. *Adoptive Couple*, 133 S. Ct. at 2567 (Thomas, J., concurring) (citing *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring)).

tion of one clause can illuminate another.<sup>63</sup> Prakash defends this presumption in part with history: “nothing,” he claims, “in the Commerce Clause’s text or original understanding actually suggests that the Founders understood ‘regulate commerce’ as having multiple meanings.”<sup>64</sup>

Yet evidence suggests that Indian “commerce” did mean something different in 1787 and 1788 than foreign or interstate commerce.<sup>65</sup> When the Clause was drafted, the power Madison had proposed over “Indian affairs” was tacked on, late, to a clause already encompassing interstate and foreign commerce.<sup>66</sup> The Convention thus devised the power over interstate and foreign “commerce” before anyone thought about including Indians.<sup>67</sup> And unlike the Interstate and Foreign Commerce Clauses, the Indian Commerce Clause had an explicit predecessor in the Articles of Confederation.<sup>68</sup> Unlike the other Clauses, then, the delegates framed all proposed modifications of the power over Indian affairs against the earlier authority granted in the Articles.

Ratification debates continued this pattern. Of hundreds of discussions of commerce, only a handful considered trade with the Indians. The vast majority

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63. Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149 (2003); see also Balkin, *supra* note 61, at 13 (“Whatever ‘regulate’ and ‘commerce’ refer to, there is a strong argument that they have the same semantic meaning with the [sic] respect to all three examples.”); Natelson, *supra* note 14, at 216 (“I have been able to find virtually no clear evidence from the Founding Era that users of English varied the meaning of ‘commerce’ among the Indian, interstate, and foreign contexts.” (footnote omitted)).

64. Prakash, *supra* note 63, at 1160.

65. Others have critiqued Prakash’s doctrinal and linguistic arguments. See, e.g., Adrian Vermeule, *Three Commerce Clauses? No Problem*, 55 ARK. L. REV. 1175 (2003); cf. Matthew L.M. Fletcher, *ICWA and the Commerce Clause*, in *THE INDIAN CHILD WELFARE ACT AT 30: FACING THE FUTURE* 28, 31 (Matthew L.M. Fletcher et al. eds., 2009) (describing the interpretation of the “Three Commerce Clauses” collectively as a “significant trap that would tend to obliterate the original meaning and intent of the Indian Commerce Clause”).

66. See *supra* text accompanying notes 36–42.

67. See Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 467–68 (1941) (“The Indian trade was a special subject with a definite content, which had been within the jurisdiction of congress under the articles of confederation . . . . It thus derived from a totally different branch of the Randolph outline than did the control over foreign and interstate commerce. Nor . . . did [they] emerge simultaneously as co-ordinated parts of a whole . . . . By th[e] time [the Indian Commerce Clause was added] the larger part of the discussion in the federal convention relative to commercial regulations was over, and in that which did take place later there is no language relating even remotely to the Indian trade.”).

68. The Articles addressed the right of state citizens to enjoy “the privileges of trade and commerce” in another state, ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1, and endorsed federal power to enter treaties of commerce, *id.* art. IX, para. 1, but contained no provision analogous to its grant of federal authority over Indian affairs.

concerned overseas commerce with foreign nations, occasionally including interstate commerce.<sup>69</sup> One ratification discussion even seemed to exclude Indian trade from the concept of “commerce.”<sup>70</sup> The only two mentions of the Indian Commerce Clause discussed the Clause’s implications for “Indian affairs” alone, contrasting the Clause’s grant of authority with the earlier authority under the Articles.<sup>71</sup> In short, no one during ratification interpreted the Indian Commerce Clause to shed light on the Interstate and Foreign Commerce Clauses, or vice versa.

There is also evidence that at least one “Founder” understood commerce to have distinct meanings in the three Clauses. During the 1791 national bank controversy, Attorney General Edmund Randolph—the Convention delegate who wrote the Commerce Clause’s first draft<sup>72</sup>—offered his opinion on the bank’s constitutionality.<sup>73</sup> He divided the Commerce Clause into its three parts, each with a corresponding series of powers.<sup>74</sup> “[W]ith respect to foreign nations,” the Clause encompassed duties, custom house regulations, and embargoes.<sup>75</sup> For the states, it permitted establishing the “forms” of interstate commercial intercourse.<sup>76</sup> And for the tribes, Randolph identified four powers under the Indian Commerce Clause: “1. to prohibit the Indians from coming into, or trading within, the United States. 2. to admit them with or without restrictions. 3. to prohibit citizens of the United States from trading with them; or 4. to permit with or without restrictions.”<sup>77</sup> Each of Randolph’s constructions related to trade, but with different inflections: the Indian commerce powers were more expansive and more concerned with government regulation than were the customs-focused understandings of the Interstate and Foreign Commerce Clauses.

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69. See, e.g., Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 114-25 (2001) (surveying usages of “commerce” at the Convention and in state ratification debates, without a single reference to Indian tribes).

70. At the Pennsylvania ratifying convention, James Wilson noted that inhabitants of the “western extremity of this state” would “care not what restraints are laid upon our commerce,” without mentioning the region’s extensive involvement in the Indian trade. Pennsylvania Convention Debates, 11 Dec. 1787, in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 550, 558 (Merrill Jensen ed., 1976).

71. See *supra* text accompanying notes 47-48.

72. See William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197, 229-30 (2012).

73. Letter from Edmund Randolph to George Washington (Feb. 12, 1791), in 7 PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 330, 331-37 (Jack D. Warren, Jr., ed., 1987).

74. *Id.* at 334-35.

75. *Id.* at 334.

76. *Id.* at 334-35.

77. *Id.*

There was good reason for Randolph's differentiation: trade with Indians had a different meaning and valence than other forms of trade, as the subsequent section explores. Commerce with Indian tribes must be interpreted on its own terms rather than in the shadow of heated debates over the Interstate Commerce Clause.<sup>78</sup>

## 2. *The Broad Meaning of Trade with Indians*

Drawing on Natelson's scholarship, Justice Thomas asserts that commerce with Indian tribes meant only "trade with Indians" at the time of the Constitution's drafting.<sup>79</sup> There are two problems with this argument. First, commerce with Indians did not exclusively mean trade. Second, trade with Indians was an expansive category that encompassed more than the narrowly economic transactions Justice Thomas envisions.

"Commerce" was a term only occasionally applied to Indian affairs. The phrases "commerce with the Indians" or "commerce with Indians" appeared in only a handful of eighteenth-century American publications.<sup>80</sup> Considerably more significant were the terms "intercourse" and "trade." The two terms captioned Congress's first law addressing Indian affairs, the Trade and Intercourse Act.<sup>81</sup> "Intercourse" was the era's predominant diplomatic and legal term of art

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78. To be clear, I am not arguing that the Foreign or Interstate Commerce Clauses do, or do not, require a commercial nexus. As the next section explores, there are suggestive parallels between the diplomatic context implicated in the Indian Commerce Clause and the Foreign Commerce Clause. My point, in this and the following section, is that the Indian Commerce Clause should be understood on its own terms and based on its own history. "Indian Affairs," I argue, was a distinct body of governance, and so evidence drawn from the other Commerce Clauses should not be extrapolated lightly to the Indian Commerce Clause, and vice versa.

79. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2567 (2013) (Thomas, J., concurring) (citing Natelson, *supra* note 14, at 215-16 & n.97). Natelson's argument rests on full-text searches of eighteenth-century printed texts using the term "commerce with Indians" or "commerce with Indian tribes." Natelson, *supra* note 14, at 215-16 & n.97.

80. *Early American Imprints*—the database Natelson employed—reports only fourteen instances of "commerce with the Indians," one instance of "commerce with Indians," and seven instances of "commerce with the Indian tribes" in all works printed between 1639 and 1800 in what became the United States. *Early American Imprints, Series I: Evans, 1639-1800*, READEX, <http://infoweb.newsbank.com/iw-search/we/Evans> [<http://perma.cc/4HFG-7U48>].

81. Both terms appear in the definition of "commerce" that Justice Thomas cites. *Adoptive Couple*, 133 S. Ct. at 2567 (Thomas, J., concurring) (citing 1 S. JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* 361 (4th rev. ed. 1773) (reprint 1978)). Based on appearance in Google Books' database of English language materials printed between 1700 and 1800, the Google Ngram shows the phrase "intercourse with the Indians" passing "commerce with the Indians" in frequency in the mid-1770s, while both were dwarfed by "trade with the Indians." *Ngram Viewer*, GOOGLE BOOKS, <https://books.google.com/ngrams> [<http://perma.cc/H4L8>].

to describe relations between Natives and white settlers.<sup>82</sup> Several of the (few) discussions of “commerce” with Indians in the eighteenth century reflect a similar meaning. They speak, for instance, of “commerce” as the exchange of religious ideas among tribes,<sup>83</sup> or sexual intercourse with Indian women,<sup>84</sup> thus using the term to encompass interaction broadly defined with and among Native nations.<sup>85</sup>

Both “commerce” and “intercourse,” though, were dwarfed by eighteenth-century occurrences of the term “trade” to describe relations with Natives. Justice Thomas presumes that the meaning of Indian “trade” requires no further examination, assuming trade encompassed only “economic” activity. History suggests otherwise.

When placed alongside “with the Indians,” “trade” took on a different character. Although it still referred to buying, selling, trading, exchanging, and gifting items, these were not primarily commercial transactions. Instead,

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-GZF3] (search “Graph these comma-separated phrases” for “intercourse with the Indians, commerce with the Indians, trade with the Indians”; then follow “Search lots of books” hyperlink). Similarly, in the first volume of the American State Papers: Indian Affairs, covering 1789 to 1815, the word “trade” appears 258 times; “intercourse,” 77 times; and “commerce,” 32 times. 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS (Walter Lowrie & Matthew St. Clair Clarke eds., Gales & Seaton 1832).

82. This is the usage of the word in the era’s diplomatic correspondence with and about Indian nations. *See, e.g.*, Treaty of Peace, Aug. 3, 1795, 7 Stat. 49 (describing the intent to restore “a friendly intercourse” between the United States and warring tribes, and discussing land cessions intended for “convenient intercourse”). Chief Justice Marshall famously concluded that “Commerce . . . is intercourse,” *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824), and other commentators have stressed the importance of intercourse in interpreting the Interstate Commerce Clause. *See, e.g.*, Balkin, *supra* note 61, at 15-29.
83. *See, e.g.*, THOMAS HUTCHINSON, 2 THE HISTORY OF THE COLONY OF MASSACHUSETTS-BAY, FROM THE FIRST SETTLEMENT THEREOF IN 1628, at 474 n. (1765) (quoting seventeenth-century sources discussing how Indian nations, through “commerce” with other Indian nations, disseminated ideas about “idols *and* idolatry” (emphasis added)).
84. *See* 2 A NEW COLLECTION OF VOYAGES, DISCOVERIES AND TRAVELS 72 (1767) (“Some would be apt to suspect [that the supposedly white-skinned Natives of Central America] might be the offspring of some European father: but beside that the Europeans come little here, and have little commerce with the Indian women when they do come . . . .”); 2 MEMOIRS OF THE RIGHT HONORABLE LORD VISCOUNT CHERINGTON 368 (1782) (recounting his illness after a voyage to Brazil: “I firmly believe my disorder was contracted by too free a commerce with Indian women”).
85. *See* REV. C. BROWN, ITINERARIUM NOVI TESTAMENTI app. at 20 (1784) (recounting a traveler’s story that Natives informed him that “your Brethren will have no Commerce with *Indians*, and if any of ours enter into their Country, they instantly kill them; neither do any of your brethren pass into our Country”); DEBATES IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES DURING THE FIRST SESSION OF THE FOURTH CONGRESS pt. 2, at 254 (Bioren & Madan 1796) (using the phrases “commerce with the Indians” and “intercourse with these tribes” as synonyms).

“trade” was a form of diplomacy and politics, “the defining feature of Native-colonial relations.”<sup>86</sup> Though all forms of trade were freighted with diverse meanings, trade with the Indians was understood almost solely through this political and diplomatic lens, especially by the political elite.<sup>87</sup> As George Washington stated, “[T]he trade of the Indians is a main mean of their political management.”<sup>88</sup> American officials insisted that trade with Indian tribes was “the most essential means of Securing their Friendship.”<sup>89</sup> Those officials fretted that the goods of Spanish and British traders would turn Indians into pawns of the nation’s opponents.<sup>90</sup> Such was the “power and influence of trade” among the Indians, they believed, that it could start and stop wars.<sup>91</sup> “Friendship and trade without end” was stamped on the medals that the government distributed to Indian chiefs to secure them to the federal interest.<sup>92</sup> Trade was so central to federal diplomacy with Indian nations that, in 1796, Congress created a series of federally run trading posts to provide Natives with

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86. JOSEPH M. HALL, JR., *ZAMUMO’S GIFTS: INDIAN-EUROPEAN EXCHANGE IN THE COLONIAL SOUTHEAST* 5 (2009). For other works stressing the centrality of exchange between Indians and Euroamericans, see KATHRYN E. HOLLAND BRAUND, *DEERSKINS & DUFFELS: THE CREEK INDIAN TRADE WITH ANGLO-AMERICA, 1685-1815* (1993); DANIEL K. RICHTER, *FACING EAST FROM INDIAN COUNTRY: A NATIVE HISTORY OF EARLY AMERICA 174-79* (2001); and DANIEL H. USNER, JR., *INDIANS, SETTLERS, AND SLAVES IN A FRONTIER EXCHANGE ECONOMY: THE LOWER MISSISSIPPI VALLEY BEFORE 1783* (1992).
87. See FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS (1790-1834)*, at 85 (1962) (“It was a commonplace [in early America] that Indian allegiance and friendship depended ultimately on the tenuous ties of trade.”).
88. Letter from George Washington to the United States Senate (Aug. 4, 1790), in 6 *THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES* 188, 189 (Mark A. Mastromarino ed., 1996).
89. Letter from Leonard Marbury to George Washington (Apr. 21, 1792), in 10 *THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES* 302, 303 (Robert F. Haggard & Mark A. Mastromarino eds., 2002).
90. See, e.g., Letter from William Blount and Andrew Pickens to Henry Knox (Aug. 1, 1793), in 13 *THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES* 359, 359-62 (Christine Sternberg Patrick ed., 2007).
91. Letter from William Blount to the Sec’y of War (Aug. 13, 1793), in 4 *THE TERRITORIAL PAPERS OF THE UNITED STATES* 297, 298 (Clarence Edward Carter ed., 1936); see also *id.* at 297 (“The Trade with the Indians affords the possessors of it so many opportunities to give springs to their actions and complexion to their national conduct . . .”).
92. Letter from Josef Ignacio de Viar and Josef de Jaudenes to Thomas Jefferson (May 25, 1792), in 26 *THE PAPERS OF THOMAS JEFFERSON* 118, 119 (John Catanzariti ed., 1995).

goods at cost.<sup>93</sup> Never intended to run a profit, these so-called “factories” required constant subsidies.<sup>94</sup>

Because of this political and diplomatic understanding, the Indian trade encompassed the exchange of an extraordinary range of items. Most obvious is land. Negotiating land cessions, central to federal Indian policy, often hinged on making Natives dependent on trade goods, for which tribes ultimately paid in territory.<sup>95</sup> But Indians and colonists also bought, sold, and exchanged people: through the negotiated return of captives<sup>96</sup> and through the Indian slave trade—a “Commerce with the *Indians*” in which Anglo-Americans purchased Natives captured in wars.<sup>97</sup> By the 1780s, the trade in Indian slaves, though largely a legal relic in long-settled colonies,<sup>98</sup> persisted on the frontier, alongside the sale of European children captured by Indians.<sup>99</sup> In this way, *pace* Justice Thomas, trade with Indians encompassed “noneconomic activity such as adoption of children,”<sup>100</sup> as Natives and Anglo-Americans adopted children they had captured or purchased.<sup>101</sup> Trade even included rituals around seem-

93. Act of Apr. 18, 1796, ch. 13, 1 Stat. 452.

94. PRUCHA, *supra* note 87, at 86-93. For a thorough history of the federal Indian factories that underscores their diplomatic role, see DAVID NICHOLS, *THE ENGINES OF DIPLOMACY: ACCOMMODATION AND MANIPULATION AT THE UNITED STATES’ INDIAN FACTORIES, 1796-1822* (forthcoming 2015).

95. For instance, Jefferson famously suggested running up Native trade debts as a means of dispossessing their land. Letter from Thomas Jefferson to William H. Harrison, Governor (Feb. 27, 1803), in 10 *THE WRITINGS OF THOMAS JEFFERSON* 368, 370 (Albert Ellery Bergh ed., 1905).

96. See, e.g., Treaty of Peace and Friendship, U.S.-Creeks, art. III, Aug. 7, 1790, 7 Stat. 35 [hereinafter Treaty of New York]; Treaty of Hopewell, U.S.-Cherokees, arts. I & II, Nov. 28, 1785, 7 Stat. 18.

97. RALPH SANDIFORD, *A BRIEF EXAMINATION OF THE PRACTICE OF THE TIMES* 22 (Benjamin Franklin & Hugh Meredith 1729).

98. Even behind the frontier, the legal issues raised by Indian slavery persisted both in statutes and in a widespread judicial debate over whether Indians could still be held as slaves. See DEBORAH A. ROSEN, *AMERICAN INDIANS AND STATE LAW: SOVEREIGNTY, RACE, AND CITIZENSHIP, 1790-1880*, at 85-89 (2007); Gregory Ablavsky, Comment, *Making Indians White: The Judicial Abolition of Native Slavery in Revolutionary Virginia and Its Racial Legacy*, 159 *U. PA. L. REV.* 1457, 1494-1517 (2011).

99. For an introduction to recent historical literature on this topic, see *INDIAN SLAVERY IN COLONIAL AMERICA* (Alan Gallay ed., 2009). In 1790, the governor of the Northwest Territory negotiated the return of an American child captured by Indians and resold, then allegedly held as security for a debt. Letter from Arthur St. Clair to Manuel Perez (May 20, 1790), in 2 *THE TERRITORIAL PAPERS OF THE UNITED STATES* 238, 238 (Clarence Edwin Carter ed., 1936).

100. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2567 (2013) (Thomas, J., concurring).

101. Adoption of Native children was widespread in the early Republic; Andrew Jackson famously adopted a Creek child. See generally Dawn Peterson, *Unusual Sympathies: Settler Imperi-*

ingly non-economic crimes like murder: common Native practice, embraced by early federal officials, required compensation by “covering the grave” through the payment of goods to victims.<sup>102</sup>

The point is not that late eighteenth-century slavery is analogous to present-day voluntary adoptions, or that the modern criminal justice system is the same as diplomatic payments for murder. Instead, recognizing the past’s discontinuity with the present expands the meaning of terms like “trade” in ways that textual searches alone elide. “Trade with the Indians” encompassed a rich constellation of exchanges, including buying and selling people and lives.

Defining “commerce with the Indian tribes” as trade thus helps little in construing the Indian Commerce Clause’s scope. Even if we accept the questionable proposition that “commerce with Indians” meant only selling, buying, and bartering, in Indian country these were never straightforwardly economic activities. Rather, as Justice Thomas’s own examples establish,<sup>103</sup> these activities were understood through the lens of cross-cultural diplomacy. This does not mean that “trade” included all relations with Indians,<sup>104</sup> but neither was its meaning so cramped as to preclude all applications now deemed “noncommercial.” In short, the “original public meaning” of Indian commerce cannot alone provide a clear basis for cabining federal authority over Indian affairs.<sup>105</sup>

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alism, Slavery, and the Politics of Adoption in the Early U. S. Republic (2011) (unpublished Ph.D. dissertation, New York University).

102. ALAN TAYLOR, *THE DIVIDED GROUND: INDIANS, SETTLERS AND THE NORTHERN BORDERLAND OF THE AMERICAN REVOLUTION* 28-33 (2006).
103. Justice Thomas observes that regulating Indian trade was necessary because traders “all too often abused their Indian trading partners, through fraud, exorbitant prices, extortion, and physical invasion of Indian territory,” which “provoked violent Indian retaliation.” *Adoptive Couple*, 133 S. Ct. at 2567-68 (Thomas, J., concurring). These examples suggest that regulation of the Indian trade stemmed from a diplomatic understanding of exchange, in which abuses threatened peaceful relations between Native Nations and Anglo-Americans.
104. Many early Americans subscribed to Enlightenment notions that defined trade and commerce in opposition to conquest and warfare. Cf. J. G. A. POCOCK, 3 *BARBARISM AND RELIGION* 317-24, 373-74 (1999). Hence the association in Indian affairs of “trade” with “peace” and “friendship”; the term was rarely used to describe warfare with Natives.
105. Two other textual arguments merit brief discussion. First, Justice Thomas argues that, because the Indian Commerce Clause refers only to *tribes*, it does not provide the federal government authority over individual Indians. *Adoptive Couple*, 133 S. Ct. at 2567-69 (Thomas, J., concurring). This sharp dichotomy finds no support in historical evidence. Federal officials in the late eighteenth century regarded individual Indians as tribal members, akin to foreign citizens, and consistently described them based on their respective tribal affiliation — as Delawares, Creeks, etc. The Trade and Intercourse Act criminalized unlicensed trade both “with the Indian tribes” and “with the Indians” interchangeably, as well as barring land sales made “by any Indians” and criminalizing attacks against “any peaceable and friendly Indian or Indians” within Indian country. Act of July 22, 1790, ch. 33, §§ 1, 4-5, 1 Stat. 137, 137-38.

*B. Interpreting Silence: The Indian Commerce Clause's Drafting and Adoption History*

To bolster their textual arguments, both revisionists—proposing a narrow scope for the Indian Commerce Clause—and nationalists—advancing a more expansive interpretation—have relied on the Clause's drafting and adoption history. The problem confronting both sets of scholars is that the Clause's history is sparse: a series of unexplained textual changes, coupled with two mentions in the ratification debates, one a sentence long.<sup>106</sup> Both revisionists and nationalists have reached their conclusions based on the implications of silence. This section challenges both revisionist and nationalist claims, arguing that silence on the Indian Commerce Clause implied neither narrow nor exclusive federal power; instead, it suggested the Clause's open-endedness. The Clause's drafting history thus provides no basis to resolve its contested scope.

*1. Silence as Consensus: Shortcomings of the Revisionist and Nationalist Accounts*

Justice Thomas, drawing again from Natelson, offers a historical account for a “limited construction of the Indian Commerce Clause.”<sup>107</sup> He reads the Clause's drafting history in light of Article IX's solicitude for states' legislative rights: “[t]his concern for state power reemerged during the drafting of the Constitution,” he contends, arguing that the rejection of Madison's proposal in favor of a “far narrower” version that “echoed the Articles of Confederation” demonstrated an intention to limit federal power.<sup>108</sup>

Omitted from this account are the six years between the Articles and the Constitution, a period when states' assertions of authority against the federal

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Second, Natelson argues that references to tribes as nations do not signify acknowledgment of their separate sovereign status because “the word ‘nation’ did not necessarily evoke the association with political sovereignty it evokes today.” Natelson, *supra* note 14, at 259. In fact, period documents suggest that those opposed to tribal sovereignty understood the term “nations” to connote independent status, and so advocated abandoning it. See James Duane's Views on Indian Negotiations (July/Aug. 1784), in 18 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789: REVOLUTION AND CONFEDERATION 299, 299-300 (Colin G. Calloway ed., 1994) [hereinafter EARLY AMERICAN INDIAN DOCUMENTS] (arguing that, in negotiations with the Haudenosaunee, “I woud never suffer [to use] the word nations, or Six Nations . . . or any other Form which woud revive or seem to confirm [the Natives'] former Ideas of Independence”).

<sup>106</sup> See *supra* text accompanying notes 41-48.

<sup>107</sup> *Adoptive Couple*, 133 S. Ct. at 2569 (Thomas, J., concurring).

<sup>108</sup> *Id.*

government undermined national Indian policy and spawned costly wars.<sup>109</sup> Briefly told, expansionist states such as New York, North Carolina, and Georgia seized on the Articles' ambiguous language to assert sole jurisdiction over Natives and their lands and to challenge federal treaties.<sup>110</sup> This interference horrified nationalists. James Madison feared that states' interpretation of Article IX would "destroy the authority of Congress altogether."<sup>111</sup> The congressional Committee on Southern Indians argued that states' self-interested interpretations would render federal power over Indian affairs a "mere nullity" and would make Article IX an "absurdity in theory as well as in practice."<sup>112</sup> By 1787, nationalist predictions that state interference would lead to expensive wars were vindicated by looming hostilities against powerful Native confederacies.<sup>113</sup>

Though Natelson claims these struggles were "a back-and-forth affair," with "no clear trend in the direction of either local or central control," they reflect more than disagreement.<sup>114</sup> The Articles' structure empowered a determined minority to block national action, and the federal government was dependent on state cooperation. Thus, though centralized federal authority over Indian affairs enjoyed widespread support,<sup>115</sup> challenges to state authority succumbed to the Articles' byzantine procedures,<sup>116</sup> while Madison and others despaired that the national government was too weak to enforce what they regarded as the correct interpretation of Article IX.<sup>117</sup>

Events at the Constitutional Convention must be read against this background. As I have argued elsewhere, the most significant constitutional reforms for Indian affairs stemmed from structural changes that increased federal

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109. I have explored this history in detail elsewhere. See Ablavsky, *supra* note 24, at 1009-38.

110. *Id.*

111. Letter from James Madison to James Monroe (Nov. 27, 1784), in 8 THE PAPERS OF JAMES MADISON 156, 156 (Robert A. Rutland et al. eds., 1973).

112. 33 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 457, 459 (Roscoe R. Hill ed., 1936).

113. REGINALD HORSMAN, EXPANSION AND AMERICAN INDIAN POLICY, 1783-1812, at 4-15, 31 (1967).

114. Natelson, *supra* note 14, at 235.

115. Clinton, *supra* note 54, at 1124-47.

116. A report condemning state interference in Indian affairs failed despite the support of fifteen of twenty delegates; with only seven states present, passage required unanimity. 33 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, *supra* note 112, at 463. Delegates from three additional states also voted, but because the states lacked the two delegates required under the Articles, these votes were purely symbolic.

117. See, e.g., Letter from James Madison to James Monroe, *supra* note 111, at 157.

power rather than from the Indian Commerce Clause itself.<sup>118</sup> But the Clause's evolution hardly suggests solicitude for "state power."<sup>119</sup> Justice Thomas emphasizes the rejection of the amendment proposed by Madison that would have granted federal authority both "within" and "without" the states.<sup>120</sup> Justice Thomas instead draws attention to the amendment proposed by the Committee of Detail that would have barred federal authority over Indians subject to state laws.<sup>121</sup> But the Convention rejected *both* proposals, an outcome that conceded more to Madison and proponents of federal authority than to its opponents. Unlike Article IX, nothing in the final draft of the Indian Commerce Clause guaranteed state authority, nor did its phrasing bar federal authority within state borders—the difficulty Madison's initial proposal had sought to remedy. Moreover, although the Indian Commerce Clause no longer provided that federal authority was "sole" or "exclusive," as Article IX had, the Constitution eschewed these labels for *all* of the federal government's enumerated powers, opting instead for broad federal authority through the Supremacy Clause.<sup>122</sup> In short, the ultimate adoption of federal power over Indian commerce without *any* qualifiers endorsed Madison's position more than it protected state authority.

Madison certainly read the Indian Commerce Clause that way, claiming victory in *Federalist No. 42*, where he stressed that the Clause "is very properly unfettered from two limitations in the Articles of Confederation, which render the provision obscure and contradictory."<sup>123</sup> The only other explicit mention of

118. Ablavsky, *supra* note 24, at 1038–50.

119. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2569 (2013) (Thomas, J., concurring). On the Clause's development, see *supra* text accompanying notes 41–48.

120. *Adoptive Couple*, 133 S. Ct. at 3569.

121. *Id.* ("The Committee[ of Detail]'s version, which echoed the Articles of Confederation, was far narrower than Madison's proposal.").

122. See LACROIX, *THE IDEOLOGICAL ORIGINS*, *supra* note 23, at 171 ("The Supremacy Clause identified and created a body of supreme law of the land that was, according to Article I, circumscribed along subject-specific lines such that there was no concurrence with the substantive areas of state law."). Other scholars have noted that a presumption of exclusivity of federal authority, rather than concurrence, guided jurisprudence into the early nineteenth century. See Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 787–800 (1994); Theodore W. Ruger, *Preempting the People: The Judicial Role in Regulatory Concurrence and Its Implication for Popular Lawmaking*, 81 CHI.-KENT L. REV. 1029, 1038–42 (2006). Natelson overlooks this history when he claims that the omission of language of exclusivity allows for concurrent state jurisdiction over Indian commerce. Natelson, *supra* note 14, at 237–41. Moreover, any supposed state authority was very short-lived, as Congress quickly passed comprehensive legislation to regulate Indian commerce. Act of July 22, 1790, ch. 33, 1 Stat. 137. Even under modern preemption principles, this would likely bar concurrent state jurisdiction.

123. THE FEDERALIST NO. 42 (James Madison).

the Clause during ratification was a single line in Anti-Federalist Abraham Yates, Jr.'s broader denunciation of national Indian policy.<sup>124</sup> Yates, a defender of New York's prerogatives, argued that in conjunction with other constitutional provisions, the adoption of the Clause would "totally surrender into the hands of Congress the management and regulation of the Indian affairs, and expose the Indian trade to an improper government."<sup>125</sup>

Justice Thomas argues that more important than these discussions was what was *not* said. The "nearly nonexistent" opposition to the Indian Commerce Clause, he argues, demonstrates that "[t]he ratifiers almost certainly understood the Clause to confer a relatively modest power on Congress—namely, the power to regulate trade with Indian tribes living beyond state borders."<sup>126</sup> But "silence" here is not as "revealing" as Justice Thomas suggests.<sup>127</sup> Unlike Yates, other Anti-Federalists accepted paramount federal authority over Indian affairs.<sup>128</sup> Article IX had already established the abstract principle of federal supremacy over Indian commerce; in this context, removing the Article's qualifiers looked more like the clarification of an ambiguous provision than a radical new departure. Perhaps for this reason, the ratification debate over Indian affairs focused on the Constitution's other provisions—particularly the Treaty and War Powers—as Justice Thomas's own citations establish.<sup>129</sup> Si-

124. Sydney, *supra* note 48, at 1158. Natelson's attribution of this essay to Robert Yates, Natelson, *supra* note 14, at 248, perpetuates an error rejected by historians of ratification, *see supra* note 48.

125. Sydney, *supra* note 48, at 1158. Neither Justice Thomas nor Natelson discusses this portion of Yates's writing, though both cite his views. *Adoptive Couple*, 133 S. Ct. at 2569 (Thomas, J., concurring); Natelson, *supra* note 14, at 247-48. Natelson paraphrases the quotation above, omitting the section concerning "Indian affairs," and then writes that if a reasonable interpretation of the Indian Commerce Clause "included plenary authority over Indian affairs, [Yates] certainly would have pointed it out." Natelson, *supra* note 14, at 247-48.

126. *Adoptive Couple*, 133 S. Ct. at 2569 (Thomas, J., concurring).

127. *Id.* Justice Thomas's interpretation also reads the limitations of Article IX *back* into the Indian Commerce Clause, despite the omission of this language.

128. Justice Thomas's evidence supports this point. *Id.* at 2570 (citing Brutus, (Letter) X, N.Y. J., Jan. 24, 1788, in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 462, 465 (J. Kaminski & G. Saladino eds., 2012)). Justice Thomas implies that Anti-Federalist concessions were limited to trade, but evidence suggests a broader scope. *See, e.g.*, Federal Farmer, Letters to the Republican, Letter I (Oct. 8, 1787), reprinted in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 18, 24 (John P. Kaminski & Gaspare J. Saladino eds., 1983) ("Let the general government[']s . . . powers extend exclusively to all foreign concerns, causes arising on the seas, to commerce, imports, armies, navies, *Indian affairs*, peace and war . . . leaving the internal police of the community, in other respects, exclusively to the state governments . . ." (emphasis added)).

129. *See, e.g.*, *Adoptive Couple*, 133 S. Ct. at 2570 (Thomas, J., concurring) (citing discussions of a federal standing army and a colloquy from the Virginia ratifying convention involving Indi-

lence, in short, cannot be read to demonstrate a narrow scope for federal power.

But this same silence also cannot be read as conclusive evidence of an intent to enshrine broad federal power, as others have interpreted it.<sup>130</sup> Robert Clinton, this position's most thorough proponent, argues that the conflicts under the Articles of Confederation produced a consensus in favor of exclusive national control.<sup>131</sup> Dismissing the textual change from "Affairs" to "Commerce" as stylistic,<sup>132</sup> Clinton follows Madison in arguing that the omission of provisions protecting state authority codified federal supremacy, a shift that "required and consumed little debate."<sup>133</sup> The lack of discussion of the Clause thus reflected widespread agreement.<sup>134</sup>

Though more compelling, this consensus-based account has gaps of its own. It is difficult to see how an agreement so universal could emerge so quickly from contentious struggles for authority under the Articles. These controversies seemingly convinced many, including many critics of the Constitution, that federal supremacy over Indian affairs was necessary. But Yates spoke for a significant unpersuaded minority, and many of these strong critics of a national Indian affairs power were also delegates at the Convention.<sup>135</sup> Furthermore, if such a consensus existed, it proved remarkably fleeting: under the new Constitution, expansionist states continued to defy federal authority.<sup>136</sup> These parallels between pre- and post-ratification history make it implausible to interpret the silence over the Indian Commerce Clause as universal acquiescence to federal supremacy.

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an land purchases); *see also* Ablavsky, *supra* note 24, at 1050-75 (arguing for the centrality of these provisions in ratification debates over Indian affairs).

130. Clinton, *supra* note 54, at 1164; Robert J. Miller, *American Indian Influence on the United States Constitution and Its Framers*, 18 AM. INDIAN L. REV. 133, 151-55 (1993).

131. Clinton, *supra* note 54, at 1064-1147.

132. *Id.* at 1156 (arguing "no change in the meaning or scope of matters committed to Congress appears to have been intended by" the shift from "affairs" to "commerce").

133. *Id.*

134. *Id.* at 1158; *see also* PRUCHA, *supra* note 94, at 41 ("The lack of debate on the question [of Indian matters] indicates, perhaps, how universally it was agreed that Indian affairs were to be left in the hands of the federal government.").

135. *See* FRANCIS G. HUTCHINS, *TRIBES AND THE AMERICAN CONSTITUTION* 67-69 (2000) (noting that strong opponents of federal authority over Indian affairs attended the Convention and recommended ratification).

136. *See* ROSEN, *supra* note 98, at 19-77 (describing state assertions of authority over Indian affairs in defiance of the federal government); *infra* Part II.C.2.

## 2. *Silence as Ambiguity: The Open-Ended Indian Commerce Clause*

What, then, to make of the Indian Commerce Clause and its drafting? The problem seems to be the assumption, shared by both sides in this interpretive debate, that the meaning of the Indian Commerce Clause was “clear” when drafted and ratified.<sup>137</sup> Because the Clause’s unenlightening text was shaped, unrecorded, behind committee doors, clarity is elusive.

There is a compelling case, though, that the Clause was open-ended when drafted. Nearly all the enumerated powers were late additions and occasioned little of the heated discussion that surrounded issues of representation or the structure of the national government.<sup>138</sup> The Indian Commerce Clause in particular was an afterthought, its earliest versions literally scrawled in the margins of constitutional drafts.<sup>139</sup> This lack of attention likely reflected two considerations. First, the Articles of Confederation had already granted the national government considerable power over Indian affairs, even if that authority’s scope was contested. The Indian Commerce Clause was therefore akin to other provisions from Article IX that were transposed into Article I, Section 8, of the Constitution without debate—the power to create post offices, to coin money, to fix weights and measures.<sup>140</sup> Second, because treaties with Native nations had caused the primary struggles between states and the national government under the Articles, the Indian Commerce Clause was less important than changes bolstering federal treaty power.

Indeed, the final phrasing of the Indian Commerce Clause likely made it particularly uncontroversial, because the Convention rejected all qualifiers en-

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137. See, e.g., *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2569 (2013) (Thomas, J., concurring) (“The ratifiers *almost certainly* understood the Clause . . . .” (emphasis added)); *id.* (“It is, thus, *clear* that the Framers of the Constitution . . . .” (emphasis added)); Clinton, *supra* note 54, at 1157 (“[T]he meaning of the Indian Commerce Clause and the intent of the framers seems reasonably *clear* . . . .” (emphasis added)); Natelson, *supra* note 14, at 248 (with reference to the Commerce Clause as a whole, interpreting ratification silence on the Clause as a “*clear* indication that its scope was understood to be fairly narrow” (emphasis added)).

138. See RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 288-89 (2009) (“[T]he delegates seemed disinclined even to raise questions about most of the specifically enumerated powers. . . . [S]urprisingly—given subsequent contention over the extent and limits of congressional power—with just a few exceptions the discussion provoked little controversy.”); see also Mark A. Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View from 1787/1791*, 9 U. PA. J. CONST. L. 357, 373-77 (2007) (“Little debate took place after [the C]ommittee [on Detail] chose to enumerate specific federal powers . . . . What mattered were the rules for staffing the national government and the rules for making national laws, not legal limitations on national power.”).

139. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 41, at 143; *Committee of Detail Documents*, 135 PA. MAG. HIST. & BIOGRAPHY 239, 273 (2011).

140. Compare ARTICLES OF CONFEDERATION of 1781, art. IX, with U.S. CONST. art. I, § 8, cls. 5, 7.

dorsing either the nationalist or the state sovereignty position. Though Madison stressed the removal of Article IX's qualifying language,<sup>141</sup> opponents of federal power could read the Clause to modify existing arrangements very little, since the Clause said nothing explicitly barring concurrent state authority. Contrary to the claim that the Convention's silence on the Clause reflected a consensus in favor of a single "clear" meaning, then, the Clause's open-endedness may best explain the lack of debate at the Convention. The resulting language allowed both proponents and critics of federal authority to claim victory.<sup>142</sup>

Present-day interpreters of the Indian Commerce Clause have thus stumbled onto what seems to have been the Clause's actual "original understanding": dueling interpretations that each construed the Clause to endorse their own position. The two sides were not equal; when the Clause was read in the context of the entire Constitution, the nationalists had the more compelling argument.<sup>143</sup> And they ultimately prevailed, at least in formal law.<sup>144</sup> Yet those embracing state authority offered a strong counterargument—particularly when the Clause was read in isolation—and long shaped events on the ground.<sup>145</sup> The key point is that both arguments were defensible interpretations of the Clause and its history.<sup>146</sup> The only thing that the Clause explicitly did was grant some version of the Indian affairs authority outlined in Article IX of the Articles of Confederation to the new federal government. Neither the Clause's terse language nor its drafting history clearly defined the scope of that authority.

### C. *Original Understandings of Exclusive Federal Power over Indian Affairs*

To understand the Constitution's implications for federal authority over Indian affairs, we must look beyond the Indian Commerce Clause. The 1780s

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141. See *supra* text accompanying note 47 (discussing Madison's views of the Indian Commerce Clause in *Federalist No. 42*).

142. Cf. Bernadette Meyler, *The New Originalism in Constitutional Law: Accepting Contested Meanings*, 82 *FORDHAM L. REV.* 803, 819-26 (2013) (arguing that many constitutional texts potentially possess multiple contested meanings).

143. See *infra* Part II.C.1.

144. See *infra* text accompanying notes 172-174.

145. See *infra* Part II.C.2.

146. Cf. Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 *STAN. L. REV.* 627, 628 (2002) ("Legislative ambiguity reaches its peak when a statute is so elegantly crafted that it credibly supports multiple inconsistent interpretations by legislators and judges. Legislators with opposing views can then claim that they have prevailed in the legislative arena.").

and '90s witnessed a vibrant debate over federalism and relations with Indians. Yet little of this discussion turned on the Clause, and little of it occurred in court. The debate was over the new nation's structure, in which the Washington Administration and state executives played outsized roles.

This Part reconstructs these executive constitutional discussions. Part II.C.1 argues that many early Americans, particularly those in the Washington Administration, subscribed to a vision of federal supremacy similar to present-day field preemption. But this view was not universally accepted. Part II.C.2 traces the constitutional claims of advocates for state authority over Indian affairs. Originally, their arguments hinged on inherent state sovereignty, particularly territorial sovereignty, rather than text. Not until the early nineteenth century did textualist arguments gain ascendance, when proposed narrow readings of the Indian Commerce Clause failed to become doctrine but succeeded in reshaping subsequent discussions of federal Indian affairs power.

### 1. *The Constitution as Field Preemption*

In relation to Indian affairs, early Americans seem to have read the Constitution differently from present-day lawyers and judges. Instead of adopting the present clause-bound approach,<sup>147</sup> most of those who drafted and interpreted the Constitution wrote of authority over Indian affairs as an interrelated, coherent bundle of powers.

This idea came from experience. In August 1787, as the Convention was meeting, the Continental Congress's committee on southern Indian affairs noted that "managing Affairs with the Indians, had been long understood and pretty well ascertained in this country."<sup>148</sup> Encompassing authority over war and peace, purchasing lands, fixing borders, and preventing illegal settlement, these "indivisible" powers, earlier exercised by the Crown, had passed "entire to the Union," the committee insisted.<sup>149</sup> Under this well-established regime, "[t]he laws of the State can have no effect upon a tribe of Indians or their lands within the limits of the state so long as that tribe is independent."<sup>150</sup>

Though contested, this conception of national authority as a bundle of powers was the dominant strand of thinking among the political elite. As I have elaborated elsewhere, Indian affairs influenced the Constitution well be-

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147. For instance, Prakash's investigation of the sources of federal plenary power over Indians begins with the Indian Commerce Clause, then proceeds through the Property Clause, the Treaty Power, and the War Power. See Prakash, *supra* note 14, at 1086-1102.

148. 33 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, *supra* note 112, at 458.

149. *Id.*

150. *Id.*

yond the Commerce or Treaty Clauses; they affected the Supremacy Clause, the Guarantee Clause, Article III jurisdiction, restrictions on the states, and military powers.<sup>151</sup> Most observers understood federal authority over Indian affairs as emerging from the interplay of *all* of these clauses.

Ratification underscored this understanding of federal power. Recall Anti-Federalist Abraham Yates, Jr.'s insistence that the Constitution granted Congress supremacy over Indian affairs.<sup>152</sup> To support this contention, Yates cited—alongside the Indian Commerce Clause—the Supremacy Clause, the federal government's new “legislative, executive and judicial powers,” and the bar on state tariffs without federal consent.<sup>153</sup> While few were as explicit as Yates, most concerns over Indian affairs during ratification similarly turned on an array of provisions: the Supremacy Clause, particularly its inclusion of treaties already “made” under the Articles; the federal judicial power to enforce Indian treaties; the federal military establishment; and the national power of taxation.<sup>154</sup> It was in these contexts, for instance, that most of the essays of *The Federalist* discussed Indians.<sup>155</sup>

Confirming Yates's fears, the Washington Administration quickly sought to ensure “that the state-governments be prohibited from intermeddling with the Indian tribes, to the utmost limit of the constitution.”<sup>156</sup> That limit, the Administration insisted, granted it considerable latitude. Soon into his presidency, George Washington informed the Governor of Pennsylvania that “the United States . . . possess[es] the only authority of regulating an intercourse with [the Indians], and redressing their grievances.”<sup>157</sup>

Washington entrusted that authority to Secretary of War Henry Knox, whose department administered Indian affairs.<sup>158</sup> Knox was an ardent proponent of national authority. Frustrated by state interference under the Articles, he read the Constitution as a grant of expansive authority. “[T]he United

151. See Ablavsky, *supra* note 24, at 1038-49.

152. See Sydney, *supra* note 48, at 1158; see also *supra* text accompanying notes 48, 124-125.

153. Sydney, *supra* note 48, at 1158.

154. See Ablavsky, *supra* note 24, at 1050-75.

155. See, e.g., THE FEDERALIST NO. 3, at 12 (John Jay) (Clinton Rossiter ed., 1999); THE FEDERALIST NO. 24, at 129 (Alexander Hamilton) (Clinton Rossiter ed., 1999); THE FEDERALIST NO. 25, at 131 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

156. Letter from Edmund Randolph to George Washington (Oct. 28, 1792), in 11 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 272, 273 (Christine S. Patrick ed., 2002).

157. Letter from George Washington to Thomas Mifflin (Sept. 4, 1790), in 6 THE PAPERS OF GEORGE WASHINGTON, *supra* note 88, at 396.

158. Act of Aug. 7, 1789, ch. 7, 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”).

States have, under the constitution, the sole regulation of Indian affairs, in all matters whatsoever,” he instructed a federal Indian agent.<sup>159</sup> By granting this authority over Indian affairs, the Constitution and federal laws “entirely preclude all interference, either of individuals, or of States,” Knox wrote another official.<sup>160</sup> He voiced similar sentiments to recalcitrant state governors.<sup>161</sup> Yet Knox was only the most vociferous member of an administration committed to federal supremacy over Indian relations: even Secretary of State Thomas Jefferson and Attorney General Edmund Randolph, usually solicitous of state concerns, insisted on federal preeminence in Indian matters.<sup>162</sup>

The Administration also agreed on the source of federal power over Indian affairs: the interplay of the national government’s diplomatic, military, and commercial authority. As Knox wrote:

[A]s indian Wars almost invariably arise in consequence of disputes relative to boundaries, or trade, and as the right of declaring War, making treaties, and regulating commerce, are vested in the United States it is highly proper they should have the sole direction of all measures for the consequences of which they are responsible.<sup>163</sup>

Jefferson voiced similar arguments. “[The] paragraphs of the Constitution, declaring that the general government shall have, and that the particular ones shall not have, the rights of war and treaty, are so explicit that no commentary

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159. Letter from Henry Knox to Israel Chapin, Apr. 28, 1792, in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 81, at 231, 232.

160. Letter from Henry Knox to William Blount (Aug. 27, 1790), Northwest Territory Collection, M367, Indiana Historical Society, Indianapolis, Ind., <http://images.indianahistory.org/cdm/compoundobject/collection/ONWT/id/510/rec/2> [<http://perma.cc/R4CF-7L5R>].

161. Letter from Henry Knox, Sec’y of War, to the Governor of Ga. (Aug. 31, 1792), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 81, at 258, 259 (“[Y]our Excellency will easily discover what is the duty of the federal and your own Government. The constitution has been freely adopted; the regulation of our Indian connexion is submitted to Congress; and the treaties are parts of the supreme law of the land.”).

162. See, e.g., Letter from Thomas Jefferson to Henry Knox (Aug. 10, 1791), in 22 THE PAPERS OF THOMAS JEFFERSON 27, 27 (Charles T. Cullen et al. eds., 1986) (arguing that “neither under the present Constitution nor the antient Confederation had any State or person a right to Treat with the Indians without the consent of the General Government”); Letter from Edmund Randolph to George Washington, *supra* note 156, at 273 (arguing for an aggressive federal role in Indian affairs to the exclusion of the states).

163. Letter from Henry Knox to George Washington (Jan. 4, 1790), in 4 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 529, 534-35 (Dorothy Twohig ed., 1993).

can explain them further, nor can any explain them away,” he insisted, rebuffing Georgia’s effort to sell Indian-owned land.<sup>164</sup>

The Washington Administration’s adoption of a position aggrandizing its authority is, perhaps, unsurprising. More unexpected is the agreement of state officials. Shortly after ratification, South Carolina Governor Charles Pinckney appealed to Washington for assistance from “the general Government, to whom with great propriety the sole management of India[n] affairs is now committed.”<sup>165</sup> Georgia’s legislature made a similar concession when it rejected the Governor’s call for negotiations with the Creeks. “With the organization of the foederal government,” the legislature wrote, “the power of making war and peace – raising and supporting armies – providing for the common defence and general welfare of the United States – entering into Treaties – and regulating commerce with the Indian tribes was vested in Congress.”<sup>166</sup> When the Virginia legislature supplied Indians with ammunition, it made sure President Washington knew it had acted from exigency alone, “[e]st in case of silence it might be interpreted into a design of passing the limits of state authority.”<sup>167</sup>

This holistic reading of the Constitution makes the Indian Trade and Intercourse Act of 1790 more intelligible. One of Congress’s first acts, the law established a licensing scheme for Indian traders, barred treaty-making with tribes without federal approval, and extended state laws over whites traveling into Indian country.<sup>168</sup> Subsequent revisions added still more provisions.<sup>169</sup> Proponents of an expansive federal commerce power have cited the law’s breadth, particularly its criminal provisions, as evidence of the broad meaning of commerce, while opponents have argued that other constitutional authority supported the law.<sup>170</sup> But searching for a single source of constitutional authority

164. Thomas Jefferson, Opinion on Certain Georgia Land Grants (May 3, 1790), in 16 THE PAPERS OF THOMAS JEFFERSON 406, 407 (Julian P. Boyd et al. eds., 1961).

165. Letter from Charles Pinckney to George Washington (Dec. 14, 1789), in 4 THE PAPERS OF GEORGE WASHINGTON, *supra* note 163, at 401, 404.

166. Letter from the Georgia House of Representatives to Governor Edward Telfair (June 10, 1790), in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: DELAWARE, NEW JERSEY, GEORGIA AND CONNECTICUT microfilm supp. no. 59, doc. 50 (Merrill Jensen ed., 1978).

167. VIRGINIA HOUSE OF DELEGATES, JOURNAL OF THE HOUSE OF DELEGATES, OF THE COMMONWEALTH OF VIRGINIA 7-8, 17.

168. Act of July 22, 1790, ch. 33, 1 Stat. 137; *see also supra* text accompanying notes 49-51.

169. *See* Act of Mar. 1, 1793, ch. 19, 1 Stat. 329; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139.

170. Jack Balkin and Akhil Amar have cited the Act’s criminal provisions as demonstrating a comprehensive definition of “commerce.” AMAR, *supra* note 61, at 108; Balkin, *supra* note 61, at 24-25; *cf.* Akhil Reed Amar, *America’s Constitution and the Yale School of Constitutional Interpretation*, 115 YALE L.J. 1997, 2004 n.25 (2006) (noting that the “Indian Intercourse Act of

asks the wrong question. The law codified a hodgepodge of federal powers, some intended to protect the federal treaty power, others related to trade. Rather than adopting a clause-bound approach, the executive officials who drafted the law, and the congressmen who enacted it with little debate, seemingly shared the view that Congress's "Indian affairs" power emerged from aggregate constitutional provisions.<sup>171</sup>

Both during and after ratification, then, much of the nation's political elite shared an interpretation of Indian relations in which the Indian Commerce Clause played a minor role. Rather than relying on the Clause in isolation, members of this elite class argued that the Constitution prohibited the exercise of state authority by granting the federal government the core Indian affairs powers in multiple provisions, and by barring the states from entering treaties or declaring war. In short, they understood federal supremacy against states as roughly analogous to present-day concepts of field preemption: that is, the federal government constitutionally occupied the "field" of Indian affairs so completely as to preclude all state authority.

This executive constitutional understanding from the 1790s shaped the Supreme Court's earliest pronouncements on Indian law decades after ratifica-

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1790 . . . plainly regulated noneconomic intercourse with Indian tribes"). By contrast, Robert Natelson has argued that this provision was an exercise of the Treaty Power codifying the Treaties of Hopewell. Natelson, *supra* note 14, at 250-56; Robert G. Natelson & David Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 MICH. L. REV. FIRST IMPRESSIONS 55, 59-60 (2010).

Both readings are problematic. Although Congress did not state which power it exercised in enacting the law, some provisions—in particular, the bar on state treaty-making—clearly reflected powers other than the Indian Commerce Clause. But Natelson's counterargument is highly unpersuasive. The law had its origins in the executive department's commitment to protect the lands of *all* Natives, not just those who signed the Treaty of Hopewell. See Letter from Henry Knox to George Washington (July 7, 1789), in 3 PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 134, 137-38 (Dorothy Twohig ed., 1989) ("It would reflect honor on the new government and be attended with happy effects were a declarative Law to be passed that the Indian tribes possess the right of the soil of all lands within their limits respectively and that they are not to be divested thereof but in consequence of fair and bona fide purchases, made under the authority, or with the express approbation of the United States."). Moreover, Natelson's reading oddly suggests that Congress believed it could convert a provision in treaties with three tribes into a universal grant of authority. Were this true, of course, the limits Natelson urges on federal power over Indian affairs would be entirely meaningless. A far better reading is that Congress read those treaty provisions to reflect its power over Indian affairs rather than vice versa—an unsurprising position when many Indian treaties contained very similar provisions and followed a standard template.

171. See 5 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, MARCH 4, 1789-MARCH 3, 1791, at 988-97 (Linda Grant DePauw et al. eds., 1986); 13 *id.* at 977-82. The brief debate over the law focused on issues of personnel and funding. The criminal jurisdiction provisions went undebated.

tion. In 1832, in *Worcester v. Georgia*, Chief Justice Marshall endorsed federal supremacy over Indian affairs against Georgia's attempt to assert jurisdiction over the Cherokee Nation.<sup>172</sup> He traced the contentious history of Article IX of the Articles of Confederation before noting that the Court need not resolve the provision's ambiguities.<sup>173</sup> "The correct exposition of this article is rendered unnecessary by the adoption of our existing constitution," he wrote. "That instrument 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."<sup>174</sup>

Chief Justice Marshall's endorsement of the preemptive interpretation of federal authority echoed Henry Knox's views from forty years earlier. Yet the Chief Justice placed greater emphasis on the Indian Commerce Clause than earlier thinkers, who all but ignored the provision. As this shift reflected, the earlier strain of constitutional thought persisted, yet the jurisprudential landscape had changed – thanks largely to federal supremacy's opponents.

## 2. *The Argument from State Sovereignty*

The embrace of federal supremacy over Indian affairs was not universal, and heated debates persisted after ratification. But like proponents of federal authority, expansionist states advanced arguments based on constitutional structure, not the Indian Commerce Clause. Only later did textual arguments rooted in the Clause emerge.

Following ratification, advocates for state authority over Indian affairs adopted different tactics to resist federal supremacy. New York simply ignored the restrictions on its authority. Throughout the 1790s, the state successfully badgered Natives to enter into a series of dubious land transactions, openly flouting the Constitution and the Trade and Intercourse Act.<sup>175</sup> Georgia's approach reflected a more fully articulated theory of state authority. Georgia's resistance began soon after ratification, when the first federal treaty ratified under the Constitution, the 1790 Treaty of New York with the Creek nation,

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172. 31 U.S. (6 Pet.) 515 (1832).

173. *Id.* at 558-59.

174. *Id.* at 559.

175. For the history of New York land transactions in the 1790s, see generally LAURENCE M. HAUPTMAN, *CONSPIRACY OF INTERESTS: IROQUOIS DISPOSSESSION AND THE RISE OF NEW YORK STATE* 58-97 (1999); and TAYLOR, *supra* note 102. New York's questionable land transactions became the subject of extensive litigation in the twentieth century, twice reaching the U.S. Supreme Court. *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985); *Oneida Indian Nation v. Cnty. of Oneida*, 414 U.S. 661 (1974).

invalidated two earlier cessions that Georgia claimed the Creeks had made to the state.<sup>176</sup> Georgians were outraged. State newspapers denounced the treaty.<sup>177</sup> Federal grand jury presentments attacked the treaty three times, decrying federal involvement “as the greatest grievance the State of Georgia (as a member of the Union) can lay under.”<sup>178</sup> State militia threatened to kill all Indians despite the treaty’s promise of federal protection.<sup>179</sup> “[T]he Executive officers of the Federal Government wished that the Indians might destroy the whole State of Georgia,” raged one militia leader.<sup>180</sup> “Congress are a set of rascals, and the Secretary of War an enemy to his country”; the militia leader wished “he [c]ould drown them in the sea.”<sup>181</sup>

Throughout the 1790s, Georgia’s leaders fashioned a constitutional argument from this populist rage. They did not challenge the federal right to enter Indian treaties, but they insisted that the Treaty of New York’s guarantee of Creek title to lands within Georgia, as well as federal commissioners’ authority within the state, was unconstitutional.<sup>182</sup> They invoked various provisions to ground these objections. Georgia Congressman James Jackson argued that the protection of Creek land “controverted the plainest principles of the Constitution, particularly those parts which secured to every citizen the rights of property”; he similarly claimed that Article IV, Section 3—which promised that nothing in the Constitution would prejudice state territorial claims—guaranteed state territory.<sup>183</sup> Others insisted that Indian cessions to the federal government for trading posts within Georgia’s boundaries violated the Enclave Clause, which required state consent for “needful buildings” within state bor-

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176. Treaty of New York, *supra* note 96, art. IV. During the 1780s, Georgia concluded the Treaties of Augusta and Galphinton with the Creeks; the two treaties, which the Creeks claimed were coerced from a handful of representatives without authority, purported to grant large portions of Creek territory to Georgia. HORSMAN, *supra* note 113, at 26-30.

177. David A. Nichols, *Land, Republicanism, and Indians: Power and Policy in Early National Georgia, 1780-1825*, 85 GA. HIST. Q. 199, 215-16 (2001).

178. 2 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800: THE JUSTICES ON CIRCUIT, 1790-1794, at 224, 333, 366-67 (Maeva Marcus ed., 1988).

179. Report of Fred’k Dalcho, Surgeon’s Mate in the Legion of the United States (Sept. 25, 1793), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 81, at 414.

180. *Id.*

181. *Id.*

182. *E.g.*, 2 ANNALS OF CONG. 1793 (1790).

183. *Id.* Jackson stressed that treaties “ceded away without any compensation” over “three millions of acres of land, the property of the State of Georgia, guaranteed to that State by the Constitution of the United States.” *Id.*

ders.<sup>184</sup> Georgian representatives even denounced licenses required to attend federal treaty negotiations with Natives, declaring, “We know of no power on earth, competent to hinder a citizen of Georgia . . . from exercising the locomotive faculty, within the limits of the State, in the most liberal extent.”<sup>185</sup> In 1795, Georgia defied the Treaty of New York by selling its western territory, including federally guaranteed Creek land, to land companies.<sup>186</sup> Stressing that the Constitution enshrined the Treaty of Paris, barred *ex post facto* laws, and guaranteed state territory, the legislature insisted that “Georgia . . . is in full possession, and in the full exercise of the jurisdiction and territorial right” over its territory, and therefore “the right of disposing thereof, is, and are [sic] hereby declared to be in the State of Georgia only.”<sup>187</sup>

Federal officials found such assertions “extravagant and absurd,”<sup>188</sup> and Georgians’ promiscuous interpretations suggest that they were grasping after arguments to bolster self-interested claims. Yet Georgians’ sense of grievance was sincere. The Georgians were straining to constitutionalize the sanctity of state sovereignty and authority over state territory—which is why Georgians bemoaned the “honor” and “dignity” of their state being “insulted” when federal officials challenged state jurisdiction.<sup>189</sup>

Georgians were the most extreme proponents of state territorial sovereignty, but others held similar views. “[I]f the State territorial Right is not Sovereign & Supreme, & exclusively so,” Patrick Henry observed, denouncing the Treaty of New York, “it must follow that some other Power does possess that exclusive Sovereignty: and every Title not derived from that other Power must be defective.”<sup>190</sup> Even the Governor of Pennsylvania—generally supportive of

184. Protest of the Commissioners of the State of Georgia, in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 81, at 613-14 (citing U.S. CONST. art. 1, § 8, cl. 17).

185. Letter from James Hendricks to the Comm’rs of the United States (May 31, 1796), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 81, at 591.

186. Act of Jan. 7, 1795, 1795 Ga. Laws 3.

187. *Id.* § 1. The controversy over this sale culminated in the Supreme Court case of *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810).

188. The Commissioners of the United States, Report from the Washington Administration to the Senate, The Creeks and the Seven Nations (Jan. 4, 1797), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 81, at 591.

189. Letter from James Hendricks to the Comm’rs of the United States, *supra* note 185, at 591; Protest of the Commissioners of the State of Georgia, *supra* note 184, at 613-14. The Georgian commissioners repeatedly spoke of the “civil and actual jurisdictional rights of the State,” *id.* at 613, and of their rights “within the limits, and under the actual jurisdiction of the State of Georgia,” Letter from James Hendricks to the Comm’rs of the United States, *supra* note 185, at 591.

190. Letter from Patrick Henry to Edward Telfair, Governor of Georgia (Oct. 14, 1790), in 2 WILLIAM WIRT HENRY, PATRICK HENRY: LIFE, CORRESPONDENCE AND SPEECHES 507, 507 (1891);

federal authority over Indian affairs—rejected a federal appeal to limit settlement in western Pennsylvania. “The Constitutional supremacy of the Laws of the Union will not be disputed,” he wrote President Washington, “but may it not be Asked . . . what power there is to pass a Law which cou’d controul the Commonwealth in the legitimate exercise of her Territorial jurisdiction?”<sup>191</sup>

In their arguments against federal authority, state advocates rarely mentioned the Indian Commerce Clause.<sup>192</sup> This was partly because early struggles over federalism centered on Indian treaties. But silence on the Indian Commerce Clause owed more to the fact that states’ assertions of territorial sovereignty were fundamentally structural, not textual. Even as states cited constitutional snippets, the argument for state authority ultimately rested on an understanding of federalism that privileged states’ sovereignty within their borders. This argument perpetuated pre-constitutional debates over the appropriate division of authority and reflected the unsettled nature of federalism in the early Republic.<sup>193</sup>

The backward-looking nature of states’ arguments, however, blunted their effectiveness. The Georgians’ attempts to shoehorn their views on state sovereignty into the Constitution fit imperfectly with the constitutional text. The Constitution, under any reasonable interpretation, granted the federal government considerable power over Indian affairs, and absolute state territorial sovereignty was inconsistent with a national government founded in the people

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*see also* Letter from Patrick Henry to Robert Walker (Nov. 12, 1790), *in* HENRY, *supra*, at 508, 509-10 (arguing the federal government was treating Georgia as “conquered”).

191. Letter from Thomas Mifflin, Governor of Pa., to George Washington (June 14, 1794), *in* 16 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 227, 230-31 (David R. Hoth & Carol S. Ebel eds., 2011).

192. In my examination of late eighteenth-century documents, I have found only one instance in which Georgians cited the Indian Commerce Clause, in a newspaper report of a speech by Governor Telfair challenging the Treaty of New York and the Trade and Intercourse Act. *See Extract from the Address of Governor Telfair, to the Legislature of Georgia*, AM. APOLLO (Bos.), Oct. 5, 1792, at 24-26. Telfair’s speech presented an interesting amalgam of claims. Interpreting the Indian Commerce Clause, he construed commerce broadly, noting that “trade and intercourse with Indian tribes, have at all times been considered the great ties by which amity and friendship are secured.” *Id.* at 25. He nonetheless argued that the federal bar on land purchases from Indians is “an extension beyond the line of commerce,” but then switched to attack the law on the ground that “it is incontrovertible, that the consent of a State is necessary to establish a right to any part of its territory.” *Id.* at 26. He also insisted that the Treaty of New York would “subvert every future claim of this State to her territory.” *Id.* at 25. Telfair’s speech thus indicates that, although textual readings of the Indian Commerce Clause appeared during this period, arguments from territorial sovereignty were paramount.

193. On the connections between prerevolutionary federalism and subsequent efforts to divide authority, *see generally* BILDER, *supra* note 23; and LACROIX, THE IDEOLOGICAL ORIGINS, *supra* note 23.

and able to act directly, rather than through the states. When Georgians insisted that they had not been represented at the Treaty of New York,<sup>194</sup> for instance, federal officials observed that Georgia's Senators had been present when the treaty was debated.<sup>195</sup> Though the Senators had voted against it, the Constitution made the treaty supreme law nonetheless.

Confronted with these limitations, states asserting control over Indian affairs in derogation of federal authority shifted their contentions. By the early nineteenth century, states, though still arguing from territorial sovereignty, also began to insist that the Indian Commerce Clause, interpreted to relate to trade alone, was the sole basis of federal authority—a move consistent with the rise of a Supreme Court jurisprudence focused on discrete constitutional clauses.<sup>196</sup> In 1814, a federal Indian agent complained of “[t]he policy of Governor Mitchell [of Georgia], claiming and exercising an interference in the management of Indian affairs, allowing the General Government the regulation of their commerce *only*.”<sup>197</sup> This Indian Commerce Clause-based interpretation coincided with the rise, beginning in the 1810s and culminating in the 1830s, of aggressive state assertions of sovereignty over Native nations.<sup>198</sup> State demands that Natives be removed westward gave new salience to questions about the respective scope of federal and state authority over Indian affairs. To resolve these issues, the New York, Alabama, Georgia, and Tennessee Supreme Courts all embraced the narrow focus on the Indian Commerce Clause, sweeping all non-commercial Indian affairs, and even “internal” Indian commerce, within state jurisdiction.<sup>199</sup> This restrictive reading also prevailed in a federal circuit

194. The Commissioners of the United States, *supra* note 188, at 597.

195. *Id.*

196. See G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE: 1815-1835*, at 8-9 (abr. ed. 1988) (arguing that Chief Justice Marshall used a linguistic analysis); cf. JEFFERSON POWELL, *LANGUAGES OF POWER: A SOURCEBOOK OF EARLY AMERICAN CONSTITUTIONAL HISTORY* 3-11 (1991) (describing the interplay between textual and extratextual constitutional arguments from 1791 to 1818). Thanks to Jessica Lowe for this citation.

197. Letter from Benjamin Hawkins to General Armstrong, Sec'y of War (June 7, 1814), in 1 *AMERICAN STATE PAPERS: INDIAN AFFAIRS*, *supra* note 81, at 858.

198. See, e.g., LISA FORD, *SETTLER SOVEREIGNTY: JURISDICTION AND INDIGENOUS PEOPLE IN AMERICA AND AUSTRALIA, 1788-1836*, at 130 (2010) (“Sovereignty talk and jurisdictional practice changed in Georgia between 1815 and 1830 . . . . [T]he state bent all of its efforts toward ending a century of (increasingly contentious) plural practice in Georgia’s Indian Country.”).

199. *Caldwell v. State*, 1 Stew. & P. 327, 330-31 (Ala. 1832); *State v. Tassels*, 1 Dud. 229, 232-34 (Ga. Super. Ct. 1830); *Murray v. Wooden*, 17 Wend. 531, 537-38 (N.Y. 1837); *State v. Foreman*, 16 Tenn. (8 Yer.) 256, 316-19 (1835). For discussion of these and similar cases, see TIM ALAN GARRISON, *THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS* (2002); ROSEN, *supra* note 98, at 57-67.

decision invalidating the Trade and Intercourse Act's criminal jurisdiction provision.<sup>200</sup> This rewritten constitutional jurisprudence, based on a clause-bound interpretation of the Constitution, provided states with their most powerful counterargument to the Washington Administration's nationalist vision. It also served, in one scholar's words, as a "legal ideology of removal," intended to forestall interference in state efforts to dispossess Natives within their borders.<sup>201</sup>

In the end, proponents of state authority lost the doctrinal struggle: in 1832, when the Supreme Court ruled on the federalism issues raised by removal in *Worcester v. Georgia*, Chief Justice Marshall enshrined federal supremacy over Indian affairs.<sup>202</sup> This impeded states little, as they removed Natives, the Court's holding notwithstanding.<sup>203</sup> But beyond this policy victory, advocates for state sovereignty arguably won the jurisprudential battle over the methods of constitutional interpretation, too. Their assertion that the Indian Commerce Clause was the only basis for federal power over Indian affairs had little relationship to constitutional understandings during and after ratification. But as treaty-making declined, Indian warfare moved westward into federal territories, and Natives had largely been dispossessed of their lands, the older sources of constitutional authority over Indian affairs faded in importance, and the narrow focus on the Indian Commerce Clause prevailed. The Clause was transformed from a minor component of a broad Indian affairs power resting on multiple provisions into the most important and often sole source of national authority over Natives.

#### D. Implications

As the history underscores, the revisionists are right: despite the Supreme Court's assertions, the Indian Commerce Clause alone cannot justify exclusive federal power over Indian affairs. The revisionists err, though, when they project their textualism onto the historical silence surrounding the Indian Commerce Clause. The interpretation with the best claim to be the original understanding of the federal Indian affairs power was based on a structural interpretation of the Constitution; it read multiple provisions in tandem to

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200. *United States v. Bailey*, 24 F. Cas. 937 (C.C.D. Tenn. 1834).

201. GARRISON, *supra* note 199, at 5-11.

202. *See supra* text accompanying notes 172-174.

203. The literature on removal is large. For an overview, see GARRISON, *supra* note 199. *See also*, e.g., MICHAEL D. GREEN, *THE POLITICS OF INDIAN REMOVAL: CREEK GOVERNMENT AND SOCIETY IN CRISIS* (1982); JILL NORGREN, *THE CHEROKEE CASES: THE CONFRONTATION OF LAW AND POLITICS* (1996).

preclude state authority over Indian affairs. Textualist interpretations focused on the Indian Commerce Clause were a later innovation derived from a results-oriented effort to reinterpret the Constitution to cabin federal authority. The current inconsistency between the federal government's broad and exclusive authority and the Indian Commerce Clause is thus manufactured. As the props that once supported exclusive federal power have been knocked out, only a single slender pillar survives to support the edifice.

In certain respects, the "original understanding" of exclusive federal power over Indian affairs provides more robust support for current law. Both Congress and the Court at least gesture toward "other constitutional authority" – before reverting to the Indian Commerce Clause – to support exclusive federal authority over Indian affairs.<sup>204</sup> But as Justice Thomas points out, these half-hearted and vague invocations are "not illuminating."<sup>205</sup> This constitutional defense need not be so thin and unpersuasive. Many constitutional provisions intended to preclude state involvement in Indian affairs, particularly restrictions on state treaty-making and war powers,<sup>206</sup> go unmentioned in the Court's decisions.<sup>207</sup> More substantially, as long as the Court constructs its arguments within the clause-bound framework concocted by federal power's opponents, its case law will rest on an unpersuasive repetition of precedent – a weak response to the revisionists' seeming intellectual courage to question hoary doctrines.

But this history also suggests revisiting current law. Adherence to the early understanding of federal power would limit states more than current doctrine does, since the Court currently favors conflict rather than field preemption in analyzing Indian affairs.<sup>208</sup> There are policy reasons why strict adherence to

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204. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2567 (2013) (Thomas, J., concurring) (quoting 25 U.S.C. § 1901(1)); *United States v. Lara*, 541 U.S. 193, 200-02 (2004) (citing, besides the Indian Commerce Clause, the Treaty Clause and "preconstitutional powers" to support federal plenary power).

205. *Adoptive Couple*, 133 S. Ct. at 2567 (Thomas, J., concurring).

206. See, e.g., Jefferson, *supra* note 164, at 407 (citing various constitutional provisions, including Article I, Section 10 of the United States Constitution, in the context of Jefferson's desire to secure exclusive power over Indian relations for the federal government, and arguing that Georgia's actions were unconstitutional).

207. For instance, the Court has never cited Article I, Section 10 of the United States Constitution, which restricts state treaty power and the power to keep troops, in any Indian-law decision.

208. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) ("State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority."); cf. *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 172 (1973) ("[T]he trend has been away from the idea of inherent Indian sover-

state exclusion from Indian country may prove too constraining in the present, as some states and tribes seek to cooperate rather than contend for authority.<sup>209</sup> But the background principle that motivated federal constitutional supremacy over Indian affairs—the concern that states’ attempts to assert jurisdiction over Native nations were legally dubious and would lead to conflict—has been vindicated by American history, and it deserves more robust consideration than recent cases have afforded.

Finally, though Indian law is often regarded as *sui generis*, there is convincing evidence that the Washington Administration’s holistic approach to the constitutional law of Indian affairs also extended to other fields of law. Other scholars have found a similar conception in early constitutional thinking about foreign affairs, for instance.<sup>210</sup> Recovering the original understanding of Indian affairs suggests that many inquiries about the Constitution’s historical meaning start with unhelpful and ahistorical presumptions. Strict adherence to textualism and fixation on enumerated powers may sometimes obscure rather than illuminate original understandings of the Constitution.

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eignty as a bar to state jurisdiction and toward reliance on federal pre-emption.”). Despite the Court’s claim that it applies conflict preemption, though, some of its precedent seems to reflect a field preemption approach. *See, e.g., Bryan v. Itasca Cnty.*, 426 U.S. 373, 379-80 (1976) (“These States lack jurisdiction to prosecute Indians for most offenses committed on Indian reservations or other Indian country, with limited exceptions.” (quoting H.R. REP. NO. 83-848, at 5-6 (1953))). Nonetheless, in certain key Indian-law cases, particularly tax cases, a field preemptive approach would have likely yielded a different outcome. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

209. *See* Matthew L.M. Fletcher, *Retiring the “Deadliest Enemies” Model of Tribal-State Relations*, 43 TULSA L. REV. 73 (2007) (arguing that the assumptions underlying the exclusion of states from Indian affairs at the time of the Constitution’s drafting should no longer apply).

210. *See, e.g.,* Andrew Kent, *The New Originalism in Constitutional Law: The New Originalism and the Foreign Affairs Constitution*, 82 FORDHAM L. REV. 757, 778-79 (2013) (“[T]he Constitution was understood by some to have granted more foreign relations and national defense powers to the federal government than parsing the strict semantic or linguistic meaning of its words would seem to convey. . . . [Some Federalists believed] that the vesting of foreign affairs and national defense powers in the national government had been so complete and exhaustive that unmentioned powers of that nature that served the same purposes could be considered impliedly granted. This implication arose perhaps from the overall structure and purposes of the document . . . .”). Other scholars have found that early American judicial decisions rarely relied on textualism as a primary interpretive method. William Michael Treanor, *Against Textualism*, 103 NW. U. L. REV. 983, 986-98 (2009); *see also* AMAR, *supra* note 29, at 5-6 (emphasizing the shortcomings of “clause-bound literalism” in interpreting many constitutional provisions, which must be read “holistically”).

## III. PLENARY FEDERAL POWER

As murky as the Indian Commerce Clause's implications for federalism are, the historical problems presented by the doctrine of plenary power—the doctrine that the federal government has complete authority over Indian tribes, including their internal affairs—are still more substantial. The Supreme Court routinely invokes the Clause to justify plenary power,<sup>211</sup> but this assertion does not find support either in text<sup>212</sup> or in any discussion of tribes' constitutional status in the Clause's sparse drafting and adoption history.<sup>213</sup>

This disjuncture between doctrine and evidence has not troubled the Court.<sup>214</sup> But scholars—both Indian law specialists and originalists—have agreed on a narrative at odds with current law. The Constitution's drafters, they argue, understood Native nations as separate sovereigns, with whom relations would be negotiated through diplomacy.<sup>215</sup> A nineteenth-century innovation, plenary power was born of extra-constitutional powers “inherent in sovereignty” as well as historical necessity, as Natives did not assimilate or vanish.<sup>216</sup>

211. *United States v. Lara*, 541 U.S. 193, 200 (2004) (citing *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993); *Washington v. Confederated Tribes of Yakima Nation*, 439 U.S. 463, 470-71 (1979)). *But see id.* at 215 (Thomas, J., concurring) (“I cannot agree with the Court . . . that the Constitution grants to Congress plenary power to calibrate the ‘metes and bounds of tribal sovereignty.’ . . . I cannot locate such congressional authority in . . . the Indian Commerce Clause.” (quoting *id.* at 202 (opinion of the Court))).

212. Numerous scholars have advanced this argument. *See, e.g.*, sources cited *supra* note 13.

213. *See supra* text accompanying notes 41-48.

214. *See, e.g., Lara*, 541 U.S. at 200 (“This Court has traditionally identified the Indian Commerce Clause . . . and the Treaty Clause . . . as sources of that [plenary and exclusive] power.” (citations omitted)); Prakash, *supra* note 14, at 1081 (“[T]he majority in *United States v. Lara* was content to merely reiterate the existing (and unedifying) textual arguments for plenary power.”).

215. *See, e.g., Clinton*, *supra* note 13, at 147 (“At the time the Constitution of the United States was drafted, the Framers generally accepted the notion that the Indian tribes constituted separate sovereign peoples who were totally self-governing within their territory . . . .”); Newton, *supra* note 28, at 200 (“The absence of a general power over Indian affairs in the Constitution is not surprising to students of history, for at the time the Constitution was drafted, the framers regarded Indian tribes as sovereign nations . . . .”); Prakash, *supra* note 14, at 1082 (“[T]he Founders regarded Indian tribes as sovereign nations, with the ability to make war, treaties, and laws for their own people.”).

216. This perspective appears in, for example, 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, 54-63 (2002); Matthew L.M. Fletcher, *Preconstitutional Federal Power*, 82 TUL. L. REV. 509, 555-60 (2007); Newton, *supra* note 28, at 212-16; Prakash, *supra* note 14, at 1077-79.

This Part questions both current doctrine and the scholarly counternarrative regarding plenary power and its origins. Part III.A observes that, contrary to most scholarly accounts, the United States initially asserted power over Indians aggressively, but the Constitution and the Washington Administration rejected this approach. Nonetheless, the new federal government did not regard Native nations as fully sovereign. Part III.B explores the Washington Administration's construction of theories of U.S. sovereignty over Native nations, theories grounded in constitutional readings of international law and territoriality. Federal officials believed that the authority they claimed—limits on Natives' international legal personality, including their right to freely alienate land—only modestly restricted Native sovereignty, yet in practice these limitations evolved into the doctrine of plenary power. Part III.C explores the doctrinal implications of this history, suggesting that recovering the United States' original assertions of sovereignty over Native nations might suggest cabining plenary power.

*A. The Indian Commerce Clause and Power over Indian Tribes*

History both complicates and supports critiques of the plenary-power interpretation of the Indian Commerce Clause. Though the Clause says little about power over Natives, it was drafted as the United States was repudiating a failed effort to aggressively assert authority against Native nations, particularly their lands. In this context, the Clause is best read as part of a broader return to diplomatic models for negotiating with Natives as independent polities.

The frequent assertion that early Americans regarded Indian tribes as separate sovereigns outside U.S. jurisdiction is too simplistic. For one, “tributary” Natives—eastern tribes surrounded by Anglo-American communities—were subject to state law.<sup>217</sup> Likely the “members of the States” under Article IX of

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217. The application of colonial regulations and civil and criminal jurisdiction to Natives in Massachusetts is considered in YASUHIDE KAWASHIMA, *PURITAN JUSTICE AND THE INDIAN: WHITE MAN'S LAW IN MASSACHUSETTS, 1630-1763* (1986). For additional background, see DANIEL R. MANDELL, *BEHIND THE FRONTIER: INDIANS IN EIGHTEENTH-CENTURY EASTERN MASSACHUSETTS* (1996); and DAVID J. SILVERMAN, *FAITH AND BOUNDARIES: COLONISTS, CHRISTIANITY, AND COMMUNITY AMONG THE WAMPANOAG INDIANS OF MARTHA'S VINEYARD, 1600-1871* (2005).

the Articles,<sup>218</sup> these Natives were presumably also the “taxed” Indians implied in the Constitution.<sup>219</sup>

Early American constitutional thinking focused, though, on the western nations who “encircle[d] the Union from Maine to Georgia”<sup>220</sup> – the Creeks, the Cherokees, the Haudenosaunee, and the tribes of the Ohio country, among others. The Revolutionary War profoundly affected these nations. The war, begun partly due to Anglo-Americans’ desire for Native land, spread into Indian country, where it became a chaotic contest between Anglo-American settlers and largely British-allied tribes, resulting in a deep-seated hatred of Indians.<sup>221</sup>

These fruits of war ensured that respect for Natives was not the hallmark of post-Revolutionary Indian policy. During debates over the Articles’ drafting, congressional delegate James Wilson had urged, “We have no right over the Indians, whether within or without the real or pretended limits of any Colony.”<sup>222</sup> Wilson, however, was ignored. After the war, the states and the federal government insisted that Natives were no longer “free and independent nation[s]” but a “subdued people.”<sup>223</sup>

The claim rested on the 1783 Treaty of Paris, which ended the war with Britain and granted most British territory east of the Mississippi to the United States.<sup>224</sup> The transfer of this vast territory – extending far beyond existing settlement or effective federal and state authority – had dramatic consequences for Natives. Under Anglo-American readings of the treaty, Native nations were

218. See 6 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 36, at 1077-78 (recording Braxton’s argument for excluding Indians who “are tributary to any State” from federal jurisdiction); see also Clinton, *supra* note 54, at 1140-41 (arguing that only Indians who “had become subject to state law and oversight . . . prior to the Revolution” were included within state jurisdiction under the Articles).

219. See Fletcher, *supra* note 216, at 555-60 (suggesting that the “taxed” Indians encompassed assimilated, nontribal Indians).

220. THE FEDERALIST NO. 25, at 163 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

221. Explorations of the role of Indians in the American Revolution can be found in COLIN G. CALLOWAY, THE AMERICAN REVOLUTION IN INDIAN COUNTRY: CRISIS AND DIVERSITY IN NATIVE AMERICAN COMMUNITIES (1995). The rise of hatred of Indians is the central theme in PETER RHOADS SILVER, OUR SAVAGE NEIGHBORS: HOW INDIAN WAR TRANSFORMED EARLY AMERICA (2008). See also PATRICK GRIFFIN, AMERICAN LEVIATHAN: EMPIRE, NATION, AND REVOLUTIONARY FRONTIER (2007); RICHTER, *supra* note 86, at 189-236.

222. 6 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 36, at 1078.

223. Proceedings of the United States and the Six Nations at Fort Stanwix, in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 105, at 313, 323-24.

224. 25 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 683-94 (Gaillard Hunt ed., 1922). On the Treaty’s consequences for Natives, see FREDERICK E. HOXIE, THIS INDIAN COUNTRY: AMERICAN INDIAN POLITICAL ACTIVISTS AND THE PLACE THEY MADE 23-36 (2012).

not “external.”<sup>225</sup> Instead, Native nations within the new borders— even those that had barely interacted with Anglo-Americans— were now ostensibly part of the United States. Expansionist states labeled Indians within their capacious borders<sup>226</sup> as state “[m]embers,” prefiguring efforts to subordinate tribes to state jurisdiction.<sup>227</sup> Federal officials demanded that tribes “acknowledge the United States to be the sole and absolute sovereigns of all the territory ceded to them by a treaty of peace, made between them and the King of Great Britain.”<sup>228</sup> Moreover, abandoning earlier practices of purchase, both the state and federal governments now claimed Native land by right of conquest; some states took Indian title through ordinary legislation.<sup>229</sup>

These claims to U.S. authority through conquest were expansive, but they were distinct from later concepts of plenary power. Both the states and the federal government focused almost entirely on obtaining land and had little interest in regulating Indians’ internal affairs.<sup>230</sup> Anglo-Americans’ principal preoccupation remained delineating sovereignty and authority among *themselves*, refracting nearly all issues involving Indians through the lens of federalism.<sup>231</sup> Assertions that were ostensibly about Native status—the claims that Indians were state “members,” for instance— were actually intended to forestall federal interference in state land grabs.<sup>232</sup> Even treaty language granting Congress the power “to manage all [the Indians’] affairs in such manner as they think prop-

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225. Matthew Fletcher suggests the existence of this category of “external” Indian nations. Fletcher, *supra* note 216, at 555-60. The confusion arises from Madison’s proposal at the Convention that Congress possess power over Indians “within [and] without the limits of the U[nited] States.” See *supra* text accompanying note 41. Madison was not referring to control of Indians outside U.S. boundaries, an authority the United States specifically disclaimed. See Treaty of Canandaigua, U.S.-Six Nations, Nov. 11, 1794, 7 Stat. 44, 44-46 (limiting the scope of the treaty to Natives “within the boundaries of the United States: For the United States do not interfere with nations, tribes, or families, of Indians elsewhere resident”). Instead, Madison was seeking to abrogate Article IX of the Articles of Confederation by affirming congressional authority within and without *state* borders.

226. Many states maintained extensive western territorial claims based on colonial charters, but they had mostly ceded those claims to the federal government by 1787. PETER S. ONUF, *THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES, 1775-1787*, at 149-72 (1983). The last holdout, Georgia, ceded its claims in 1802. FORD, *supra* note 198, at 24-25.

227. See, e.g., James Duane’s Views on Indian Negotiations, *supra* note 105, at 299; Treaty of Galphinton, in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 105, at 390.

228. Treaty of Fort Finney, U.S.-Shawnee Nation, art. II, Jan. 31, 1786, 7 Stat. 26, 26.

229. 25 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, *supra* note 224, at 683-94; Act of Apr. 18, 1783, ch. 2, 1783 N.C. Sess. Laws 322, 322-25.

230. Ablavsky, *supra* note 24, at 1018-33.

231. *Id.*

232. See James Duane’s Views on Indian Negotiations, *supra* note 105, at 299.

er” – later the subject of doctrinal disagreement – was, in context, an effort to bolster federal authority against states rather than a claim of power *over* Indian tribes.<sup>233</sup>

Nonetheless, even Anglo-Americans’ more limited claim to Indian lands through conquest was a break with earlier practice and a bold assertion of authority over Indian tribes. It was also an arrogant misinterpretation of reality. As the United States soon discovered, Native nations refused to “submit to be treated as Dependants.”<sup>234</sup> Insisting that they were not bound by a treaty between the United States and Britain,<sup>235</sup> Indian leaders turned for support to the neighboring British and Spanish, who were eager to check American expansion.<sup>236</sup> Native nations also constructed a “formidable” confederation that threatened the United States with war.<sup>237</sup> In short, regardless of what Anglo-Americans labeled them, Native nations possessed *de facto* independence, belying assertions of conquest.<sup>238</sup>

Many Anglo-Americans recognized this mismatch between the authority the United States claimed and what it could exercise.<sup>239</sup> By the summer of 1787,

233. Treaty of Hopewell, *supra* note 96, art. IX. The treaty’s structure and preamble suggest that the provision – a near-verbatim quote of Article IX of the Articles of Confederation – was intended to address authority to regulate cross-cultural intercourse, not tribal governance. In *Cherokee Nation*, Justice Johnson in dissent argued that the Cherokees had, through this provision, relinquished “all power, legislative, executive and judicial to the United States.” *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 24-25 (1831) (Johnson, J., dissenting). In *Worcester*, Chief Justice Marshall offered a more persuasive reading that limited the provision’s scope, though he missed its federalism context. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 518-19 (1832).

234. James Duane’s Views on Indian Negotiations, *supra* note 105, at 299.

235. See, e.g., Letter from Alexander McGillivray to Andrew Pickens (Sept. 5, 1785), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 105, at 387, 388 (“[W]e [Creeks] know our own limits, . . . and, as a free nation . . . we shall pay no regard to any limits that may prejudice our claims, that were drawn by an American, and confirmed by a British negotiator.”).

236. See James H. Merrell, *Declarations of Independence: Indian-White Relations in the New Nation*, in *THE AMERICAN REVOLUTION: ITS CHARACTER AND LIMITS* 197, 202 (Jack P. Greene ed., 1987).

237. Letter from Captain John Doughty to Henry Knox, Sec’y of War (Oct. 21, 1785), in 2 THE ST. CLAIR PAPERS 9, 10 (William Henry Smith ed., Cincinnati, Robert Clarke & Co. 1882); see also Speech of the United Indian Nations to Congress (Dec. 18, 1786), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 105, at 356, 356-58.

238. See Merrell, *supra* note 236, at 202-03.

239. Both James Madison and James Monroe, for instance, found New York’s assertion that the Six Nations were state “members” problematic. See, e.g., Letter from James Monroe to James Madison (Nov. 15, 1784), in 8 THE PAPERS OF JAMES MADISON 140, 140 (Robert A. Rutland et al. eds., 1962) (questioning “whether the living simply within the bounds of a State, in the exclusion only of an European power, while they acknowledge no obidience to its laws but hold a country over which they do not extend, nor enjoy the protection nor any

the disasters of Indian policy under the Articles of Confederation led Congress to abandon its assertions of conquest.<sup>240</sup> Now, instead of employing a “language of superiority and command,” a congressional committee urged the more “politic and Just” course of “treat[ing] with the Indians . . . on a footing of equality.”<sup>241</sup> It also recommended returning to purchasing Indian lands.<sup>242</sup>

Read against this history, the Constitution arguably reflected a conscious choice to place Natives outside the body politic. Most Indians were not counted for the purposes of congressional representation, a decision at odds with earlier proposals for possible Native representatives in Congress.<sup>243</sup> Including Indian tribes within the Commerce Clause was inconsistent with the claim that they were conquered peoples. Furthermore, the sparse discussions of Natives at the Convention portrayed them as independent if bellicose nations rather than as vassals of the United States.<sup>244</sup>

It is wrong, then, to assert that the Indian Commerce Clause established federal plenary power, but it is equally wrong to assert that federal power over Indian tribes was unknown when the Constitution was drafted. A better reading of history is that the Constitution obliquely endorsed a significant and simultaneous shift in Anglo-Americans’ thought about Natives’ status: the repudiation of a theory of Native peoples as conquered in favor of a grudging acknowledgment of Native independence. This recognition had limits, as the following section explores.

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of the rights of citizenship within it, is a situation wh. will even in the most qualified sense, admit their being held as members of a State”).

240. See *supra* Part II.B.2.

241. 33 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 112, at 479; see also Merrell, *supra* note 236, at 203-04 (discussing the Continental Congress’s new course of Indian policy).

242. See 33 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 112, at 480.

243. See U.S. CONST. art. 1, § 2, para. 3 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by . . . excluding Indians not taxed . . .”). For treaty provisions providing for possible Native representation in Congress, see Treaty of Hopewell, *supra* note 96, art. XII, which states, “That the Indians may have full confidence in the justice of the United States, respecting their interests, they shall have the right to send a deputy of their choice, whenever they think fit, to Congress”; and Treaty with the Delawares, U.S.-Delaware Nation, art. VI, Sept. 17, 1778, 7 Stat. 13, which states, “[I]t is further agreed upon between the contracting parties should it for the future be found conducive for the mutual interest of both parties to invite any other tribes who have been friends to the interest of the United States, to join the present confederation, and to form a state whereof the Delaware nation shall be the head, and have a representation in Congress . . .”).

244. See *supra* text accompanying notes 41-48; Ablavsky, *supra* note 24, at 1038-50.

*B. Native Sovereignty, United States Sovereignty, and the Law of Nations*

Few words dominate federal Indian law more than the term “sovereignty.” Though it is not a Native term, Native nations have adopted it to express deeply felt but oft-denied rights of autonomy, while in doctrine “sovereignty” has become a term of art for adjudicating jurisdictional disputes.<sup>245</sup>

The central place of sovereignty in Indian law owes much to the Washington Administration. Embracing law and restraint over claims of conquest, the Administration drew on the law of nations to determine Native status. As a result, federal officials framed nearly all issues of Indian affairs, including the question of land title, through the international law concept of sovereignty.

This focus on the law of nations yielded mixed results for Natives, as this section explores. In many respects, international law provided a more expansive scope for Native autonomy. But the law of nations could be a sword as well as a shield, interpreted by Anglo-Americans to limit as well as protect Native sovereignty. As Part III.B.2 considers, early federal officials used international law to claim territorial sovereignty over Natives and the corresponding right to serve as their sole “protectors” within the borders of the United States. Part III.B.3 traces federal international-law arguments that the United States was the sole legal purchaser of Native lands. In both instances, Anglo-Americans asserted that the restrictions placed on Native sovereignty and independence were minor. Natives, however, disagreed, and their assessment proved more accurate: as Part III.B.4 argues, these early constraints became the roots of plenary power.

*1. The United States and the Law of Nations*

The renewed salience of the law of nations and sovereignty in the post-revolutionary United States stemmed from several sources. First, the American Revolution made sovereignty central to late eighteenth-century thought about nationhood.<sup>246</sup> Sovereignty questions were at the heart of the constitutional

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245. See Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1111 (2004) (describing the Court’s treatment of sovereignty as well as the view of tribe members “for whom ‘sovereignty’ is as common and heartfelt a term as ‘rights’ is to most other Americans”).

246. For instance, in printed English-language materials digitized by Google Books, the word “sovereignty” appears nearly nine times more frequently in 1787 than in 1740. *Ngram Viewer*, GOOGLE BOOKS, <https://books.google.com/ngrams> [<http://perma.cc/FXE7-CD8L>] (search “Graph these comma-separated phrases” for “sovereignty”; then follow “Search lots of books” hyperlink).

debates about the imperial crisis that culminated in the Revolution,<sup>247</sup> and the Declaration of Independence represented a bold assertion of self-sovereignty.<sup>248</sup> But the Revolution also underscored that sovereignty depended on recognition by the community of nations, leading to deep-seated concern among Anglo-American elites over the United States' status in international law.<sup>249</sup>

Second, the late eighteenth century was a moment of transition in international law. In the 1780s and '90s, the law of nations remained an amalgam of older ideas about natural rights and newer concepts of positive law derived from treaties and national customs.<sup>250</sup> These sources gave the law of nations a universalism that it would later lose; the interpretations of the era's foremost thinkers granted non-European nations international-law rights that they could invoke against European colonizers.<sup>251</sup> Federal officials shared this universalist conception. They routinely spoke of the "law of nations" and customary international law as applying to their relationships with Natives.<sup>252</sup> There was little doubt to early Americans that international law governed both the United States and Indian nations as well as their relations.

Finally, the law of nations became increasingly prominent due to the United States' situation in the early 1790s. Anglo-Americans viewed Native nations as proxies in the struggle for the borderlands with the British in Canada and

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247. For background on these debates, see *infra* notes 337-338 and accompanying text.

248. See THE DECLARATION OF INDEPENDENCE (U.S. 1776). This aspect of the Declaration is explored in DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* 25-62 (2007).

249. For an exploration of the Revolution and its aftermath as part of the American effort to join the community of nations, see generally GOULD, *supra* note 33; and Golove & Hulsebosch, *supra* note 29.

250. Thomas Jefferson, for instance, wrote that "[t]he Law of Nations . . . is composed of three branches. 1. The Moral law of our nature. 2. The Usages of nations. 3. Their special Conventions." Opinion on the Treaties with France, 28 April 1793, in 25 PAPERS OF THOMAS JEFFERSON 608, 609 (John Catanzariti ed., 1992). On the transition from natural to positive law in eighteenth-century international law, see STEPHEN C. NEFF, *JUSTICE AMONG NATIONS: A HISTORY OF INTERNATIONAL LAW* 144-213 (2014).

251. See Jennifer Pitts, *Empire and Legal Universalisms in the Eighteenth Century*, 117 AM. HIST. REV. 92 (2012).

252. See, e.g., Letter from Gov. St. Clair to the Judges of the Northwestern Territory (Aug. 2, 1788), in 3 TERRITORIAL PAPERS OF THE UNITED STATES 273, 275 (Clarence Edward Carter ed., 1934) ("As to the Natives they are generally under the Protection of the Law of Nations . . ."); Memorial from House of Representatives and Council of the Southwest Territory to U.S. Congress, Sept. 18, 1794, in 4 TERRITORIAL PAPERS OF THE UNITED STATES 354-55 n.21 (Clarence Edward Carter ed., 1936) (urging an attack on the Creeks and Cherokees for treaty violations "according to the usage and custom of nations").

the Spanish in Florida and Louisiana.<sup>253</sup> Federal officials feared, with some justification, that the British and Spanish supported Native nations as buffers against U.S. expansion; several times in the early 1790s, this issue became so heated that both Americans and Europeans spoke of possible war.<sup>254</sup> These disputes forced American officials—particularly Secretary of State Thomas Jefferson—to articulate legal theories of Native status that European diplomats would acknowledge, further encouraging federal officials to frame these questions using cosmopolitan international-law discourse.<sup>255</sup>

There was widespread agreement, then, that the law of nations should govern relations between the United States and Natives. It was less clear what the content of that law would be. The members of the Washington Administration were well versed in the writings of the European publicists, particularly the works of the influential eighteenth-century international lawyer Emil de Vattel.<sup>256</sup> But the fundamental texts of the eighteenth-century law of nations, though universalist in aspiration, were Eurocentric in content; they said little about Native peoples.<sup>257</sup> The Administration thus faced the challenge of translating international law principles from Europe to the American borderlands. Its efforts to do so had lasting consequences for Natives, as the following sections explore.

2. “[T]he Species of Sovereignty which the United States claim over the Indians”

The Washington Administration’s emphasis on the law of nations yielded a more expansive view of Native sovereignty than the United States had conceded under the Articles. Knox insisted that “Indians possess the natural rights

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253. See GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815*, at 112-22 (2009).

254. *Id.* at 123-38.

255. *Cf.* GOULD, *supra* note 33, at 180-209 (noting the salience of law of nations arguments over Natives in disputes with Britain and Spain, albeit in a later period).

256. On Vattel’s influence in early America, see ONUF & ONUF, *supra* note 33, at 10-19.

257. *Cf.* S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 20-23 (2d ed. 2004) (describing Vattel’s implications for Natives, but stressing Vattel’s European focus). Earlier legal thought, particularly by the Spanish scholar Francisco de Vitoria, had focused on Natives’ status under natural law. *Id.* at 16-19; ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 13-31 (2005); NEFF, *supra* note 250, at 107-35. But this thought seemingly had little effect on early American Indian law. *Cf.* Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 *GEO. L.J.* 1, 17 (1942) (noting that Vitoria had little direct impact on U.S. law, but arguing for indirect Spanish influence).

of man,”<sup>258</sup> obligating the United States to treat them with “justice and humanity.”<sup>259</sup> He also urged repudiating earlier practice under the Articles: “independent nations and tribes of indians,” he wrote Washington, “ought to be considered as foreign nations, not as the subjects of any particular state.”<sup>260</sup> Thomas Jefferson went further. In his view, “the Indians had . . . full, undivided and independant sovereignty as long as they chose to keep it and that this might be for ever.”<sup>261</sup> One draft of a Jefferson letter to American diplomats overseas disclaimed power over Indians, “for we pretend to none over a nation of independent government.”<sup>262</sup>

The Administration’s practice largely followed these principles, as it replaced claims of conquest with diplomacy. The Administration emphasized treaties with Native nations, the provisions of which largely disclaimed authority over Natives or their self-governance.<sup>263</sup> Indian country, the Attorney General recognized, lay outside the scope of federal legislative jurisdiction.<sup>264</sup> The successive Trade and Intercourse Acts asserted personal jurisdiction only over citizens of the United States who ventured into Indian country;<sup>265</sup> one scholar

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258. Letter from Henry Knox to George Washington, *supra* note 163, at 529, 529-35.

259. Henry Knox’s Notes on the State of the Frontier, Jan. 1790, in 5 PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 76, 79 (Dorothy Twohig et al. eds., 1996).

260. Letter from Henry Knox to George Washington, *supra* note 170, at 134-40.

261. Notes on Cabinet Opinions, 26 February 1793, in 25 PAPERS OF THOMAS JEFFERSON, *supra* note 250, at 271, 272.

262. Letter from Thomas Jefferson to William Carmichael and William Short (June 30, 1793), in 26 PAPERS OF THOMAS JEFFERSON, *supra* note 92, at 405, 417 n.28. The quotation omits the insertion of the words “an independent” between “over” and “a nation,” which was deleted in the manuscript but restored by the volume’s editors. *Guide to Editorial Apparatus*, in 26 PAPERS OF THOMAS JEFFERSON, *supra* note 92, at vii.

263. Though post-ratification Indian treaties required tribes to place themselves under federal protection, these treaties abandoned provisions requiring recognition of federal sovereignty and replaced them with guarantees of tribal lands and implicit acknowledgments of Native autonomy. See, e.g., Treaty of Canandaigua, U.S.-Six Nations, Jan. 21, 1795, 7 Stat. 44; Treaty of Peace and Friendship, U.S.-Cherokee Nation, Feb. 7, 1792, 7 Stat. 39; Treaty of New York, *supra* note 96.

264. Letter from the Att’y Gen. to the Sec’y of the Treasury (June 19, 1795), in 2 TERRITORIAL PAPERS OF THE UNITED STATES 520, 520 (Clarence Edwin Carter ed., 1934) (“There can be no doubt, that all the laws of Congress . . . are, in their operation coextensive with the Territory of the United States, and obligatory upon every person therein, except independent Nations & Tribes of Indians residing on Indian lands . . .”).

265. Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of Mar. 1, 1793, ch. 19, 1 Stat. 329; Act of July 22, 1790, ch. 33, 1 Stat. 137. Not until the final version of the Trade and Intercourse Act in 1834 did the United States assert criminal jurisdiction over Natives. Act of June 30, 1834, ch. 161, § 19, 4 Stat. 729, 732 (codified as amended in scattered sections of 25 U.S.C.).

has described the laws as entrenching a system of legal pluralism that acknowledged the persistence of Native jurisdiction.<sup>266</sup>

Yet Jefferson's claim that Indians possessed full sovereignty under this new legal order was disingenuous. The Washington Administration had repudiated earlier practice by acknowledging aspects of Natives' independence, yet it did not consider tribes to be fully external nations. Rather, these nations still existed, as Knox, Washington, and others often wrote, "within the limits of the United States"—that is, within the borders set by the Treaty of Paris.<sup>267</sup> According to these officials, this inclusion meant that the United States now possessed "territorial title"—what we would now call territorial sovereignty—over Indian country.<sup>268</sup> This insistence on territory reflected the era's intellectual currents. Enshrined in the writing of the influential eighteenth-century international lawyer Emil de Vattel, the concept of uniform sovereignty over a national territory with defined borders paralleled the rise of the nation-state and the repudiation of imperial models in which authority radiated from center to periphery.<sup>269</sup> The logic of territoriality meant that Native sovereignty and U.S.

266. FORD, *supra* note 198, at 30-42.

267. See, e.g., Letter from Henry Knox to George Washington (June 15, 1789), in 2 PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 490, 493 (Dorothy Twohig ed., 1987) ("The time has arrived when it is highly expedient, that a liberal system of justice should be adopted for the various indian tribes within the limits of the United States."); Letter from George Washington to the Comm'rs to the S. Indians (Aug. 29, 1789), in 3 PAPERS OF GEORGE WASHINGTON, *supra* note 170, at 551-52, 556 (providing instructions for the commissioners for concluding treaties "with the independent tribes or nations of Indians within the limits of the united States, south of the river Ohio," and urging them to conclude a treaty with "the Creeks who are within the limits of the United States acknowledge themselves to be under the protection of the united States of America, and of no other sovereign whosoever"); Letter from Edmund Randolph to George Washington (Sept. 12, 1791), in 8 PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL PAPERS 524, 524-26 (Mark A. Mastromarino ed., 1999) (discussing constitutional authority over negotiations with "Indian tribes, within the limits of the United States").

268. Letter from Timothy Pickering to Arthur Campbell (Aug. 28, 1795), Folder 2, Timothy Pickering Papers, Ayers 926, Newberry Library, Chicago, Ill.

269. Eileen P. Scully, *The United States and International Affairs, 1789-1919*, in 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 604, 606-08, 622-26 (Michael Grossberg & Christopher Tomlins eds., 2008). The rise of territorial sovereignty is often associated with the development of the "Westphalian" state system in the seventeenth and eighteenth centuries, though its rise both predated and postdated the Treaty of Westphalia. See KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 5-43 (2009). See generally STUART ELDEN, THE BIRTH OF TERRITORY (2013) (describing the development of territory in ancient and medieval thought). An exploration of territorial sovereignty's rise in early America and its effect on Native independence can be found in FORD, *supra* note 198. For a consideration of imperial concepts of uneven sovereignty and their endurance, see LAUREN A. BENTON, A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400-1900 (2010).

sovereignty coexisted within the same space. The implications were significant, for this shared sovereignty suggested that Natives did not possess sovereignty equivalent to that of the United States or Spain or Britain: Euro-American nations could not possess sovereignty over the same territory. Territoriality established Native sovereignty as subordinate to the sovereignty of the United States.

Exactly how U.S. sovereignty limited Native sovereignty was a subject of considerable discussion, arising first in 1782 during negotiations over the Treaty of Paris.<sup>270</sup> With their territorial interests at stake, the Spanish insisted that “neither Spain nor the United States has any rights of sovereignty over the Indians.”<sup>271</sup> They pressed John Jay, the American envoy, as to how Anglo-Americans could claim “territories which manifestly belong to free and independent nations of Indians.”<sup>272</sup> Jay replied that these “were points to be discussed and settled between us and them; that we claimed the right of preemption with respect to them, and the sovereignty with respect of all other nations.”<sup>273</sup>

Jay’s views were ignored under the Articles, but the Washington Administration, especially Secretary of State Jefferson, elaborated them into a law of nations doctrine that the Administration enunciated in border negotiations with the British and Spanish. The core of this doctrine was that, due to their inclusion within the United States, Native nations were not free to negotiate or associate with other Euro-American nations. In Jefferson’s words, it was

an established principle of public law among the white nations of America that while the Indians included within their limits retain all other natl. rights no other white nation can become their patrons, protectors or Mediators, nor in any shape intermeddle between them and those within whose limits they are.<sup>274</sup>

Or, as one of Jefferson’s British interlocutors observed, the Americans did “not regard[] the Indians living on their respective frontiers or within their respective territory, as possessing that sort of independent sovereignty which would

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270. HOXIE, *supra* note 224, at 23-36.

271. Letter from Joseph-Matthias Gérard de Rayneval to John Jay (Sept. 4, 1782), *in* 2 JOHN JAY: THE WINNING OF THE PEACE: UNPUBLISHED PAPERS 1780-1784, at 329, 331 (Richard B. Morris ed., 1980).

272. Letter from John Jay to Robert Livingston (Nov. 17, 1782), *in* 6 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 11, 24 (Francis Wharton ed., 1889).

273. *Id.* On preemption, see *infra* Part III.B.3.

274. Notes for a Conversation with George Hammond (ca. Dec. 10, 1792), *in* 24 THE PAPERS OF THOMAS JEFFERSON 717, 717 (John Catanzariti ed., 1990).

entitle them to a claim on the intervention of a third power in terminating any dispute in which they might be involved.”<sup>275</sup> Jefferson forcefully announced the same position to the Spanish during tense negotiations over Spanish patronage of the Creeks and other southern Indian nations.<sup>276</sup>

The sole power and duty to protect Native nations was thus the “Species of Sovereignty which the United States claim over the Indians within their boundaries in exclusion of every other Sovereign,” as Knox’s successor Timothy Pickering described it.<sup>277</sup> As for the source of this sovereignty, Jefferson stated repeatedly that it was based on “the usages established among the white nations, with respect to indians living within their several limits”<sup>278</sup> – “a kind of *Jus gentium* for America,” he termed it, using the era’s Latin term for international law.<sup>279</sup> Echoing the principle articulated by Vattel that states were legally barred from interfering in other states’ internal affairs,<sup>280</sup> Jefferson insist-

275. Notes of a Conversation with George Hammond (Dec. 12, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 274, at 728, 728 n.

276. See Letter from Thomas Jefferson to William Carmichael and William Short (Nov. 3, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 274, at 565, 566 (“[W]e take for granted that Spain will be ready to agree to the principle that neither party has a right to stipulate protection or interference with the Indian nations inhabiting the territory of the other.”); Letter from Thomas Jefferson to William Carmichael and William Short (Oct. 14, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 274, at 479, 479-81. Carmichael and Short were U.S. commissioners to Spain whom Jefferson instructed at various points to “communicate” the Administration’s views on Indian affairs “to the Court of Madrid.” Letter from Thomas Jefferson to William Carmichael and William Short (June 30, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 92, at 405, 412. According to Jefferson’s account, the Spanish concurred with Jefferson’s interpretations. Letter from Thomas Jefferson to George Washington (Nov. 2, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 274, at 562, 562 (reporting that the Spanish envoys “did not imagine their government would think themselves authorized to take under their protection any Nation of Indians, living within limits confessed to be ours”).

277. Letter from Timothy Pickering to William Blount (Mar. 23, 1795), in 4 THE TERRITORIAL PAPERS OF THE UNITED STATES, *supra* note 252, at 386, 387.

278. Letter from Thomas Jefferson to William Carmichael and William Short (May 31, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 92, at 148, 148. Jay had similarly argued based on existing usage during the Treaty of Paris negotiations. See Letter from John Jay to Robert Livingston, *supra* note 272, at 24 (observing, in response to Spanish questioning of U.S. sovereignty over Indians, “that Mexico and Peru had been in the same predicament, and yet that his Catholic majesty had had no doubts of his right to the sovereignty of those countries”).

279. Notes of a Conversation with George Hammond (June 3, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 274, at 26, 30. On the *jus gentium*, see NEFF, *supra* note 250, at 151-66.

280. EMER DE VATTEL, THE LAW OF NATIONS 96 (Béla Kaposy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund 2008) (1758) (emphasizing that internal affairs are “a national concern” in which “no foreign power has a right to interfere”).

ed on this norm to Britain and Spain; he regarded it as a restriction on European states' actions within U.S. boundaries, rather than a limitation on Native sovereigns.<sup>281</sup>

Yet Anglo-Americans tried to get Indians to acknowledge this principle as well. Since independence, federal negotiators had included language in treaties that tribes placed themselves “under the protection of the United States of America, and of no other sovereign whosoever.”<sup>282</sup> But although many tribes signed these treaties, others strongly resisted. The Creeks, for instance, “most positive[ly] refus[ed] to acknowledge the Creek Nation to be within the limits, or under the Protection of the United States,” seeking to maintain their alliance with the Spanish.<sup>283</sup> Natives rejected suggestions that authority could be claimed over them without their consent. “You well know that no sovereignty was ceded to you at the peace of 1763 [between the Creeks and the British], except such lands as was purchased by his Majesty’s subjects by solemn treaty,” Creek leader John Galphin informed encroaching Georgians.<sup>284</sup> “We actually see our whole country laid out into districts, without considering us to have any kind of claim or right, which nature has bestowed on us, and of which oppression or prejudice alone can attempt to rob us.”<sup>285</sup> Yet such protestations were, as a matter of law, in vain, for Native assent was not necessary to claim sovereignty; only the customs of “white nations” constituted the law of nations.<sup>286</sup>

This international law grounding may suggest that the U.S. assertion of sovereignty over Indian nations was a claim to pre- or extra-constitutional power, as the Court proposed in dicta in *Lara*,<sup>287</sup> and as Fletcher has further elaborated.<sup>288</sup> This is true if “constitutional” authority requires an unambiguous grounding in explicit constitutional text. But Jefferson, Knox, and other officials would likely not have shared this cramped meaning of constitutionalism, for several reasons. First, as scholars have recently emphasized, interna-

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281. See *supra* notes 261–262, 276 and accompanying text.

282. Treaty of Peace and Friendship, *supra* note 263, art. II; Treaty of New York, *supra* note 96, art. II; see also Treaty with the Wyandots, Etc., art. XIII, Jan. 9, 1789, 7 Stat. 28 (“[T]o be under the protection of the said United States, and no other power whatever.”).

283. Washington’s Memoranda on Indian Affairs (1789), in 4 THE PAPERS OF GEORGE WASHINGTON, *supra* note 163, at 468, 472.

284. Letter from John Galphin to Jared Irwin (Aug. 21, 1793), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 81, at 371, 371.

285. *Id.*

286. See *supra* text accompanying notes 274, 278.

287. *United States v. Lara*, 541 U.S. 193, 201 (2004).

288. Fletcher, *supra* note 216.

tional law norms deeply shaped the U.S. Constitution, even beyond empowering Congress to punish offenses against the “Law of Nations”<sup>289</sup>: the document’s purpose was in part to create a sovereign capable of complying with international law’s requirements.<sup>290</sup> Second, it would be misleading to characterize the concepts of territorial sovereignty underlying claims to authority over Native nations as extra-constitutional. The Constitution established this sovereignty both in an abstract sense and through specific provisions: the elevation of the Treaty of Paris and all other treaties to “the supreme Law of the Land”;<sup>291</sup> congressional power to admit new states;<sup>292</sup> guarantees of state and federal land claims;<sup>293</sup> and perhaps most significantly, the Property Clause, granting the “Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>294</sup> Therefore, although concepts of territoriality and the law of nations predated the Constitution, the document became the touchstone for their meaning, scope, and expression in the post-ratification United States.

In short, the Washington Administration acknowledged considerable Native autonomy but did not recognize Native nations as the United States’ equals in the community of nations. Instead, the Washington Administration claimed, by dint of the law of nations, ultimate sovereignty over the territory of the United States, and it insisted that this sovereignty limited Native power to ally with foreign nations. Anglo-Americans believed this to be a modest limitation, but, from the Native perspective, the “protection” of the United States doubtless looked less like a guardian’s solicitude than a demand for subordination.<sup>295</sup>

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289. U.S. CONST. art. I, § 8, cl. 10.

290. On the law of nations background to the Constitution, see *supra* note 33. See also ONUF & ONUF, *supra* note 33, at 108 (“The Revolutionaries’ internationalist commitments converged with a powerful tendency in American constitutionalism toward natural law principles. The distinction between foreign and domestic spheres, and therefore between international and constitutional thought, was not clearly drawn in this period.”).

291. U.S. CONST. art. VI, cl. 2.

292. *Id.* art. IV, § 3, cl. 1.

293. *Id.* art. IV, § 3, cl. 2.

294. *Id.*

295. For a discussion of the usage of “protection” as a term of art implying jurisdiction over Native peoples in late eighteenth-century North America, see Lauren Benton, *Shadows of Sovereignty: Legal Encounters and the Politics of Protection in the Atlantic World*, in ENCOUNTERS: OLD AND NEW 13-17 (Alan Karras & Laura Mitchell eds., forthcoming 2015).

### 3. *Sovereignty and Native Land*

Nowhere was the Washington Administration's shift from earlier Indian policy clearer than in its approach to Native lands. As a considerable body of scholarship has recognized, Indian land ownership was a hotly contested question in early American law.<sup>296</sup> Yet the Washington Administration repeatedly emphasized the sanctity of Native title. To an extent that previous work has failed to appreciate, the restrictions the Administration claimed over Native land tenure—most notably its power as sole purchaser—stemmed from an application of the same principles of sovereignty and international law with which the Administration approached Native autonomy.<sup>297</sup>

Self-interest colored all interpretations of Indian land ownership in early America. Some speculators, having purchased Native land in questionable transactions, argued that Natives enjoyed absolute title.<sup>298</sup> More common was the insistence that Indians had only a tenuous claim to their lands, formalized in the assertion that the Treaty of Paris had ceded all Indian title to the United States. The Indians and their British allies assumed that “[the Americans’] intention was to exterminate the Indians and take the lands.”<sup>299</sup>

Yet in its waning days, the Continental Congress repudiated this approach, declaring in the Northwest Ordinance that the Indians’ “lands and property shall never be taken from them without their consent.”<sup>300</sup> Knox and other Washington Administration members endorsed this robust understanding of Indian land ownership. Knox wrote Washington:

The Indians being the prior occupants possess the right of the Soil—It cannot be taken from them unless by their free consent, or by the right of Conquest in case of a just War—To dispossess them on any other

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296. The literature on this topic is large. Key works include STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* (2005); LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* (2005); TAYLOR, *supra* note 102; BLAKE A. WATSON, *BUYING AMERICA FROM THE INDIANS: JOHNSON V. MCINTOSH AND THE HISTORY OF NATIVE LAND RIGHTS* (2012); and ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 227-317 (1990).

297. Stuart Banner distinguishes property from sovereignty, BANNER, *supra* note 296, at 6-9, but does not address that contrast in discussing preemption, *id.* at 156-68.

298. The most influential such work was SAMUEL WHARTON, *PLAIN FACTS: BEING AN EXAMINATION INTO THE RIGHTS OF THE INDIAN NATIONS OF AMERICA, TO THEIR RESPECTIVE COUNTRIES* (1781).

299. Notes of a Conversation with George Hammond, *supra* note 274, at 30.

300. 32 *JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789*, at 340 (Roscoe R. Hill ed., 1936).

principle would be a gross violation of the fundamental Laws of Nature and of that distributive justice which is the glory of a nation.<sup>301</sup>

The Administration sought to put into practice what it preached. “You will make it clearly understood,” Knox instructed a commissioner to the Indians, “that we want not a foot of their land, and that it is theirs, and theirs only; that they have the right to sell, and the right to refuse to sell, and that the United States will guaranty to them their said just right.”<sup>302</sup>

Federal commissioners followed Knox’s directions and walked back earlier bluster. “We . . . frankly tell you, that we . . . put an erroneous construction on that part of our treaty [of Paris] with the King [granting western lands],” they informed members of the Northwest Indian Confederacy. “As [the King] had not purchased the country of you, of course he could not give it away; he only relinquished to the United States his claim to it.”<sup>303</sup> The commissioners then repudiated the theory of conquest: “Brothers: We now concede this great point. We, by the express authority of the President of the United States, acknowledge the property, or right of soil, of the great country above described, to be in the Indian nations, so long as they desire to occupy the same.”<sup>304</sup>

Yet, as in the case of sovereignty, this defense of Native title came with an important qualification. Although the Washington Administration regarded Indian nations as the rightful owners of the land, they did not believe that Indian title was equivalent to fee simple absolute. In particular, Natives could not freely alienate their land. Jefferson articulated the Administration’s position when pointedly asked by the British, “What did I understand to be our right [as Americans] in the Indian soil?”<sup>305</sup> Jefferson responded: “[A] right of preemption of their lands, that is to say the sole and exclusive right of purchasing from them whenever they should be willing to sell.”<sup>306</sup>

Preemption – the legal principle granting the government the sole authority to purchase Native lands – had a lengthy history in North America. Throughout the seventeenth and eighteenth centuries, colonies had enacted laws and

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301. Letter from Henry Knox to George Washington, *supra* note 267, at 491.

302. Instructions to Brigadier General Rufus Putnam (May 22, 1792), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 81, at 234, 234.

303. Speech of the Commissioners of the United States to the Deputies of the Confederated Indian Nations, in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 81, at 352, 353.

304. *Id.* at 354.

305. Notes of a Conversation with George Hammond, *supra* note 274, at 30.

306. *Id.* Jefferson also mentioned the right to regulate commerce “between [Indians] and the whites.” *Id.*

constitutional provisions restricting private purchases of Indian land.<sup>307</sup> British reforms after the Seven Years' War reserved the right of preemption to the crown alone,<sup>308</sup> a legacy Congress had claimed, with mixed success, under the Articles.<sup>309</sup> To federal officials, preemption was one of the foundations of the new national government's Indian policy.<sup>310</sup> Federal officials insisted that the Constitution granted the right of extinguishing Indian title to the federal government alone,<sup>311</sup> and the first Trade and Intercourse Act barred the purchase of Indian lands except at a public treaty held under federal authority.<sup>312</sup> The Senate rejected one of the first Indian treaties negotiated under the Constitution for inadequately protecting federal preemption rights.<sup>313</sup>

The Washington Administration understood preemption in two ways. The first was federalist: as enshrined in the Trade and Intercourse Act, preemption was a sword against land-hungry states.<sup>314</sup> The second was international: preemption, by barring foreign purchases of Native lands, was a corollary of the restriction on Native sovereignty placing Indian nations within the United States under U.S. protection alone. In fact, to many federal officials, preemption was a restriction that applied to Europeans, not Indians; it was a prohibition that fell on "individual[s] of [other] nation[s]" who wished to purchase Native land rather than on the Indian sellers.<sup>315</sup> "I consider[] our right of

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307. See, e.g., 17 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789: NEW ENGLAND AND MIDDLE ATLANTIC LAWS 1607-1789, at 27, 81, 166, 220, 227, 235, 314, 318, 340, 393, 420, 423, 459, 473, 500, 631, 668, 678, 710, 733, 735, 755 (Alden T. Vaughan & Deborah A. Rosen eds., 2004).

308. BANNER, *supra* note 296, at 85-95; Robert N. Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs*, 69 B.U. L. REV. 329, 356-57 (1989).

309. Federal power of preemption appeared in Benjamin Franklin's first draft of the Articles, 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 198 (Worthington Chauncey Ford ed., 1905), but it was not included in the final draft. Madison believed the states retained the right of preemption under the Articles, Letter from James Madison to James Monroe, *supra* note 111, at 156, but elsewhere congressional delegates suggested that the federal government possessed the power, 33 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 112, at 458.

310. Letter from Henry Knox to George Washington, *supra* note 163, at 529, 534-35.

311. Letter from Edmund Randolph to George Washington, *supra* note 267, at 524-25. In this letter, Randolph listed three constitutional powers with respect to Indians: regulating commerce, making treaties, and protecting the right of preemption. *Id.* Randolph did not specify the source of the preemption right.

312. Act of July 22, 1790, § 4, 1 Stat. 137, 138.

313. WATSON, *supra* note 296, at 170.

314. See *supra* Part II.C.1.

315. Notes of a Conversation with George Hammond, *supra* note 274, at 29-30.

preemption of the Indian lands, not as amounting to any dominion, or jurisdiction, or paramountship whatever,” Jefferson remarked, “but merely in the nature of a remainder after the extinguishment of a present right, which gave us no present right whatever but of preventing other nations from taking possession and so defeating our expectancy.”<sup>316</sup>

This international focus explains federal officials’ accounts of preemption’s origins. The Supreme Court, and much Indian law scholarship, has labeled European assertions of control over Native lands as the “doctrine of discovery,” under which “fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States.”<sup>317</sup> Many scholars have ascribed the plenary power’s origins to this doctrine.<sup>318</sup> But, as historians have come to recognize, this account of Anglo-Americans’ historical land claims was largely a fiction contrived by John Marshall.<sup>319</sup> Rights based on discovery was one of multiple doctrines that operated to justify British possession of North America,<sup>320</sup> yet discovery’s legal status was dubious, rejected by the era’s lead-

316. Notes on Cabinet Opinions, *supra* note 261, at 272.

317. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 203 n.1 (2005) (quoting *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985); *Cnty. of Oneida v. Oneida Indian Nation*, 414 U.S. 661, 667 (1974)). The most thorough account of the Doctrine of Discovery’s role in American history appears in ROBERT J. MILLER ET AL., *DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES 1-89* (2010). Miller employs the term “Doctrine of Discovery” broadly, however, to include international law doctrines—including possession, *terra nullius*, and conquest—that other scholars have treated as distinct. *Id.* at 6-8. For additional background, see WILLIAMS, *supra* note 296 (tracing the Doctrine of Discovery’s roots to medieval legal thought).

318. See, e.g., Cleveland, *supra* note 216, at 28-41; Frickey, *supra* note 13, at 55-60; Newton, *supra* note 28, at 207-11; Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 219, 260-65.

319. See Andrew Fitzmaurice, *Discovery, Conquest, and Occupation of Territory*, in *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* 840, 841 (Bardo Fassbender & Anne Peters eds., 2012) (“The ‘doctrine of discovery’ may be a useful shorthand when applied to the justifications of empire employed by States, but it is misleading if applied to the history of the law of nations which has largely been opposed to the principle of discovery.”); Lindsay G. Robertson, *John Marshall as Colonial Historian: Reconsidering the Origins of the Discovery Doctrine*, 13 J.L. & POL. 759, 766 (1997) (“The historical mandate on the strength of which the Discovery Doctrine elucidated in *Johnson v. M’Intosh* was adopted into American law was not clearly either historical or a mandate.”).

320. This was an important question during pre-revolutionary debates over British authority. See James Muldoon, *Discovery, Grant, Charter, Conquest, or Purchase: John Adams on the Legal Basis for English Possession of North America*, in *THE MANY LEGALITIES OF EARLY AMERICA* 25, 40-41 (Christopher L. Tomlins & Bruce H. Mann eds., 2001); Anthony Pagden, *Law, Coloniza-*

ing authorities on international law and easily mocked.<sup>321</sup> In both international law and American practice respecting Native lands, purchase and possession played a far greater role than discovery and conquest.<sup>322</sup>

The Washington Administration's assertion of a preemptive right in Native lands, then, implied different conclusions, and relied on different sources, from the Supreme Court's later holding in *Johnson v. M'Intosh* that Indians possessed a right of occupancy only.<sup>323</sup> Unlike Chief Justice Marshall, the Administration disclaimed any notion that it possessed fee title to Native lands. Federal officials were also uninterested in the abstract search for origins that preoccupied Marshall.<sup>324</sup> They instead grounded their preemptive right to Native lands as they did their argument restricting Native rights to ally with foreign powers—in treaties and customary international law. Jefferson described “the right of pre-emption” as “a principle of the law of nations, fundamental with respect to America.”<sup>325</sup>

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*tion, Legitimation, and the European Background*, in 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 1, 29-31 (Michael Grossberg & Christopher Tomlins eds., 2008).

321. See Fitzmaurice, *supra* note 319, at 842-44 (noting that Grotius rejected discovery outright, while Vattel only “conceded a minor role for discovery” in establishing title as long as it was followed by actual possession); Pagden, *supra* note 320, at 18 (“If sailing along a coast can give a right to a country, then might the people of *Japan* become, as soon as they please, the proprietors of Britain.”) (quoting RICHARD PRICE, OBSERVATIONS ON THE NATURE OF CIVIL LIBERTY, THE PRINCIPLES OF GOVERNMENT, AND THE JUSTICE AND POLICY OF THE WAR WITH AMERICA 17 (9th ed. 1776), reprinted in POLITICAL WRITINGS 20, 40 (D.O. Thomas ed., 1991)).
322. Pagden, *supra* note 320, at 24-29; see also BANNER, *supra* note 296, at 110-11 (discussing the widespread practice of land purchases in early America); KEN MACMILLAN, SOVEREIGNTY AND POSSESSION IN THE ENGLISH NEW WORLD: THE LEGAL FOUNDATIONS OF EMPIRE, 1576-1640, at 179-207 (2006) (stressing the importance of Roman law concepts of prescription and effective control in English claims to North American territory); CHRISTOPHER L. TOMLINS, FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580-1865, at 133-90 (2010) (emphasizing the role of discourses of use and purchase in claiming Native land); Fitzmaurice, *supra* note 319, at 841, 856 (tracing the “triumph of the idea of occupation over its rivals discovery and conquest” in the history of international law).
323. 21 U.S. (8 Wheat.) 543, 587-88 (1823).
324. Of the members of the Washington Administration, only Jefferson offered, at one point, a justification of preemption that traced to original settlement, sounding in the Doctrine of Discovery. Jefferson, *supra* note 164, at 407. Jefferson's account diverged sharply from Marshall's later version. Jefferson interpreted this history as grant “against all other nations *except* the natives” and emphasized that Native title could be claimed only through war or purchase. *Id.* (emphasis added).
325. *Id.*; see also Letter from Thomas Jefferson to Henry Knox (Aug. 26, 1790), in 17 THE PAPERS OF THOMAS JEFFERSON 430, 430-31 (Julian P. Boyd ed., 1965) (describing preemption as “the *jus gentium* established for America by universal usage”).

Negotiations with the Northwest Indian Confederacy provide the clearest account of the administration's understanding of preemption's origins. Endeavoring to explain preemption to Native envoys, the commissioners began their account with prerevolutionary British practice. The King, they explained, possessed a claim to Native territory, "founded on a right acquired by treaty, with other white nations, to exclude them from purchasing, or settling, in any part of your country."<sup>326</sup> Under this principle, "the King alone had a right to purchase of the Indian nations, any of the lands between the great lakes, the Ohio, and the Mississippi."<sup>327</sup> Having established the basis for the British claim, they continued:

[I]t is this right which the King granted to the United States . . . , by the treaty of peace, . . . they alone have now the right of purchasing; so that, now, neither the King, nor any of his people, have any right to interfere with the United States, in respect to any part of those lands.<sup>328</sup>

Therefore, the commissioners emphasized, the United States disclaimed all ownership of Native lands: "We only claim . . . the general right granted by the King, as above stated, and which is well known to the English and Americans, and called the right of pre-emption, or the right of purchasing of the Indian nations disposed to sell their lands, to the exclusion of all other white people whatever."<sup>329</sup>

In the eyes of federal officials, then, preemption was separate from the question of Native land ownership. It was a problem of sovereignty—as much European as Native—and its status as binding law rested on the positive law of nations, particularly treaty law. Moreover, conceiving of preemption as a restriction on purchasers, not sellers, solved the problem of origins, since the European nations had bargained away their rights to buy Indian lands through formal treaties and enacted laws barring their subjects from purchasing Native territory.<sup>330</sup>

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326. Speech of the Comm'rs of the U.S. to the Deputies of the Confederated Indian Nations, *supra* note 303, at 353.

327. *Id.*

328. *Id.* at 353-54.

329. *Id.* at 354.

330. Secretary of War Timothy Pickering outlined this view thoroughly in a letter to General Anthony Wayne in preparation for the Treaty of Greenville. The Indians, he anticipated, would ask, if the land was acknowledged to be theirs, "Why shall we not sell it to whom we please?" He proposed an answer to Wayne:

The White Nations, in their treaties with one another, agree on certain boundaries beyond which neither is to advance. [In] America where these boundaries agreed on by the White people, pass along the countries of the Indians, the mean-

Natives did not agree with the federal officials' construction. "You have talked . . . a great deal about pre-emption, and your exclusive right to purchase Indian lands, as ceded to you by the King, at the treaty of peace," the Native leaders replied to the federal commissioners' attempt to justify the concept of preemption.<sup>331</sup> The Natives quickly pointed out the flaw in the officials' international law argument: the absence of Native consent. "We never made any agreement with the King, nor with any other nation, that we would give to either the exclusive right of purchasing our lands," they replied.<sup>332</sup>

If the white people, as you say, made a treaty that none of them but the King should purchase of us, and that he has given that right to the United States, it is an affair which concerns you and him, and not us: we have never parted with such a power.<sup>333</sup>

For their part, the Natives declared to the commissioners, "[W]e consider ourselves free to make any bargain or cession of lands, whenever and to whomsoever we please."<sup>334</sup>

Native resistance to preemption puzzled federal officials, who thought they were doing Native peoples a great favor by protecting their land rights. But Natives understood the stakes: as modern scholarship has underscored, preemption was a powerful tool in dispossessing Native peoples, forestalling Native property innovations that preserved their independence.<sup>335</sup> Giving the

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ing of the treaties is this, that one White Nation shall not purchase or [take] possession of any Indians land beyond their boundary so agreed on even altho' the Indians should [agree] to sell or give it to them . . . . For each white [n]ation makes certain rules about Indian Lands which every one of the people is obliged to follow the most important of these rules is that which forbids individuals [taking hold of] Indian lands without the consent of the Nation; when [indi]viduals do such things, it is because they wish [to] cheat not only the Indians but their own nation [w]hich therefore has a right to punish them & take away the lands so unlawfully obtained. The United States have made such a rule the [de]sign of which is to protect the Indian Lands [a]gainst such bad men.

Letter from Timothy Pickering to Anthony Wayne (Apr. 8, 1795), in Northwest Territory Collection, M367, Indiana Historical Society, Indianapolis, Ind., <http://images.indianahistory.org/cdm/compoundobject/collection/ONWT/id/1472/rec/2> [<http://perma.cc/KAB7-ENUC>].

331. Letter from Gen. Council of Indian Nations to the Comm'rs of the United States (Aug. 16, 1793), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 81, at 356.

332. *Id.*

333. *Id.*

334. *Id.*

335. See TAYLOR, *supra* note 102, at 404 (arguing that preemption should not be considered "anything more than a partisan fiction asserted to dispossess native people" and noting that it defeated Native efforts to retain authority by leasing lands "directly to individuals of their

federal government sole power to purchase Indian lands made it increasingly easy to describe Natives as federal “tenant[s],” as Edmund Randolph did, pre-figuring the later concept that Natives only occupied, rather than owned, their lands.<sup>336</sup> The Indians’ self-imagined benefactors again constructed law that would eventually undermine Native independence.

#### 4. *The Doctrinal Origins of Plenary Power*

As previous sections have underscored, federal officials understood the sovereignty they claimed over Native nations as modest. They saw no contradiction in acknowledging Native sovereignty while asserting that ultimate sovereignty lay, for certain purposes, with the United States. Yet these purportedly narrow restrictions sapped Native power and provided the seeds for the doctrine of plenary power. There is a clear intellectual lineage from these early assertions to the Court’s claims of absolute authority over Natives a century later.

The context of sovereignty in the late eighteenth century clarifies how early Americans could regard Natives as simultaneously sovereign and subordinate. The American Revolution began as a constitutional struggle over sovereignty, as many Anglo-Americans rejected the Blackstonian position that the King-in-Parliament possessed supreme authority within the British Empire.<sup>337</sup> American proposals to divide power led the British to accuse colonists of embracing the “solecism” of “*imperium in imperio*”;<sup>338</sup> the British insisted that there could be only one sovereign within a polity.

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own choice”); Eric Kades, *The Dark Side of Efficiency: Johnson v. M’Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065 (2000) (describing how federal preemption rights ensured the efficient expropriation of Native lands); see also WILLIAMS, *supra* note 296, at 280, 287-317 (“Seldom has the dynamic relationship between American racism and the dominant racial caste’s economic interests been so clearly revealed within the normative fineries of American legal discursive practice . . . [as i]n the Revolutionary-era debate on the status and rights of Indians in their lands . . .”).

336. Letter from Edmund Randolph to George Washington, *supra* note 267, at 524-26; see also BANNER, *supra* note 296, at 163 (“When Indian land could be bought and sold with the Indians still on it, the Indians’ right to the land started to feel, to the buyers and sellers, less like fee simple ownership.”). Banner traces the subsequent evolution of doctrine toward Indian occupancy rather than fee simple ownership. *Id.* at 150-90.

337. On the Revolution as constitutional struggle, see generally JACK P. GREENE, *THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION* (2011); LACROIX, *THE IDEOLOGICAL ORIGINS*, *supra* note 23; GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 345-89 (1969); and Barbara A. Black, *The Constitution of Empire: The Case for the Colonists*, 124 U. PA. L. REV. 1157 (1976).

338. The use of “solecism” to dismiss the concept of “*imperium in imperio*” is discussed in LACROIX, *THE IDEOLOGICAL ORIGINS*, *supra* note 23, at 226 n.12. See also Daniel J. Hulsebosch,

The new nation grappled with refuting this fundamental principle of eighteenth-century political thought. One solution was that sovereignty derived from the people at large.<sup>339</sup> More concretely, the valorization of federalism itself provided the solution. The new ideology, derived partly from the law of nations,<sup>340</sup> celebrated multiple and overlapping sources of authority that early Americans described as “divided sovereignty.”<sup>341</sup>

Given this profusion of ideas, the concept that Native nations possessed extensive sovereignty within the sovereignty of the United States was not alien. In fact, Native nations’ position within the United States was conceived similarly to federalism. The restrictions imposed on tribal sovereignty resembled state limitations under the Constitution, which barred states from engaging in diplomacy or splitting their territory without federal consent.<sup>342</sup> A similar presumption concerning enumerated powers also seemed to apply: both states and tribes were free to exercise sovereign powers not granted to the United States.<sup>343</sup>

Constitutionally, of course, states and tribes were not the same. But the key difference was not the text of the Constitution, which addressed both state and tribal sovereignty only obliquely.<sup>344</sup> Rather, the central contrast lay in consent,

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Imperia in Imperio: *The Multiple Constitutions of Empire in New York, 1750-1777*, 16 LAW & HIST. REV. 319 (1998).

339. See WOOD, *supra* note 337, at 374-89.

340. See LACROIX, THE IDEOLOGICAL ORIGINS, *supra* note 23, at 125-28. See generally HENDRICKSON, *supra* note 33 (describing the Constitution’s origins as an experiment in international cooperation).

341. See LACROIX, THE IDEOLOGICAL ORIGINS, *supra* note 23, at 221 (“Between the middle decades of the eighteenth century and the early years of the nineteenth century, federal thought was transformed from a heterodox willingness to tolerate messy, multilayered government into an affirmative belief that such multiplicity—untidy though it might be—could form the basis for a new species of union.”) On divided sovereignty, see POWELL, *supra* note 196, at 23-24. See also Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657 (2013) (arguing for translating concepts of divided sovereignty from the state-federal context to Indian law).

342. U.S. CONST. art. I, § 10, para. 1; art. IV, § 3.

343. Compare Report on Public Lands, Nov. 8, 1791, in 22 THE PAPERS OF THOMAS JEFFERSON, *supra* note 162, at 274, 285 (recording statement by Jefferson that “in respect to the internal regulation of the Indians” the United States exercised only the “jurisdiction over them . . . prohibiting them from allowing any person to inhabit their country” without a U.S. license), with Massachusetts Convention Debates, Jan. 23, 1788, in 6 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1313, 1315 (John P. Kaminski & Gaspare J. Saladino eds., 2000) (recording view of Federalist delegate that “Congress had no right to alter the internal regulations of a state”).

344. See, e.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 454 (1793) (opinion of Wilson, J.) (“To the Constitution of the United States the term SOVEREIGN, is totally unknown.”). States’ primary protection in the text of the 1787 Constitution came through the “political safe-

as the Supreme Court would later recognize.<sup>345</sup> Through ratification, state citizens had, at least formally, ceded portions of state sovereignty to the United States. Native nations never consented to their inclusion within the United States.<sup>346</sup> Nor could their customs evince acquiescence to the law of nations. U.S. claims to sovereignty over tribes—purportedly based on international law—rested ultimately on imposition, not acceptance.

Natives understood this flaw in American logic. As we have seen, Native leaders rejected the limitations thrust upon them; they had not yielded any authority, regardless of what Euro-American empires had agreed. Far from conceding U.S. sovereignty over them or their lands, Native leaders insisted that Native nations were the United States' equals in the community of nations. "We are of the same opinion with the people of the United States," the Mohawk leader Joseph Brandt informed a federal commissioner.<sup>347</sup> "[Y]ou consider yourselves as independent people; we, as the original inhabitants of this country, and sovereigns of the soil, look upon ourselves as equally independent, and free as any other nation or nations."<sup>348</sup>

Native nations' resistance stemmed from more than concern over their dignity as equal sovereigns. Native power in this period stemmed from the ability to engage in diplomacy with Euro-American nations, something the U.S. formulation of sovereignty denied. As they had for over a century, tribes exploited their strategically important location perched between competing empires to protect their autonomy.<sup>349</sup> This so-called playoff system—called the "great ruling principle of modern Indian politics" by contemporaries<sup>350</sup>—thrust Indian

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guards of federalism"—their inclusion within federal governance—as the subsequent adoption of the Tenth and Eleventh Amendments through that process underscored. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546 (1954) (arguing that the U.S. Constitution protects state interests through the states' "crucial role in the selection and the composition of national authority"). Native nations, placed outside the polity, lacked similar protections.

345. See *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (holding that the Constitution did not apply to the Cherokee Nation as "the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution").

346. Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45, 55-57 (2012).

347. Reply of the Six Nations to a Speech from Gen. Knox, U.S. Sec'y of War, Apr. 21, 1794, in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 81, at 481, 481.

348. *Id.* On "free and independent" as a term of art in the eighteenth-century law of nations, see Bellia & Clark, *supra* note 33, at 754.

349. Merrell, *supra* note 236, at 202.

350. Daniel K. Richter & Troy L. Thompson, *Severed Connections: American Indigenous Peoples and the Atlantic World in an Era of Imperial Transformation*, in THE OXFORD HANDBOOK OF THE

affairs into the center of American diplomacy, as Native nations used tacit British and Spanish support to check U.S. expansionism.<sup>351</sup> Native power also came from Indians' acknowledged ownership of most land in the United States.<sup>352</sup> As long as Natives held title, the expectations of land speculators, settlers, and state and federal governments anxious for income could not be realized.<sup>353</sup>

The legal principles espoused by the United States therefore struck at the fundamental sources of Native power. The waning of Native autonomy rested on inequalities—military, demographic, diplomatic—but it was also a “conquest by law,”<sup>354</sup> as Anglo-Americans sought to quash Natives' ability to play empires against each other and to drive down the price of Native lands through monopsony.

The watershed moment for Native peoples in the trans-Appalachian West came when the United States triumphed over a British-supported coalition of Indian nations during the War of 1812. This was a legal as well as a military victory. Rejecting British efforts to write Native independence into the peace treaty,<sup>355</sup> the United States enshrined the principle that American Indian nations were lesser sovereigns solely under U.S. protection.<sup>356</sup> Under the postwar legal framework, “the Indians possessed ‘a qualified sovereignty only’ [while] ‘supreme sovereignty’ belonged to the United States.”<sup>357</sup>

Native nations' position within the United States had shifted significantly, therefore, by 1831, when the Supreme Court sought to clarify Natives' constitutional status in *Cherokee Nation v. Georgia*.<sup>358</sup> The Court splintered over whether the Cherokee Nation was a “foreign nation” for purposes of Article III juris-

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ATLANTIC WORLD: 1450-1850, at 500 (Nicholas Canny & Philip Morgan eds., 2011) (internal quotation marks omitted).

351. *Id.*; see also Jeremy Adelman & Stephen Aron, *From Borderlands to Borders: Empires, Nation-States, and the Peoples in Between in North American History*, 104 AM. HIST. REV. 814, 838 (1999).

352. Cf. TAYLOR, *supra* note 102, at 397-407 (noting Native efforts to preserve autonomy through property innovation and stressing the limits on Native power resulting from restrictions on their land ownership).

353. BANNER, *supra* note 296, at 136-38.

354. This phrase comes from the title of Lindsay Robertson's work. ROBERTSON, *supra* note 296.

355. SADOSKY, *supra* note 33, at 200-05.

356. GOULD, *supra* note 33, at 205-06.

357. *Id.* Leonard Sadosky describes this as the ascendancy of the “Jackson Doctrine,” which sought to deny Natives “independent and unfiltered communications with . . . European powers.” SADOSKY, *supra* note 33, at 200. The end of the War of 1812, he observes, “marked the removal of American Indian nations from contact with the Westphalian system.” *Id.* at 204.

358. 30 U.S. (5 Pet.) 1 (1831).

diction: Justices Baldwin and Johnson argued against Native sovereignty,<sup>359</sup> while Justice Thompson, joined by Justice Story, insisted that Indian tribes were separate, sovereign entities.<sup>360</sup> All argued from historical practice—further demonstrating the tensions within early Indian law.

Chief Justice Marshall split the difference. He conceded that the Cherokee Nation constituted a separate state and had been so regarded by the United States.<sup>361</sup> “[Y]et,” Justice Marshall continued, “it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations.”<sup>362</sup> Their territory, he observed, “is admitted to compose a part of the United States . . . . [T]hey are considered as within the jurisdictional limits of the United States.”<sup>363</sup> Moreover, he explained:

They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.<sup>364</sup>

Chief Justice Marshall’s ensuing declaration that Indian tribes were “domestic dependent nations” therefore owed much to earlier thinking about Native sovereignty.<sup>365</sup> Like earlier federal officials, he interpreted U.S. claims to territorial sovereignty, including the authority to control Native land sales and alliances, to make Native nations less than fully sovereign members of the international community—hence “domestic.” But Justice Marshall put a new valence on this status. Knox, Jefferson, and others had not interpreted the restrictions on Native sovereignty to imply subordination; they had in fact stressed Natives’ continued independence. Justice Marshall emphasized Native *dependence*, casting Indian tribes as wards of their U.S. guardian, reliant on their “great father,” the President, for protection.<sup>366</sup> Justice Marshall’s patron-

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359. *Id.* at 20–31 (Johnson, J., concurring); *id.* at 49–50 (Baldwin, J., concurring).

360. *Id.* at 52–54 (Thompson, J., dissenting).

361. *Id.* at 16 (plurality opinion).

362. *Id.* at 17.

363. *Id.*

364. *Id.* at 17–18.

365. *Id.* at 17; cf. Ian Hunter, *Vattel in Revolutionary America: From the Rules of War to the Rule of Law*, in *BETWEEN INDIGENOUS AND SETTLER GOVERNANCE* 12 (Lisa Ford & Tim Rowse eds., 2013) (linking Marshall’s decisions to the international-legal thought of the 1790s, but unpersuasively arguing that the dispossession of Natives was construed as extralegal).

366. *Cherokee Nation*, 30 U.S. at 17.

izing description, questionable in the 1830s, was even less apt applied to the powerful Native nations of the 1790s. The shifting balance of power gave a new inflection and a broader reach to the “species of sovereignty” the United States claimed over tribes.<sup>367</sup>

*Cherokee Nation* also extended the reach of the Washington Administration’s principles. Jefferson, Justice Marshall, and others constructed Native nations’ constitutional status by expanding international-law principles to North American practices. Their formulation of Native quasi-sovereignty, in turn, became the foundation for a new generation of international-law scholarship seeking to clarify indigenous peoples’ legal status in colonial law.<sup>368</sup> Through Justice Marshall, early American legal thought on Natives transmuted into the nineteenth-century international law of empire.

A half century after *Cherokee Nation*, the Court decided *United States v. Kagama*,<sup>369</sup> where it enunciated congressional plenary power over Indians. Though the tone and content of the two decisions are strikingly different, key core principles persisted. In *Kagama*, the Court considered, and rejected, the Indian Commerce Clause as the source of federal plenary power.<sup>370</sup> That power existed, the Court reasoned, because “these Indians are within the geographical limits of the United States.”<sup>371</sup> “The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union,” the Court expounded.<sup>372</sup> “There exist within the broad domain of sovereignty but these two.”<sup>373</sup> But the Court did not rest congressional authority on territorial sovereignty alone. “These Indian tribes *are* the wards of the nation,” it reasoned, discussing *Cherokee Nation*.<sup>374</sup> “From their

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367. See *supra* text accompanying note 277.

368. See ANAYA, *supra* note 257, at 26 (noting the incorporation of Marshall’s decisions into Henry Wheaton’s treatise *Elements of International Law*); BENTON, *supra* note 269, at 271-72 (noting the application of Marshall’s holdings to British India by Travers Twiss and other nineteenth-century international lawyers); cf. FORD, *supra* note 198, at 24-26, 183-210 (situating *Cherokee Nation* as part of a broader global “transformation of settler sovereignty” encompassing the United States, Canada, and Australia that she suggests began in Georgia); Linda Colley, *Empires of Writing: Britain, America and Constitutions, 1776-1848*, 32 L. & HIST. REV. 237, 256-63 (2014) (arguing for the role of written constitutions in British and American imperial projects to extend authority over Natives and other colonized peoples).

369. 118 U.S. 375 (1886).

370. *Id.* at 378-79.

371. *Id.* at 379.

372. *Id.*

373. *Id.*

374. *Id.* at 383.

very weakness and helplessness . . . there arises the duty of protection, and with it the power.”<sup>375</sup>

*Kagama*’s endorsement of plenary power both fulfilled and repudiated original understandings of Natives’ constitutional status. Continuity rather than innovation characterized the Court’s reasoning, which relied on the same principles—territorial sovereignty and the United States as protector—earlier advanced to justify American claims to authority over Native nations. Yet the Court’s decision employed these tenets to claim a far more sweeping authority than previously asserted. Moving far beyond the earlier era’s limited restrictions on Native sovereignty, the Court’s bolder position claimed that Congress could interfere with internal tribal affairs at will. Moreover, the Court’s reading of protection reversed the concept’s earlier meaning. Crafted to prevent Native alliances and forestall warfare, the principle of sole federal protection of Indians originally stemmed from Native power, not weakness. But the *Kagama* Court transformed this principle to argue that Indian incapacity justified federal power. Finally, *Kagama* radically reworked the sources of federal power over Native nations. In place of the international law principles that undergirded earlier claims, the Court substituted the inherent prerogatives of sovereignty common in late nineteenth-century jurisprudence.<sup>376</sup>

Over the course of a century, then, the sovereignty that the United States claimed over Native nations grew ever greater, culminating in the doctrine of plenary power. This trajectory owed much to the United States’ military and diplomatic conquest of the continent—a conquest that made Native sovereignty seem a legal artifice rather than the palpable fact it had been when the Constitution was drafted.<sup>377</sup> It stemmed, too, from the rise of a racialist paradigm that denigrated Native peoples and their claims to nationhood.<sup>378</sup> Nineteenth-century international law reflected this transformation: shedding its earlier universalism, it became more positivist and more imperialist, crafting hierar-

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375. *Id.* at 384.

376. See Cleveland, *supra* note 216, at 7.

377. Sovereignty obviously remained a reality for the Native nations that continued to exercise it, notwithstanding acknowledgment *vel non* by the United States.

378. For an introduction to the considerable literature on this topic, see REGINALD HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM 189-207 (1981); RICHTER, *supra* note 86, at 189-236; Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 617-28 (2009); and Joshua Piker, *Indians and Race in Early America: A Review Essay*, 3 HIST. COMPASS 1 (2005).

chiefs among nations and requiring “civilization” as a precondition for sovereignty.<sup>379</sup>

But there is an internalist story for the development of plenary power as well—that is, one grounded in the evolution of legal discourse itself. In this account, the first federal leaders’ narrow claims of sovereignty over Native nations became the doctrinal tools for ever more aggressive assertions of federal authority to regulate Indians. This result was not what the doctrines’ creators had intended, but neither was it unforeseeable: as Native resistance underscored, earlier and more limited federal claims of authority over Native nations rested on principles of dominance that could, and did, expand. Through this process, Jefferson’s insistence that the United States did not possess “any dominion, or jurisdiction, or paramountship whatever” over Indians transformed into an assertion of complete and unfettered power.<sup>380</sup>

### C. Implications

Little has changed in plenary power doctrine in the century since *Kagama* was decided, except that as the racialized rhetoric and theories of unenumerated federal powers employed in *Kagama* fell out of favor in the late twentieth century, the Court dragged in the Indian Commerce Clause post hoc to sanitize the doctrine.<sup>381</sup> The history presented here suggests a more accurate account of plenary power’s sources, one less reliant on an implausible reading of the Indian Commerce Clause. This perspective also clarifies how “two largely incompatible and doubtful assumptions,” in Justice Thomas’s words—federal plenary power and inherent tribal sovereignty—came to coexist in federal Indian law.<sup>382</sup> “In my view,” Justice Thomas wrote, “the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both posi-

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379. The relationship between positivism, international law, and imperialism is explored in ANGHIE, *supra* note 257; and Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L.J. 1 (1999).

380. Notes on Cabinet Opinions, *supra* note 250, at 272.

381. This transformation in Supreme Court jurisprudence occurred relatively quickly. Compare *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974) (describing plenary power as “based on . . . the assumption of a ‘guardian-ward’ status” as well as on Indians’ status as “an uneducated, helpless and dependent people” (quoting *Bd. of Cnty. Comm’rs v. Seber*, 318 U.S. 705, 715 (1943), and citing *United States v. Kagama*, 118 U.S. 375, 383–84 (1886))), with *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (citing this same portion of *Morton* for the proposition that “the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs”). For a description of the constitutionalization of plenary power over Indian affairs, see Cleveland, *supra* note 216, at 77–81.

382. *United States v. Lara*, 541 U.S. 193, 214–15 (2004) (Thomas, J., concurring).

tions simultaneously.”<sup>383</sup> But this “untenabl[e]” approach reflects how early federal officials thought about Native sovereignty: from the beginning, American policymakers conceived of Native nations as separate, but lesser, sovereigns. The incompatibility that Justice Thomas identifies stems not from the doctrine itself, but from the attempt to reinterpret this historical legacy into present-day jurisprudential categories. Though the Court has used Indian law’s “confusion” to impose coherence at Natives’ expense,<sup>384</sup> the original understandings of Natives’ status suggest consistency rather than contradiction.

Recovering the early constitutional history of Natives also helps to resolve a central tension in Indian law scholarship as to whether the “Founders” perpetuated domination over Native peoples or enshrined Native nations as independent sovereigns. The answer is both. Though the Constitution’s drafters and early interpreters regarded most tribes as separate sovereigns largely outside U.S. authority, and many used federal power to protect Native rights, in the end the legal order they constructed was imposed on Native nations without their consent—indeed, over their vigorous objection. As Natives pointed out, early Americans’ construction of the community of nations did not acknowledge Native nations as the United States’ equals. The “Founders” thereby placed the United States on the ideological road to the doctrine of plenary power and the denial of Native sovereignty.

The history presented in this Article thus questions a now commonplace scholarly assertion—that powers derived from sovereignty are a late nineteenth-century gloss inconsistent with the Constitution’s original understanding.<sup>385</sup> This declension model is, in part, an effort to maintain a “pure” Constitution, untainted by later unpalatable applications.<sup>386</sup> This Article suggests that constitutional law’s subsequent nationalism, racism, and imperialism were all present at the creation.

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383. *Id.* at 215.

384. *Id.* at 223. For works criticizing the Court’s efforts to craft coherence, see Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431 (2005); and David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996).

385. This is the central argument in Cleveland, *supra* note 216. See also William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1800-05 (2013) (suggesting that powers inherent in sovereignty “ha[ve] very little support in the text, structure, or early history of the Constitution” and are “a creature of a late-nineteenth- and early-twentieth-century jurisprudential trend”).

386. Mark Graber has made a similar argument concerning interpretations of *Dred Scott*. Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271 (1997).

Nonetheless, the authority that the United States originally claimed over Indian tribes was importantly different from later, more aggressive invocations of federal power. It was *not* plenary; it acknowledged tribal sovereignty and restricted the authority of the United States to the regulation of Natives' international alliances and land sales. Furthermore, this authority's origins in the law of nations suggested substantial checks based on treaty and customary law. These aspects of original understandings bolster present-day calls for limits on federal power over Natives as well as arguments that evolving international-law norms should govern federal Indian law.<sup>387</sup> Unbridled, unchecked federal power over Indians has not always been with us.

More broadly, the history presented here suggests a different approach to the question of Native sovereignty in Supreme Court jurisprudence. The privileged position of Chief Justice Marshall's decisions in Indian law's constitutional history has led some Justices to conclude that tribal sovereignty is the Court's creation, thereby justifying the Court's aggressive crafting of doctrine construing the scope of tribal sovereignty.<sup>388</sup> Recognizing the centrality of the executive in the historical decision to acknowledge and protect tribal sovereignty, however, points toward a more modest judicial role in the present, with greater deference to the political branches.<sup>389</sup>

History also suggests a constructive comparison between tribal and state sovereignty. The Constitution does not enshrine Native sovereignty, but unlike the Articles of Confederation,<sup>390</sup> it contains no textual provision explicitly codifying state sovereignty either.<sup>391</sup> Instead, the constellation of legal thought labeled "Our Federalism" rests largely on a structural reading of the Constitution and its values, even as support for state sovereignty—like protection for tribal

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387. See, e.g., Frickey, *supra* note 13, at 74-94 (arguing for applying international law limitations to federal power over Indians); Newton, *supra* note 28, at 237-47 (arguing for heightened scrutiny for congressional restrictions on tribal sovereignty); Williams, *supra* note 318, at 293-99 (urging the abandonment of the "guardianship responsibility by which individual European colonizers arrogated to themselves an unquestioned authority over Indian Nations").

388. See, e.g., Transcript of Oral Argument at 55-56, *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (No. 12-515) (2014).

389. Cf. Michalyn Steele, *Comparative Institutional Competency and Sovereignty in Indian Affairs*, 85 U. COLO. L. REV. 759, 780-815 (2014) (arguing that the Court should defer to Congress on questions of tribal sovereignty based on an analogy from the Court's treatment of state sovereignty).

390. ARTICLES OF CONFEDERATION of 1781, art. I.

391. Though I refer here primarily to the 1787 Constitution, the Tenth Amendment does not alter this conclusion: to the extent the Amendment codifies a concept of state sovereignty, it does so obliquely, especially compared to the explicit protection written into the Articles of Confederation.

sovereignty—has waxed and waned.<sup>392</sup> As this Article has shown, the Constitution’s drafters and early interpreters thought about Natives’ status in a similar way—as the product of deep questions of constitutional order such as territorial jurisdiction and international law.

The point is not that tribes and states are constitutionally equivalent, though the analogy has yielded important insights.<sup>393</sup> Rather, I make the more modest claim that the Court should be more attentive to the parallels in history and values than it has been. As sovereigns, states possess what the Court has termed “dignity”;<sup>394</sup> they also enjoy the Court’s embrace of jurisdictional pluralism recognizing the benefits of state divergence from national norms. But the Supreme Court has never referred to the dignity of a tribal sovereign in a majority opinion,<sup>395</sup> and it views Native nations’ nonconformity with skepticism.<sup>396</sup>

The doctrinal consequences of these contrasting narratives are apparent. The Court has recently and repeatedly defended state sovereignty based not on

392. *Younger v. Harris*, 401 U.S. 37, 44-45 (1971). This initial articulation of the principle invoked no specific text but instead “the profound debates that ushered our Federal Constitution into existence,” arguing that “this slogan, ‘Our Federalism,’ born in the early struggling days of our Union of States, occupies a highly important place in our Nation’s history and its future.” *Id.*

393. See, e.g., Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617 (1994) (“[T]he forces behind Union/state federalism, which invoke republican democracy and ensure a role for states, have to a certain extent guided and should continue to guide the Union/tribe relationship.”); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 701 (1989) (noting that “there is much to learn from thinking about both the differences and the similarities” between tribes and states).

394. See, e.g., *Alden v. Maine*, 527 U.S. 706, 714 (1999).

395. Justice Ginsburg has twice referred to tribal dignity in her dissents, see *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 347 (2008) (Ginsburg, J., concurring in part and dissenting in part); *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 121 (2005) (Ginsburg, J., dissenting), while Justice Sotomayor suggested the parallels between the dignity of tribal and state sovereigns in a recent concurrence, *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2042 (2014) (Sotomayor, J., concurring). Cf. Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003) (exploring the rise of concepts of dignity in the Supreme Court’s jurisprudence, and arguing it has relevance with respect to tribes).

396. See David H. Getches, *Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 345-48 (2001); cf. Wenona T. Singel, *The First Federalists*, 62 DRAKE L. REV. 775, 837-42 (2013) (recounting the benefits of innovations in tribal governance). See generally Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799 (2007) (describing judicial and scholarly hostility to exercises of tribal sovereignty that diverge from liberal norms).

constitutional text but “in light of [the Constitution’s] history and structure.”<sup>397</sup> For Indian tribes, this argument is reversed: any “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes and cannot survive without express congressional delegation.”<sup>398</sup> Under this implicit divestiture doctrine, the Court has concocted all manner of restrictions on Native sovereignty,<sup>399</sup> grounded not in text but in problematic readings of history.<sup>400</sup>

397. *Alden*, 527 U.S. at 724; see also, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2689-92 (2013) (questioning the Defense of Marriage Act for departing from the constitutional “history and tradition of reliance on state law to define marriage”); *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623-24 (2013) (invalidating a portion of the Voting Rights Act for violating the “fundamental principle of equal sovereignty among the States” (internal quotations and citations omitted)); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602-03 (2012) (limiting congressional power to condition grants to states under the Spending Clause because “[o]therwise the two-government system established by the Framers would give way to a system that vests power in one central government”); *Printz v. United States*, 521 U.S. 898, 906-12 (1997) (holding that, although “there is no constitutional text speaking to this precise question,” the federal government may not “commandeer” state officials based on “historical understanding and practice, . . . the structure of the Constitution, and . . . the jurisprudence of this Court”).

398. *Montana v. United States*, 450 U.S. 544, 564 (1981).

399. These have included restrictions on criminal jurisdiction over non-Indians and nonmember Indians, *Duro v. Reina*, 495 U.S. 676, 685-86 (1990); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209-10 (1978); on civil adjudicative jurisdiction over nonmembers within the reservation, both on and off tribal land, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008); *Nevada v. Hicks*, 533 U.S. 353 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Montana*, 450 U.S. at 563-66; and on legislative jurisdiction, including taxation, over nonmembers within the reservation, *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001).

400. The Court’s only serious consideration of the history of Native jurisdiction came in *Oliphant*, where it outlined nineteenth-century restrictions on tribal criminal jurisdiction. But the only provision the Court cited predating the era of Indian removal was Justice Johnson’s opinion in *Fletcher v. Peck*, prefiguring his later concurrence in *Cherokee Nation* denying Native sovereignty altogether. *Oliphant*, 435 U.S. at 209 (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810) (Johnson, J., concurring)). Justice Johnson’s idiosyncratic opinion from two decades earlier is a poor interpretive guide for Chief Justice Marshall’s holding. It also ignores historical evidence suggesting that the federal government not only permitted, but oversaw, tribal court jurisdiction exercising tribal sovereignty over non-Natives. See FORD, *supra* note 198, at 60-63.

In *Lara*, both the majority and Justice Thomas emphasized the 1871 congressional act that terminated treaty making with tribes. See *United States v. Lara*, 541 U.S. 193, 201 (2004) (“We recognize that in 1871 Congress ended the practice of entering into treaties with the Indian tribes.”); *id.* at 215 (Thomas, J., concurring) (“I would ascribe much more significance to legislation such as the Act . . . that purports to terminate the practice of dealing with Indian tribes by treaty”). Though the Act’s historical significance is considerable—

The basis for this divergent treatment of state and tribal sovereignty seems to be tribes' status as "dependent" sovereigns.<sup>401</sup> Setting aside the question of why states' explicit surrender of some sovereignty does not make them similarly "dependent,"<sup>402</sup> the Court's interpretation of Native nations' dependency is historically unsound. Chief Justice Marshall's classification of Indian tribes was not an open-ended invitation to craft restrictions on Native authority but a judicial endorsement of the Washington Administration's interpretation of Natives as unequal but sovereign nations. In light of that history, a better reading of Marshall's holding would be that like states, Native nations possess "residual and inviolable sovereignty" outside the restrictions claimed by the United States.<sup>403</sup>

Delineating the precise bounds of that sovereignty has proven, and will likely prove, as elusive as it has in the federalism context. But a helpful starting point would be to move away from claims that tribes are sovereigns by historical accident, existing only at the caprice of the national government.<sup>404</sup> The recognition of Native sovereignty in early American law reflected the reality of Native nations' independence and power, but it was also the product of considered deliberation and experimentation that mirrored the era's intellectual ferment around federalism. The Washington Administration determined that acknowledging Native sovereignty was not merely more expedient; it was also, as the Administration repeatedly pointed out, more just.<sup>405</sup>

"Constitutional" is a word with many meanings in American law. Its most familiar doctrinal use is to describe limits on the federal government that may

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symbolizing the shift to governing Indian affairs through legislation rather than diplomacy and, relatedly, through the executive rather than Congress—doctrinally such an ordinary statute, let alone one that is "constitutionally suspect," *Lara*, 541 U.S. at 218 (Thomas, J., concurring), does not deserve such weight. Even if it reflects a late nineteenth-century judgment "that the tribes had become a purely domestic matter," *id.*, that policy assessment is not constitutional law, and the political branches' more recent determination that the tribes possess inherent sovereignty—including in the statute at issue in *Lara*—seems more relevant.

401. See Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within Our Federalism: Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667, 667-68 (2006) (arguing that the implicit divestiture doctrine is based on the presumption of tribal dependency).

402. Judith Resnik convincingly suggests that tribes, states, and the federal government are "inter-dependent sovereigns." Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and the Methods of Marbury v. Madison to Tribal Courts' Criminal Jurisdiction*, 36 ARIZ. ST. L.J. 77, 134 (2004).

403. THE FEDERALIST NO. 39, at 242 (James Madison) (Clinton Rossiter ed., 1961).

404. See, e.g., *United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance.").

405. See, e.g., *supra* text accompanying notes 241, 259, 301-302.

not be altered absent amendment. Despite the Court's efforts, sovereignty—both state and tribal—has fit poorly, and unpredictably, into this frame.<sup>406</sup> Though the history presented here supports expanded Native autonomy, arguably too much has changed for the Court to enshrine as doctrine the Washington Administration's understanding of Native status, any more than the Court can now reconstruct the federalism of the 1790s. But the term "constitutional" plays another role for the Court: it determines which claims about the past will receive acknowledgment and legal recognition in the present.<sup>407</sup> This Article suggests that, like the Court's endorsement of the diminished yet enduring sovereignty of the states, tribal sovereignty warrants respect on the basis of the Constitution's original "history and structure."<sup>408</sup> In this sense, Native sovereignty is, and should remain, constitutional.

### CONCLUSION

When we look beyond the Indian Commerce Clause—a minor and open-ended part of constitutional thinking about Indian affairs—the Constitution's "original understanding" becomes clearer. Under the Washington Administration, exclusive federal power was understood to derive from the entire Constitution, while the limited sovereignty that the United States claimed over Native nations stemmed from the law of nations. Yet subsequently, even as the federal government asserted more power over Natives, the basis for federal authority narrowed to the single constitutional provision that explicitly mentioned Indians. The mismatch between the Clause's text and the federal government's sweeping power has led to calls to revisit federal Indian law, often at tribes' expense. These claims rest on inaccurate history. Indian law is not incoherent; it is the product of constitutional thought that has been forgotten.

Consistent is not the same as correct. From the perspective of Native peoples, federal Indian law remains doctrine imposed by a non-Native legal sys-

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406. On state sovereignty, see Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 346, which states that "[t]he rhetoric of state sovereignty is responsible for much of the intellectual poverty of our federalism-related jurisprudence." On tribal sovereignty, compare *United States v. Lara*, 541 U.S. 193, 205 (2004), which argues that earlier cases "make clear that the Constitution does not dictate the metes and bounds of tribal autonomy," with *id.* at 228 (Souter, J., dissenting), which argues that "our previous understanding of the jurisdictional implications of dependent sovereignty was constitutional in nature."

407. This is clearest in the Court's jurisprudence on determining which rights are "deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); see also *Michael H. v. Gerald D.*, 491 U.S. 110, 127-28 n.6 (1989) (parsing how to identify such "deeply rooted" rights).

408. See *supra* text accompanying note 397.

tem—the self-proclaimed “Courts of the conqueror”<sup>409</sup>—on Native nations unwillingly and forcefully incorporated into the United States. A better grasp of the Constitution’s “original understanding” cannot solve this ongoing challenge of Indian law’s imperial origins.<sup>410</sup> The late eighteenth century was an important watershed in the waning of Native autonomy, and early federal officials laid the groundwork for later claims of unbridled power over Native nations. For this reason, some have argued for abandoning Anglo-American law altogether and turning to indigenous legal concepts to redeem Indian law.<sup>411</sup>

But these deep questions about federal Indian law do not preclude also improving current doctrine by revisiting first principles.<sup>412</sup> History can help here. The 1780s and ‘90s are central to understanding Indian law not because constitutional meaning was fixed at that moment, but because the process of creating the “United States” occurred in dialogue with other nations, including Native nations. In short, wrestling with the sovereignty and nationhood of the United States also required grappling with that of Native nations; the answers proposed for *both* sets of questions proved long-standing and influential.

Late eighteenth-century views warrant continued attention on another basis, as well. Current law lacks the acute consciousness, widespread among the era’s legal elite, that the treatment of Native peoples was an essential component of the national character. The “Founders” felt this way not because they were moral exemplars, but because they lived in a world where relations with Native peoples could not be shunted aside as a minor administrative matter, and because their near-millenarian understanding of the United States’ role blended with a sharp sense of international scrutiny and judgment. They thus

409. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 588 (1823). See generally WALTER R. ECHO-HAWK, *IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED* (2010).

410. See Frickey, *supra* note 384, at 487 (arguing that the core tension in federal Indian law is the “fundamental normative confusion” about “our creation of a constitutional democracy through colonialism.”); Resnik, *supra* note 393, at 697 (“No act of interpretation and no elaboration of consent theory can explain federal exercise of power and dominion over Indian tribes.”).

411. For an argument for alternative legal visions rooted in indigenous norms, see ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800*, at 3-12 (1997); and Williams, *supra* note 318, at 289-99. Notably, Williams bases his account in history.

412. The possibility of redemption within current law was the subject of a prominent debate in federal Indian law scholarship. See Robert Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations: An Essay in Reaction to Professor Williams’ Algebra*, 30 ARIZ. L. REV. 413 (1988); Robert A. Williams, *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence’s Learning to Live with the Plenary Power of Congress over the Indian Nations*, 30 ARIZ. L. REV. 439 (1988). On constitutional redemption more broadly, see J. M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011).

resolved to treat Natives based on “laws founded in justice and humanity.”<sup>413</sup> From the perspective of Native peoples, and in the judgment of history, these efforts failed. Yet in the process, notwithstanding their commitment to American empire and racist disdain for Indians, early American leaders defied popular prejudice and crafted doctrine that granted considerable space for Native autonomy, a tradition that federal Indian law in its finer moments continues to uphold.

Yet it was not early American officials alone who shaped the constitutional law of Indian affairs. Native voices rarely appear in Indian law, based on the presumption that they did not craft the law that applied to them. But as this Article has suggested,<sup>414</sup> the grudging acknowledgment of Native autonomy in early American law stemmed from tribes’ refusal to concede the subordinate status that Anglo-Americans assigned to them. Though Chief Justice Marshall later cast Natives as legal naïfs,<sup>415</sup> Native leaders proved as adept as Anglo-Americans at using the resources of international law to assert themselves as “free and independent” nations.<sup>416</sup> These arguments often failed in the face of unequal power, but they forced the United States to grapple with deep questions of justice in Indian policy. Ultimately, Natives were subject to a history and a doctrine not of their choosing, yet they were, and remain, constitutional actors in their own right.

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413. The quotation is from the Northwest Ordinance, ch. 8, 1 Stat. 50, 52 (1789).

414. This Article has only briefly introduced the depth of Native engagement with international law created in an Anglo-American and European context, a topic I explore more fully elsewhere. See Gregory Ablavsky, *Species of Sovereignty: Native-Claims Making and the Early American State* (Oct. 10, 2014) (unpublished conference paper) (on file with author).

415. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831).

416. Scholarship has stressed the importance of Native legal activism in shaping Indian policy, but has focused on the twentieth century. See, e.g., CHRISTIAN W. McMILLEN, *MAKING INDIAN LAW: THE HUALAPAI LAND CASE AND THE BIRTH OF ETHNOHISTORY* (2007); DAVID E. WILKINS, *HOLLOW JUSTICE: A HISTORY OF INDIGENOUS CLAIMS IN THE UNITED STATES* (2013); CHARLES F. WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* (2005). For consideration of Natives as legal actors in the early modern period, see NATIVE CLAIMS: INDIGENOUS LAW AGAINST EMPIRE, 1500-1920 (Saliha Belmessous ed., 2012); and WILLIAMS, *supra* note 411.