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## In Defense of the Indian Commerce Clause

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# IN DEFENSE OF THE INDIAN COMMERCE CLAUSE

*By Stephen Andrews*

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A quick glance through the Supreme Court’s Indian law jurisprudence reveals that the Court’s doctrine is all but disconnected from the Constitution’s text. The Supreme Court routinely upholds federal plenary power over Indian affairs,<sup>1</sup> and the Court has said that this power originates from the Indian Commerce Clause.<sup>2</sup> But that rationale is inconsistent with the Court’s Commerce Clause jurisprudence—the Court has said that “commerce” means trade, or, more broadly, economic activity,<sup>3</sup> and economic activity is far narrower than plenary power.

Recently, Justice Thomas observed this disconnect and argued that the Court should scale back its Indian law jurisprudence. Although the Articles of Confederation expressly granted Congress the power to regulate “Indian affairs,” he argues, the Constitution only expressly grants Congress the power to regulate “Commerce . . . with the Indian tribes.”<sup>4</sup> The power to regulate “affairs” is broader than the power to regulate “Commerce”—that is, trade or economic activity—so Justice Thomas concludes that “[b]y limiting Congress’ power to [Commerce], the Framers declined to grant Congress the same broad powers over Indian affairs conferred by the Articles of Confederation.”<sup>5</sup> Justice Thomas is not alone in this opinion. Other originalists, such as Professor Saikrishna Prakash<sup>6</sup> and Robert Natelson<sup>7</sup>, reach the same conclusion.

While Justice Thomas would bring Indian law into accord with modern Commerce Clause doctrine, his view is only the first of three general ideological camps. The second camp is the liberal originalists consisting of Professors Akhil Amar and Jack Balkin.<sup>8</sup> Although primarily writing in the Interstate Commerce Clause arena, Amar and Balkin, have argued that, at the founding, the word “commerce,” had two definitions.<sup>9</sup> The first meant “trade.” The second definition was broader, meaning “intercourse,” whether or not strictly economic. Since “intercourse” is roughly equivalent to “affairs,” the text of the Commerce Clause confers on Congress roughly the same power over Indians that Congress possessed in the Articles of Confederation.

The final group consists of Professor Gregory Ablavsky and Lorraine Toler, who argue that the combination of the War, Treaty, Commerce, and Supremacy Clauses act as a sort of constitutional field-preemption, reserving the realm of Indian affairs solely to the federal government.<sup>10</sup>

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<sup>1</sup> See, e.g., *U.S. v. Lara*, 541 U.S. 193, 200 (2004).

<sup>2</sup> *Id.*

<sup>3</sup> See, e.g., *U.S. v. Lopez*, 514 U.S. 549 (1995).

<sup>4</sup> U.S. CONST. art. I, § 8, para. 3.

<sup>5</sup> *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 664 (2013) (Thomas, J., concurring).

<sup>6</sup> Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1089-90 (2004) (“Therefore, the fact that the Constitution never grants Congress the power to manage Indian affairs indicates that the Constitution does not mean for Congress to have such a power.”).

<sup>7</sup> Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 229 (2007).

<sup>8</sup> Akhil Reed Amar, AMERICA’S CONSTITUTION: A BIOGRAPHY 107-108 n. (2005); Jack Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010).

<sup>9</sup> See Amar, *supra* note 8; Balkin, *supra* note 8.

<sup>10</sup> Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L. J. 1012 (2015); Lorraine Toler, *The Missing Indian Affairs Clause*, 88 UNIV. OF CHI. L. R. 413 (March 2021).

The outcome of this debate has broad implications in both Indian law and Commerce Clause jurisprudence. If adopted, Justice Thomas's view would overturn over a century of Indian law precedent and an entire Title of the United States Code related to Indian law (25 U.S.C.) would be rendered unconstitutional. Given that the Court's current Interstate Commerce Clause doctrine holds that "Commerce" refers to economic activity,<sup>11</sup> Justice Thomas's critique carries force, and, as other scholars have noted, Justice Thomas's willingness to question precedent may pressure the Court to change its doctrine.<sup>12</sup>

And the Amar/Balkin approach has profound implications for Commerce Clause jurisprudence. To see why, consider what Professor Prakash has called the "presumption of intrasentence uniformity."<sup>13</sup> This presumption holds that one word means the same thing throughout an entire sentence. So, if "commerce" means "intercourse," in the Indian Commerce Clause context, then "commerce" arguably means "intercourse" in the Interstate and Foreign Commerce Clauses too. If so, current immigration and foreign affairs doctrine would rest on firmer textual ground,<sup>14</sup> and Congress would have the power to regulate in the case of a global pandemic, such as the Coronavirus.<sup>15</sup>

This article is the final word in this debate. This article establishes that the founding generation understood the word "commerce" in the Indian Commerce Clause to mean "intercourse," rather than strictly trade or economic activity. This interpretation accords with the early history of the republic, and it was explicitly adopted in America's earliest statutes, congressional traditions, and in two of Justice John Marshall's foundational Indian law cases.

This Article proceeds in four parts. Part I explores how structural deficiencies in the Articles of Confederation nearly led to an unwinnable war against the Indians. Under the Articles of Confederation, the national government and certain state governments clashed over the jurisdiction of Indian affairs. While the Articles gave Congress "sole and exclusive" power to "regulate . . . Indian affairs," that power was subject to two exceptions, which allowed the states to retain a degree of power.<sup>16</sup> Some states interpreted the Indian Affairs Clause's two exceptions to mean both that states could independently treat and war with Indian tribes and that Congress could not agree to any treaty which affected state sovereignty. By the time of the Constitutional Convention, these states' actions had led the Secretary of War, Henry Knox, to warn Congress of the impending likelihood of an unwinnable war against a general Indian confederacy.<sup>17</sup>

The specter of this war loomed as the convention delegates met to draft the Constitution. Part II examines the Constitution's drafting and ratification history. In the days leading up to the

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<sup>11</sup> See, e.g., *U.S. v. Lopez*, 514 U.S. 549 (1995).

<sup>12</sup> Ralph A. Rossum, UNDERSTANDING CLARENCE THOMAS: THE JURISPRUDENCE OF CONSTITUTIONAL RESTORATION 214-21 (2014); Jeffrey Toobin, *Partners*, 87 NEW YORKER 40-51 (2011). See also, Ablavsky, *supra* note 10 at 1016.

<sup>13</sup> Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149 (2003) [hereinafter "Our Three Commerce Clauses"].

<sup>14</sup> Jack Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010).

<sup>15</sup> Akhil Amar, THE CONSTITUTION TODAY: TIMELESS LESSONS FOR THE ISSUES OF OUR ERA 1, 395 (2016) [hereinafter "The Constitution Today"].

<sup>16</sup> ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4.

<sup>17</sup> See *infra* Part I.

Constitutional Convention, Madison lamented that the weak Articles had proved unable to halt “[e]ncroachments by the States on the federal authority,” such as “the Wars and Treaties of Georgia with the Indians.”<sup>18</sup> Both Madison’s Virginia Plan and the Committee of Detail’s first draft of the Constitution shored up the federal government’s War and Treaty powers and thus remedied those pieces of the Articles that had nearly led the nation to war.<sup>19</sup> Significantly, these pieces of the Committee’s draft remained virtually unchanged in the final Constitution.<sup>20</sup>

The final draft of the Constitution, however, never explicitly conferred on Congress an Indian affairs power, instead only conferring the power to regulate Commerce with the Indian tribes. Recent scholarship by Lorraine Toler has established that the drafters of the Constitution actually intended to include an Indian affairs power in the Constitution.<sup>21</sup> But, due to a simple mistake, they instead merely added Indians to the pre-existing Interstate Commerce Clause.<sup>22</sup>

Whatever the Founder’s intentions, as Steven Calabresi has argued in the Fourteenth Amendment context, the final text of the Constitution trumps any intended application.<sup>23</sup> Thus, even as the Constitution shored up the structural inadequacies of the Articles, it created a potential gap in federal power over Indian affairs.

Despite this potential gap, in the ratification debates, both federalist and anti-federalist understood that the Constitution conferred a general Indian affairs power on the federal government.

Part III examines the post-ratification history of the Constitution. Even before the Constitution was adopted by all thirteen States, Washington and the First Congress moved to assuage Indian hostilities in the South. The Washington Administration explicitly claimed that the Constitution’s War, Treaty, Commerce, and Supremacy Clauses gave the federal government absolute national power over treaty negotiations with the Indians.<sup>24</sup> In light of this post-ratification history, it is clear that the Constitution was intended to—and in fact did—increase the federal government’s power over the Indians.

However, it was not until a few years after ratification that the United States had to grapple with the apparent gap between “affairs” and “commerce” in the Constitution. Part IV examines how the founding generation handled this gap. The issue crystalized in front of the First Congress, who passed a statute—the Trade and Intercourse Act—establishing trade regulations with Indians, and, importantly, prohibiting Americans from committing non-economic crimes against Indians on Indian territory—even when no treaty existed between the United States and the tribe at issue. And George Washington—who had previously spoken of America’s power “to regulate

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<sup>18</sup> THE PAPERS OF JAMES MADISON, VOL. 9, 9 APRIL 1786–24 MAY 1787 AND SUPPLEMENT 1781–1784, 345-358 (Robert A. Rutland & William M. E. Rachal eds., 1975).

<sup>19</sup> See *infra* Part II.

<sup>20</sup> *Id.*

<sup>21</sup> Toler, *supra* note 10.

<sup>22</sup> *Id.*

<sup>23</sup> Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEXAS L. REV. 3 (2011).

<sup>24</sup> See *infra* Part III.

intercourse with the Indians”<sup>25</sup>—signed this Act into law. Under the Originalists’ economic definition of “commerce,” no constitutional clause obviously justifies the Trade and Intercourse Act, and efforts to justify these statutes by Originalist scholars such as Natelson are unpersuasive.

The Trade and Intercourse Act became one of the bedrocks of American Indian policy. Subsequent Congresses passed new Trade and Intercourse Acts, forming a tradition that eventually led Justice John Marshall to contend in two of the three foundational Indian law cases—*Cherokee Nation v. Georgia*<sup>26</sup> and *Worcester v. Georgia*<sup>27</sup>—that the Commerce Clause conferred on Congress the power “to regulate intercourse.”<sup>28</sup>

This Article concludes by describing implications of this broad definition of Commerce and areas of future research. Current doctrine holds that the federal government possesses plenary power over the Indian tribes, including their internal affairs. Even if the Commerce Clause confers an Indian affairs power on Congress, at first glance, it is not clear that this power can justify the regulation of the purely internal affairs of the Indians. Future research should seek to map this broad definition of Commerce onto Indian doctrine. More importantly, given what Prakash has called the “presumption of intrasentence uniformity,”<sup>29</sup> “commerce” should have the same meaning in all three of the Commerce Clauses. Besides providing a firmer textual basis for the Court’s Foreign Affairs and Immigration doctrines,<sup>30</sup> a broad definition of Commerce in the Interstate Commerce Clause provides an analytically satisfying explanation of modern Commerce Clause doctrine and provides Congress with the power to regulate in the case of a global pandemic, such as the Coronavirus.<sup>31</sup> Nevertheless, the historical and structural elements that argue in favor of a broad definition of the Indian Commerce Clause appear absent in the Interstate context, and future research is needed to explore the appropriateness of a broad definition of the Interstate Commerce Clause.

## I. CONFEDERATION AMERICA

To understand life under the Articles of Confederation, it is first necessary to understand how the Articles’ provisions divided—or failed to divide—authority between the state and national governments. In combination, the Articles of Confederation’s Indian Affairs Clause and two Treaty Clauses failed to clearly delineate the line between State and National authority in the realm of Indian Affairs. Because the Articles of Confederation provided for neither judicial resolution nor congressional enforcement, these structural flaws caused conflict that could not be resolved. Left to fester, this conflict nearly led confederate-era America to the brink of a catastrophic Indian war.

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<sup>25</sup> Letter from George Washington to Thomas Mifflin (Sept. 4, 1790), in 6 THE PAPERS OF GEORGE WASHINGTON 396.

<sup>26</sup> 30 U.S. 1 (1831).

<sup>27</sup> 31 U.S. 515 (1832) (Marshall, J.).

<sup>28</sup> *Cherokee Nation*, 30 U.S. at 14.

<sup>29</sup> Prakash, *Our Three Commerce Clauses*, *supra* note 13.

<sup>30</sup> Balkin, *supra* note 8.

<sup>31</sup> Amar, *The Constitution Today*, *supra* note 15.

### *A. The Articles of Confederation's Application to Indian Affairs*

The Articles of Confederation contained several provisions relevant to Indian affairs: The Indian Affairs Clause, the Treaty Clauses, the War Clause, and the Nine-State Clause. Equally important, however, were the provisions which the Articles lacked. The Articles did not allow Congress to impose duties and taxes. Nor did they provide that Congress' laws and treaties would be supreme over State law. Finally, the Articles did not provide for a judiciary to resolve disputes.

#### 1. Indian Affairs Clause

First, the Articles gave Congress "the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the states; provided that the legislative right of any state, within its own limits, be not infringed or violated."<sup>32</sup> Although the power to regulate "affairs" was theoretically quite broad, practically, it included the power to conduct diplomacy, negotiate treaties, regulate commerce, and manage war and peace.

The power's theoretic breadth flows from the wide definition of the word "affair." Samuel Johnson's dictionary defined "affair" as "Business; something to be managed or transacted."<sup>33</sup> Similarly, Francis Allen's defined it as "[s]omething done or to be done."<sup>34</sup> And Nathan Bailey's defined it as "business, concern, matter, or thing."<sup>35</sup> Several scholars have thus noted that Congress' power to regulate Indian affairs seems quite broad.<sup>36</sup> By the plain text of the word "affairs", if something concerned the Indians, then Congress had the power to regulate.

As a matter of practice, however, this power was used to achieve specific ends: conducting diplomacy, negotiating treaties, regulating commerce, and making war and peace. This practice extended back to the earliest days of this country. Less than three months after Lexington and Concord, the Continental Congress' Committee of Indian Affairs created three Departments of Indian Affairs, which were to "treat" and establish commercial relations with the Indians "in order to preserve peace,"<sup>37</sup> and this practice continued during the Confederation. For example, a congressional committee composed of Charles Pinckney, James Monroe, and Rufus King reported that each Department's superintendent's responsibilities included diplomacy,<sup>38</sup> war,<sup>39</sup> and the

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<sup>32</sup> ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4.

<sup>33</sup> SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London 1755).

<sup>34</sup> FRANCIS ALLEN, A COMPLETE ENGLISH DICTIONARY (London 1765).

<sup>35</sup> NATHAN BAILEY, A UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (Edinburgh 25th ed. 1783).

<sup>36</sup> See Natelson, *supra* note 7 at 284; Prakash, *supra* note 6 at 1084.

<sup>37</sup> 2 J. CONT'L CONG. 175-76 (July 12, 1775).

<sup>38</sup> See, e.g., 30 J. CONT'L CONG. 367, 369 (Jun. 28, 1786) ("[I]t be the [Superintendent's] duty . . . to discourage all combinations of Indians, and persuade the several tribes to keep and act as much independent of each other as possible.").

<sup>39</sup> See, e.g., *id.* ("[I]t be the [Superintendent's] duty . . . [that] if war should be Necessary at any time or unavoidable to give it such direction as to keep it at a distance from the Citizens of the United States.").

regulation of commerce.<sup>40</sup> Along with the power to wage war, according to this congressional committee, the Department of Indian Affairs possessed the power to negotiate treaties.<sup>41</sup> These duties and powers were reaffirmed in a late-Confederation report from the Southern District of Indian Affairs, which declared, “in managing affairs with [the Indians], the principal objects have been those of making war and peace, purchasing certain tracts of their land, fixing the boundaries between them and our people, and preventing the latter settling on lands left in possession [by treaty] of the former.”<sup>42</sup> These records show that, whatever the theoretic limits of Congress’ Indian affairs power, that power was practically used to engage in precisely the type of affairs one would expect: diplomacy, treaty-making, commerce, and war.

The Indian Affairs Clause also had two exceptions. The first was the “Not-Members” exception, which excluded Indians who were “members of any of the states.”<sup>43</sup> And the second was the “Legislative-Rights” exception, which prohibited Congress from “infring[ing] or violat[ing]” “the legislative right of any state, within its own limits.”<sup>44</sup>

To understand these exceptions, it is helpful to look at the Articles’ drafting history. The first draft of the Articles gave Congress the power, without exception, to “regulat[e] the Indian trade and manag[e] all Affairs with the Indians.”<sup>45</sup> Some states were dissatisfied with this exclusive grant of power.<sup>46</sup> So, after debate, the Committee of the Whole presented Congress with a revised draft, which added the Not-Members Exception.<sup>47</sup> As Natelson points out, “contemporaneous dictionaries make clear, the requirement that an Indian be a ‘member’ of a state meant that he had to be integrated into the body-politic as a citizen—or at least a taxpayer—of the state.”<sup>48</sup> While many Indian tribes resided outside the country’s borders in early America, some sovereign Indian tribes resided within states’ borders. The Not-Members Exception excluded these intra-state tribes from congressional power and reserved that power for the states. As Madison explained, “By Indian[s] not members of a State, must be meant those, I conceive who do not live within the body of the Society, or whose Persons or property form no objects of its laws.”<sup>49</sup>

States’ rights advocates wanted more. One proposed adding the modifier “not residing within the limits of any of the United States.”<sup>50</sup> Another proposed limiting Congress’ trade power to only “with such nations and tribes as are not resident within such limits wherein a particular

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<sup>40</sup> By far the largest portion of the Committee’s report is dedicated to commerce with the Indians. *See, e.g.,* Id. (“They shall superintend such regulations as Congress shall from time to time establish respecting the Indian trade.”); *see also* Natelson, *supra* note 7 at 217.

<sup>41</sup> 33 J. CONT’L. CONG. 66, 67 (Feb. 20, 1787) (“[I]t [is] necessary that the United States should be at peace with the Indians . . . . In this business it will be necessary not only to mark precisely the grounds of the present evils, but to ascertain the remedies, if any, which are within the power of the union . . . .”).

<sup>42</sup> 33 J. CONT’L. CONG. 458 (Aug. 3, 1787).

<sup>43</sup> ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4

<sup>44</sup> *Id.*

<sup>45</sup> 3 J. CONT’L. CONG. 550 (July 12, 1776).

<sup>46</sup> For a brief discussion on some of the State’s complaints, *see* Natelson, *supra* note 7, at 228.

<sup>47</sup> 5 J. CONT’L. CONG. 681-82 (Aug. 20, 1776).

<sup>48</sup> Natelson, *supra* note 7, at 229.

<sup>49</sup> THE PAPERS OF JAMES MADISON, VOL. 8, 10 MARCH 1784–28 MARCH 1786, 156-159 (Robert A. Rutland & William M. E. Rachal eds., 1973); *see also* Natelson, *supra* note 7, at 234.

<sup>50</sup> 9 J. CONT’L. CONG. 841, 844 (Oct. 27, 1777).



State claims, and actually exercises jurisdiction.”<sup>51</sup> Both proposals were rejected, however, and the final draft added only the Legislative-Rights Exception.

Clearly, the Legislative-Rights Exception broadened states’ authority beyond merely citizen-Indians, though the precise limits of this authority remain hazy. Some states would later assert that their legislative right was violated any time Congress’ action affected a state’s legislative authority. According to these states, Congress would violate a state’s authority if it negotiated part of a state’s land away in a treaty. On the other side, nationalists, such as Madison, thought this addition meant only that states had a preemptive right to land within their state.<sup>52</sup> According to Madison, a broad interpretation of “legislative rights,” such as some states advanced, would “destroy the authority of Congress” because “no act of Congress within the limits of a State can be conceived which will not in some way or another encroach upon the authority [of the] States.”<sup>53</sup> While most scholars agree with Madison,<sup>54</sup> Natelson is sympathetic to the states.<sup>55</sup> Whichever side was ultimately correct, these conflicting interpretations were a recurrent issue in the early Republic.

## 2. Treaty Clauses

The Articles also gave Congress the “sole and exclusive” power of entering into treaties, with one exception.<sup>56</sup> Congress could not enter a treaty of commerce if “the legislative powers of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever.”<sup>57</sup> In other words, Congress could make commerce treaties, but they couldn’t make commerce treaties that limited states’ ability to tax or restrict trade.

Another part of the Articles prohibited any State from entering into any treaty “with any King, Prince, or State.”<sup>58</sup> Although the Mohedean Indian cases had established Indian tribes as sovereigns,<sup>59</sup> Legally, Indians were viewed as lesser sovereigns than a “King, Prince, or State.” For example, unlike foreign States, when Congress treated with the Indians, a section of the treaty normally declared the Indians to be under the protection of the United States.<sup>60</sup> And the treaties also prohibited the Indian tribes from engaging in trade with other powers.<sup>61</sup> Indeed, a generation after the founding, Justice Marshall cited these treaty provisions for the principle that Indian tribes

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<sup>51</sup> 9 J. CONT’L. CONG. 841, 844 (Oct. 27, 1777).

<sup>52</sup> See Letter from James Madison, *infra* note 183.

<sup>53</sup> *Id.*

<sup>54</sup> FRANCIS PAUL PRUCHA, *THE GREAT FATHER* 38, 49 (1984) (citing Madison and characterizing the proviso as “cast[ing] a heavy blur over the article” and “hazy”).

<sup>55</sup> Natelson, *supra* note 7 at 234.

<sup>56</sup> ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* art. VI., para. 2.

<sup>59</sup> Robert N. Clinton, “*The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs*,” 69 BOSTON UNIVERSITY LAW REVIEW (BULR), 329 (1989).

<sup>60</sup> See, e.g., Treaty of Hopewell with the Cherokee, 30 J. CONT’L. CONG. 188 (Apr. 17, 1786).

<sup>61</sup> *Id.*

were not foreign states but rather “domestic dependent nations.”<sup>62</sup> Thus, this qualifying language provided States with at least pretextual legal grounds to treat independently with Indian tribes, especially those residing within their boundaries.

A further complication arises from the interaction of the Treaty Clauses with the Indian Affairs Clause. As discussed, the Indian Affairs Clause included the power to negotiate treaties. At the same time, the Indian Affairs Clause was subject to the Not-Members and Legislative-Right Exceptions. The overlap between the Treaty Clauses and the Indian Affairs Clause thus posed potential problems: What if a state negotiated a treaty with some members of Tribe X, and Congress negotiated a treaty with other members of Tribe X, and the terms of those two treaties conflicted? Would the congressional treaty take precedence because of Congress’ “sole and exclusive” treaty power? Or would the state treaty take precedence because Congress was prohibited from regulating Indian affairs when it infringed the legislative rights of the state? The Articles answered none of these questions.

### 3. Absent Provisions: War, Taxing, Voting Provisions, and No Judiciary

Whatever powers Congress did in fact possess, as Professor Amar notes, “Congress had no effective means of carrying out” these powers.<sup>63</sup> Although the Articles provided that Congress would have “sole and exclusive” power to determine peace and war, including a war with the Indians,<sup>64</sup> it did not grant Congress the power to levy taxes to fund war should it declare one, instead providing that expenses would be “supplied by the several States” who would themselves levy taxes on their citizens.<sup>65</sup> As Professor Amar says, even though, “[o]n paper, such requisitions were ‘binding,’” in practice, “they were mere requests.”<sup>66</sup> This inability to raise funds posed problems for the national government, because, as Thucydides once remarked, “War is a matter not so much of arms as of money.”<sup>67</sup>

### 4. The Nine-State Clause

The Articles’ state-centric voting procedure also limited Congress’s effective power. To enter treaties or wars, at least nine States had to agree.<sup>68</sup> The Articles thus opted for a state-centric voting model; unlike the Constitution, votes were not counted by the number of delegates, but by the number of states. However, as Pinckney would later explain, “[I]t was frequently difficult to obtain a representation from nine states; and if only nine States were present, they must all concur

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<sup>62</sup> *Cherokee Nation v. Georgia*, 20 U.S. 1, 5-15 (1831).

<sup>63</sup> Amar, *supra* note 8, at 28.

<sup>64</sup> ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1.

<sup>65</sup> Id. at art. VIII, para. 1-2.

<sup>66</sup> Amar, *supra* note 8, at 28.

<sup>67</sup> THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR (Rex Warner trans., 1972).

<sup>68</sup> ARTICLES OF CONFEDERATION of 1781, art. IX, para. 6.

in making a treaty. A single member would frequently prevent the business from being concluded; and if he absented himself, Congress had no power to compel his attendance.”<sup>69</sup>

Finally, the Articles provided no judicial enforcement mechanism. The Articles did not provide for a judiciary. Instead, they created a labyrinthine procedure to resolve disputes that does not appear to have been frequently used.<sup>70</sup> And, as Professor Amar points out, under the Articles, Congress “had no explicit ‘legislative’ or ‘governmental’ power to making binding ‘law’ enforceable in state courts.”<sup>71</sup>

### *B. Life Under the Articles: States Interference with National Treaty Efforts*

These provisions of the Articles almost immediately caused conflict between the states and Congress. Georgia and North Carolina interpreted the Legislative-Rights Exception of the Indian Affairs Clause to undermine Congress’ authority to negotiate and enforce treaties with the Indians and to give States the power to treat independently with the Indian tribes. This interpretation, combined with other structural flaws in the Articles, caused unresolvable conflict that nearly led the United States to a ruinous Indian war.

Under the Treaty of Paris of 1783, Great Britain ceded all claims to territory east of the Mississippi to the United States. But because the Treaty of Paris said nothing about the Indians, the United States technically remained at war with them.<sup>72</sup> At the same time, westward expansion was an important goal for Congress, the individual states, and citizens themselves.<sup>73</sup> George Washington, however, recognized that “[the Indians] would not suffer their Country . . . to be wrestled from them without another struggle.”<sup>74</sup> To secure Indian land, Washington suggested that Congress should “purchas[e] their Lands in preference to attempting to drive them by force of arms out of their Country.”<sup>75</sup> Congress appears to have heeded Washington’s advice. On October 15, 1783, Congress passed an Ordinance that called for treaty conventions with various Indians tribes to establish boundaries and regulate Indian trade.<sup>76</sup>

But states frequently interfered with national efforts to negotiate treaties. Georgia was one of the worst offenders. On March 15, 1785, Congress resolved to appoint commissioners to treat with “the Cherokee and all other Indians southward of them.”<sup>77</sup> The Creek was one such tribe, located near Georgia. But Georgia was determined to negotiate a treaty with the Creek for Creek

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<sup>69</sup> 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 280 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT’S DEBATES].

<sup>70</sup> ARTICLES OF CONFEDERATION of 1781, art. IX, para. 2.

<sup>71</sup> Amar, *supra* note 8, at 28.

<sup>72</sup> See Prucha, *supra* note 54, at 74.

<sup>73</sup> *Id.*

<sup>74</sup> Letter from George Washington to James Duane (Sept. 7, 1783), in *Founders Online*, National Archives, accessed Sept. 29, 2019.

<sup>75</sup> *Id.*

<sup>76</sup> 25 J. CONT’L. CONG. 680-94 (Oct. 15, 1783). For an extended discussion on early treaty negotiations, see Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055 (1995).

<sup>77</sup> 33 J. CONT’L. CONG. 680-94 (Mar. 15, 1785).

land before the Commissioners could arrive.<sup>78</sup> On June 9, Georgia's Governor wrote Colonel Elijah Clarke, a state agent assigned to treat on behalf of Georgia, urging haste, for "it is a business of the first consequence to the state and should not be delayed, especially as the commissioners from Congress will shortly be on the same errand."<sup>79</sup> The Creek, however, would not meet with Georgia until the congressional Commissioners arrived.<sup>80</sup>

By the time the Commissioners arrived, unfortunately, only two out of the 100 Creek towns were present at the negotiation.<sup>81</sup> The Commissioners informed the Creek that they could not negotiate with such a small minority and left.<sup>82</sup> Agents from Georgia, however, stayed behind and negotiated a treaty whereby the "Creeks," who were, the treaty proclaimed, "Members of Georgia," relinquished the entirety of Creek territory into "the limits of the State of Georgia."<sup>83</sup> Unsurprisingly, the rest of the Creek refused to accept this treaty, and when white settlers began to flood in, the Creek sent warriors to drive them out.<sup>84</sup> The Georgians responded by tricking the Creek. They guaranteed the Creek's safety if the Creek's Chiefs would parlay with them.<sup>85</sup> But when the Creek Chiefs arrived, they were apprehended, threatened, and coerced into another treaty.<sup>86</sup>

Following these events, relations between Georgia and the Creek continued to devolve. The commissioners would come to suspect that so few Creek tribes had arrived for treaty negotiations because their leader, Alexander McGillivay, had commanded them to hold back. They suspected further that McGillivay was in the pay of the Spanish, and they later learned that the Creek had entered a treaty with Spain whereby the Creek agreed to trade exclusively with the Spanish.<sup>87</sup>

This trade agreement was concerning because the European powers used commerce to manage political relations with the Indians. In one of his first addresses to Congress, Washington noted that "the trade of the Indians is a main mean of their political management."<sup>88</sup> Many Europeans and Founding-era Americans were proponents of Montesquieu's *doux commerce* theory, which held that countries who trade with one another remain at peace. By establishing exclusive commercial relations with the Creek, the Spanish improved their relationship, while straining America's relationship, with the Creek. While this effect aided the Spanish—by creating a barrier between the United States—it hurt the United States, because it made war with the Creek more likely.

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<sup>78</sup> 1 WALTER H. MOHR, *FEDERAL INDIAN RELATIONS, 1774-1788*, 146-47 (1933).

<sup>79</sup> *Id.*; see also GEORGIA HISTORICAL COLLECTIONS, VIII, 167 (1785); Arthur Preston Whitaker, *The Spanish American Frontier: 1783-1795*, 29 (1962).

<sup>80</sup> 1 Mohr, *supra* note 78, at 147.

<sup>81</sup> Report of Benjamin Hawkins, in 1 Indian Affairs 16 (Nov. 17, 1785).

<sup>82</sup> *Id.*

<sup>83</sup> Articles of a treaty concluded at Galphinton, in 1 Indian Affairs 17 (Nov. 12, 1785).

<sup>84</sup> Letter from Alexander McGillivray to Little Tallassie, in 1 Indian Affairs 18 (Apr. 8, 1787).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> 1 Mohr, *supra* note 78, at 145.

<sup>88</sup> 1 J. OF THE EXECUTIVE PROC. OF THE SENATE OF THE UNITED STATES OF AMERICA, 1789-1805, 56 (Aug. 4, 1790).

Indeed, over the ensuing years, Georgia's relations with the Creek continued to disintegrate. Ultimately, Secretary of War Henry Knox reported to Congress in July of 1787 that the Creek "have commenced, or soon will commence hostilities" against Georgia.<sup>89</sup> Knox worried that "there is the greatest reason that a general hostile confederacy of the Southern Indians will be speedily formed."<sup>90</sup>

The Cherokee would likely have been a member of such a confederacy. In late November of 1785, a congressional commission and the Cherokee signed the Treaty of Hopewell, which established clear boundary lines and guaranteed the Cherokee the right to certain lands.<sup>91</sup> North Carolina and Georgia rejected this treaty from the outset. As treaty negotiations were beginning, William Blount, an agent of North Carolina, sent the Commissioners in charge of treaty negotiations two letters. The first informed the Commissioners of boundary lines that had existed in North Carolina's constitution since 1776.<sup>92</sup> The second detailed a statute on North Carolina's books that contained the Cherokee to certain lands.<sup>93</sup> Perhaps unsurprisingly, North Carolinian speculators had been committing atrocities against the Cherokee and Chickasaws and claiming their land since the closing days of the revolution.<sup>94</sup> North Carolina's claim to this land was, therefore, quite questionable. Indeed, much of the land that North Carolina claimed title to would not pass into the hands of the United States for another generation.<sup>95</sup> Nevertheless, if the Commissioners gave any land to the Cherokee in violation of these documents, Blount wrote, North Carolina would "consider such a treaty a violation and infringement upon her legislative rights."<sup>96</sup> Georgia had employed similarly nefarious measures to claim part of the Cherokee's land,<sup>97</sup> and Georgia was unwilling to relinquish it: Georgia's General Assembly called Congress' "pretended treaty" at Hopewell "a manifest and direct attempt to violate the retained sovereignty and legislative right of this State."<sup>98</sup> Writing to Congress, the Commissioners noted that, without North Carolina and Georgia's support, "difficulties [would] frequently arise" that would make the treaty "ineffectual."<sup>99</sup> Nevertheless, Congress accepted the treaty.<sup>100</sup>

The Commissioners' warning proved prophetic. In July of 1787, Knox informed Congress that "the treaty made by the Commissioners . . . at Hopewell . . . has been flagrantly violated by the usurpation of the lands signed by the said treaty as the hunting grounds of the Cherokee."<sup>101</sup>

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<sup>89</sup> 33 J. OF CONT'L CONG. 364 (Aug. 4, 1787).

<sup>90</sup> *Id.* at 368.

<sup>91</sup> The Treaty can be found in 1 Indian Affairs 20. Congress accepted the treaty in April 1786. 30 J. Cont'l. Congr. 187-190 (Apr. 10, 1786). The Treaty of Hopewell with the Cherokee was actually one of three such treaties.

<sup>92</sup> Letter from William Blount to Commissioners for treating with the Southern Indians, *in* 1 Indian Affairs 44 (Nov. 28, 1785).

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

<sup>94</sup> 1 Mohr, *supra* note 78, at 149.

<sup>95</sup> *Id.*

<sup>96</sup> Letter from William Blount to Commissioners for treating with the Southern Indians, *in* 1 Indian Affairs 44 (Nov. 28, 1785).

<sup>97</sup> 1 Mohr, *supra* note 78, at 145.

<sup>98</sup> 1 Indian Affairs 17.

<sup>99</sup> *Id.* at 39.

<sup>100</sup> 33 J. of the Cont'l Cong. 362 (July 7, 1786).

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

The parties' disagreement turned on the extent of the Articles' Legislative-Right Exception. In Georgia and North Carolina's view, Congress had violated their legislative right by negotiating away land that those States claimed. Nationalists thought that, while States could negotiate with tribes within their boundaries, these negotiations were invalid to the extent they conflicted with a national treaty or a national effort to negotiate a treaty.<sup>102</sup>

This interpretive debate provides the necessary background to understand Knox's report to Congress. As discussed in July of 1787, Knox advised Congress that Georgia and North Carolina's land grabs had led to imminent hostilities with the Creek, and, likely, "a general confederacy of the Southern Indians."<sup>103</sup> To avoid such a "ruinous" event as the creation of a hostile Southern Indian confederacy, Knox made three suggestions:<sup>104</sup>

- First, Congress could adopt an interpretation of the Articles allowing Congress "to regulate the necessary boundaries for the independent tribes of Indians, notwithstanding they might be comprehended within the limits of any State."<sup>105</sup>
- Second, Georgia and North Carolina could request that the United States act as judge in the border dispute.<sup>106</sup>
- Third, Georgia and North Carolina could cede the disputed territory to the United States.<sup>107</sup>

If none of these actions were taken, Knox worried that the United States would find itself engaged in a "general Indian war,"<sup>108</sup> for which "the finances of the United States are such at present as to render them utterly unable to maintain an Indian war with any dignity or prospect of success."<sup>109</sup>

Less than a month later, Congress took up the issue. Congressmen Few and Blount moved to direct the Superintendent of Indian Affairs for the Southern Department to invite the Creek to a treaty negotiation.<sup>110</sup> Before this resolution could be considered, Congressman Nathan Dane of Massachusetts moved to table that motion to consider a report from the Southern Department of Indian Affairs.<sup>111</sup> The report noted:

There can be no doubt that settlements are made by our people on the lands secured to the Cherokees, by the late treaty between them and the United States; and also on lands near the Oconee claimed by the Creek, various pretences seem to be set

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<sup>102</sup> See, e.g., Letter from James Madison to James Monroe, 27 November 1784, in *Founders Online*, National Archives, accessed September 29, 2019, <https://founders.archives.gov/documents/Madison/01-08-02-0083> ("as far as N. Y. may claim a right of treating with Indians for the purchase of lands within her limits, she has the confederation on her side; as far as she may have exerted that right in contravention of the Genl. Treaty, or even unconfidentially [sic] with the Comisrs. of Congs. she has violated both duty & decorum").

<sup>103</sup> 33 Journals of the Continental Congress 364 (July 9, 1787).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

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

<sup>109</sup> *Id.* at 388.

<sup>110</sup> 33 J. of the Cont'l Con., 454 (Aug. 3, 1787).

<sup>111</sup> *Id.* at 455.

up by the white people for making these settlements, which the Indians tenacious of their rights, appear to be determined to oppose.<sup>112</sup>

The report rejected North Carolina and Georgia's interpretation of the Articles' Not-Members and Legislative-Rights Exceptions, arguing that "[such construction], if right, appears . . . to leave the federal powers a mere nullity."<sup>113</sup> "But whatever may be the true construction," the report continued, "it must be impracticable to manage Affairs with the Indians within the limits of the two States, so long as they adhere to the opinions and measures they seem to have adopted."<sup>114</sup> To solve this problem and prevent war, the Committee recommended that the two states must either "make liberal cessions of territory to the United States," or "accede to Congress' managing, exclusively, all affairs with the Cherokees, Creek, and other independent tribes within the limits of the said States" so that Congress "may have the acknowledged power of regulating trade, and making treaties with those tribes, and of preventing on their lands, the intrusions of the white people."<sup>115</sup> The Committee's suggestions, then, mirrored Knox's. And if war were to occur, the report continued, Georgia should be informed that "Congress . . . can never employ the forces of the union in any cause . . . but on the principle that Congress shall have the sole direction of the war, and the settling of all the terms of peace with such Indian tribe."<sup>116</sup>

The Committee concluded by proposing several resolutions in accordance with its recommendations.<sup>117</sup> Eleven states and twenty delegates were present.<sup>118</sup> A supermajority of fifteen delegates voted to table Few and Blount's motion and take up the Committee's resolutions.<sup>119</sup> Despite this supermajority, Georgia and North Carolina voted no, and two States split, leaving the final tally 7-2. So, the resolutions were defeated.<sup>120</sup>

Originalist Natelson attributes no significance to this outcome,<sup>121</sup> but this vote highlights the Articles' structural inadequacies. Its Nine-State voting requirement prevented a supermajority of delegates from taking action that both the Secretary of War and the Southern Department of Indian Affairs said was necessary to prevent a ruinous and unwinnable war. Indeed, a generation later, Justice Marshall cited this report in *Worcester v. Georgia* as an example of the Articles' failures.<sup>122</sup>

This history makes clear that structural flaws in the Articles undermined Congress' power to regulate Indian affairs. One of these flaws flowed from the Indian Affairs Clause itself, which

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<sup>112</sup> *Id.* at 457.

<sup>113</sup> *Id.* at 458.

<sup>114</sup> *Id.* at 459-60.

<sup>115</sup> *Id.* at 460.

<sup>116</sup> *Id.* at 461-62.

<sup>117</sup> *Id.* at 462.

<sup>118</sup> *Id.* at 463.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Natelson, *supra* note 7, at 235 ("Congress voted seven states to two for the Dane-Lee motion to postpone the Georgia-North Carolina proposal, but the committee report does not seem to have been taken up.")

<sup>122</sup> 31 U.S. 515, 559 (1832).

was, as Madison would later remark, “obscure and contradictory.”<sup>123</sup> Despite Congress’ treaty power, the Not-Members and Legislative-Right Exceptions of the Indian Affairs Clause provided States with a pretextual justification to treat independently with the Indian tribes and to violate Congress’s Indian treaties.

But the Indian Affairs Clause was only one part of a broken system. Nothing in the Articles explicitly prohibited States from treating with Indians. Nor did the Articles establish congressional treaties as supreme over state treaties. And when States seized these ambiguities to assert questionable claims, the Articles did not provide for a judiciary to resolve interpretative disputes. And, as we have seen, the Articles’ state-centric Nine-Vote requirement afforded Congress little recourse to reign in misbehaving States. Thus, because of the Articles’ procedures, Congress found itself incapable of enforcing its own treaty and of preventing a disastrous war. The Constitutional Convention and ratification debates must be understood against the backdrop of this history.

## II. ADOPTING THE CONSTITUTION

As Congress considered the Southern District of Indian Affairs’ report in August of 1787, the Constitutional Convention had already convened. The drafters sought to fix the structural deficiencies that had brought the nation close to war. The federalist argued that the Constitution was necessary to end and prevent Indian wars, while anti-federalists warned that the Constitution committed an unfettered Indian affairs power to Congress.

### *A. The Constitutional Convention*

As Madison prepared the Virginia Plan prior to the Constitutional Convention, he took account of the “Vices of the Political system of the U. States.”<sup>124</sup> At the top of his list was “Encroachments by the States on the federal authority,” of which a chief example was “the Wars and Treaties of Georgia with the Indians.”<sup>125</sup> The resultant Virginia Plan provided that the new national government would enjoy all the rights “vested in Congress by the Confederation,” and *also* the power “to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; to negative all laws passed by the several States, contravening in the opinion of the National Legislature, the articles of the Union.”<sup>126</sup>

This provision, which survived the Committee of the Whole, clarified the Articles’ jurisdictional ambiguities and stripped North Carolina and Georgia of textual support for their interpretation of the Indian Affairs Clause.<sup>127</sup>

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<sup>123</sup> THE FEDERALIST NO. 42 (James Madison).

<sup>124</sup> 1 FARRAND’S RECORDS 23.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 21.

<sup>127</sup> *Id.* at 15-30.



Moreover, the Virginia Plan provided several means for the new government to enforce its authority. First, the legislature would have power “to call forth the force of the Union agst. Any member of the Union failing to fulfill its duty under the articles.”<sup>128</sup> Second, the Virginia Plan called for “a National Judiciary [to] be established.”<sup>129</sup> Disputes between the new national government and the States would be resolved by an independent branch of government.

In contrast, the New Jersey Plan called for a continuation of the powers under the Articles without any modification.<sup>130</sup> Madison replied that the New Jersey Plan would not “prevent encroachments” and cited as an example the fact that “[b]y the Federal Articles, transactions with the Indian appertain to Congress, yet in several instances the States have entered into treaties and wars with them.”<sup>131</sup> Madison’s point reflects the precise views of the Southern Indian Affairs’ report, of which a supermajority of Congressmen approved but which was nevertheless defeated.

Although the Committee of Detail’s initial draft of the Constitution gave Congress no Indian affairs power, it nevertheless contained several provisions relevant to Indian affairs. For starters, the draft gave the Senate “power to make treaties.”<sup>132</sup> And whereas the Articles forbade states from entering into a treaty “with any King, Prince or State,”<sup>133</sup> the draft eliminated this qualifier and provided that “No State shall . . . enter into *any* treaty, alliance, or confederation.”<sup>134</sup> Most significantly, the draft made “Acts of the Legislature” and “all treaties made under the authority of the United States” the “supreme law of the several States,” which “the judges in the several States” would “be bound thereby.”<sup>135</sup> No longer could Georgia or any other state point to its own treaties as grounds for violating a national treaty. Further, the draft significantly strengthened the national government’s military powers. The first listed power of the legislature was “the power to lay and collect taxes, duties, imposts and excises”<sup>136</sup>—empowering Congress to fund wars. And in addition to the power to make war, Congress now would have the power “[t]o raise armies.”<sup>137</sup> Should war break out, Congress would no longer find itself, as Knox had lamented, broke and “utterly unable to maintain an Indian war with any dignity or prospect of success.”<sup>138</sup> Finally, the draft created a judicial power.<sup>139</sup> If Georgia or North Carolina again asserted a questionable interpretation of the Constitution, an independent judiciary would have the authority to invalidate that interpretation.

These provisions of the Committee of Detail’s draft remained largely unaltered in the final draft of the Constitution. The final Constitution split the power to make treaties between

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<sup>128</sup> 1 FERRAND’S RECORDS 21.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 24.

<sup>131</sup> *Id.* at 45.

<sup>132</sup> *Id.*

<sup>133</sup> ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1.

<sup>134</sup> 2 FARRAND’S RECORD 187 (emphasis added).

<sup>135</sup> *Id.* at 183.

<sup>136</sup> *Id.* at 181.

<sup>137</sup> *Id.* at 182.

<sup>138</sup> 33 J. OF CON’T CONG. 388 (July 7, 1787).

<sup>139</sup> 2 FARRAND’S RECORD 186.

the President and the Senate<sup>140</sup> but carried over the absolute prohibition against states entering into treaties<sup>141</sup> and the Supremacy Clause.<sup>142</sup> The Constitution also gave Congress the power to make war,<sup>143</sup> raise armies for two year periods<sup>144</sup> and fund those armies through “Taxes, Duties, Imposts and Excises.”<sup>145</sup> Finally, the Constitution created a judiciary, whose power extended to “all Cases . . . arising under . . . Treaties made.”<sup>146</sup> The Committee of Detail’s report had made structural changes that would enable the federal government to manage Indian affairs, and these changes were carried into the final draft of the Constitution with few modifications.

Notably absent from the Committee’s report, however, was any explicit reference to Indian affairs. Natelson suggests that this absence meant that the committee thought non-diplomatic Indian affairs, such as commercial relations, might better be handled at the state level.<sup>147</sup> But this suggestion ignores the historical context. Given the specter of war, *of course* the committee was chiefly concerned with assigning the national government control over diplomatic relations with the Indians. But that concern does not indicate that the committee thought Indian affairs was otherwise best handled at the State level; rather, it indicates only that the committee first focused on preventing war.

Indeed, following the Committee’s report, Madison sought to clarify the federal government’s expansive power by motioning to insert the following into the legislature’s powers: the power “[t]o regulate affairs with the Indians, as well within as without the limits of the United States.”<sup>148</sup> Four days later, Rutledge presented the Committee of Detail’s new report, which recommended adding to the end of the Commerce power the phrase, “and with Indians, within the limits of any State, not subject to the laws thereof.”<sup>149</sup> This clause was entirely in line with Madison’s proposal and consistent with both Knox’s and the Southern District of Indian Affairs’ reports.<sup>150</sup> No longer could any state claim that the national government lacked authority over Indians merely because those Indians resided within the state. Further, this clause comprehended not only diplomatic power, but commercial and regulatory power. Nevertheless, as Robert Clinton observes in a different context, “the phrase ‘not subject to the laws thereof’ had the potential for reincorporating the entire debate over the legal status of Indians into the text of the Constitution since it bore a vague resemblance to the ‘not members of any of the states’ proviso” in the Articles.<sup>151</sup> The Committee of Eleven ultimately shortened this clause to only “with the Indian

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<sup>140</sup> U.S. CONST. art. II, Sec. 2, para. 2.

<sup>141</sup> U.S. CONST. art. I, Sec. 10, para. 1

<sup>142</sup> U.S. CONST. art. VI, para. 2.

<sup>143</sup> U.S. CONST. art. I, Sec. 8, para. 11.

<sup>144</sup> U.S. CONST. art. I, Sec. 8, para. 12.

<sup>145</sup> U.S. CONST. art. I, Sec. 8, para. 1.

<sup>146</sup> U.S. CONST. art. III, Sec., para. 1.

<sup>147</sup> Natelson, *supra* note 7, at 236.

<sup>148</sup> *Id.* at 321, 324.

<sup>149</sup> *Id.* at 367.

<sup>150</sup> See PAPERS OF JAMES MADISON, *supra* note 49, at 103.

<sup>151</sup> Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055 (1995).

tribes,” and the Committee probably did so to head off any debate over the legal status of State power over the Indians.<sup>152</sup>

The final text of the Constitution, however, read “Congress shall have the power . . . to regulate *Commerce* . . . with the Indian tribes.”<sup>153</sup> In fact, recent research has established that the final text of the Indian Commerce Clause was a mistake; the Committee of Detail intended to include an Indian affairs power.<sup>154</sup> The Committee chair, John Rutledge, directed James Wilson to include it, and all evidence indicates that Wilson intended to include it, but he appears to have simply made a mistake and forgot.<sup>155</sup> Instead, Indians were simply added to the pre-existing Interstate Commerce Clause. By all accounts, then, the Constitution should have included an Indian affairs power. But, this research suggests, by mistake, we have an Indian Commerce power.

No one appears to have immediately recognized the significance of this gap, a fact which is unsurprising. The Constitution strengthened the federal governments war and treaty powers and made federal law the supreme law of the land.<sup>156</sup> As the ratification debates make clear, both federalist and anti-federalist alike assumed that the Constitution gave the federal government greater power over Indian affairs.<sup>157</sup> The two sides disagreed, however, on whether a strong national government was needed to handle Indian hostilities.<sup>158</sup> Indeed, Professor Amar has shown that the federalists’ primary argument in favor of the Constitution was a geostrategic one,<sup>159</sup> and the threat of Indian hostilities was one piece of that argument. In short, the Constitution *did* strengthen federal power over Indian affairs, and the gap between *Commerce* and *Affairs* was not immediately recognized.

### *B. The Ratification Debates*

Throughout the ratification debates, everyone assumed the Constitution dramatically increased federal power over Indian affairs. In Federalist 3, John Jay argued that wars were less likely to occur with a strong national government and noted particularly that “[n]ot a single Indian war has yet been occasioned by aggressions of the present federal government,” but that “there are several instance of Indian hostilities having been provoked by the improper conduct of individual States, who, either unable or unwilling to restrain or punish offenses, have given occasion to the slaughter of many innocent inhabitants.”<sup>160</sup> In Massachusetts’s debate, John Carnes read a letter from Harrison Gray Otis, noting that the “probability of Indian war . . . evinced the great necessity of the establishment of an efficient federal government, which will be the result of the adoption of

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<sup>152</sup> *Id.*

<sup>153</sup> U.S. CONST. art. I, § 8, para. 3.

<sup>154</sup> See Toler, *supra* note 10.

<sup>155</sup> Toler, *supra* note 10.

<sup>156</sup> See *supra* Part II(A).

<sup>157</sup> See *supra* Part II(B).

<sup>158</sup> *Id.*

<sup>159</sup> Amar, *supra* note 8, at 42.

<sup>160</sup> THE FEDERALIST NO. 3 (John Jay).

the proposed Constitution.”<sup>161</sup> Likewise, Horatio Gates, writing to Madison about hostilities with the Cherokee, said, “Every thing [sic] I hear, every thing [sic] I know, convinces me, that unless we have as Speedily as possible a Firm, Efficient, Federal Constitution establishd [sic], all must go to Ruin, and Anarchy and Misrule.”<sup>162</sup>

Anti-federalist Patrick Henry in Virginia responded to this argument, writing, “It is well known that we have nothing to fear from [the Indians]. Our back settlers are considerably stronger than they.”<sup>163</sup> Rather, Henry warned, Congress’ enhanced treaty power would enable it to seize land from the States: “By the Confederation, the rights of territory are secured. No treaty can be made without the consent of nine states. While the consent of nine states is necessary to the cession of territory, you are safe. If it be put in the power of a less number, you will infallibly lose [territory.]”<sup>164</sup>

Anti-federalist Roberts Yates understood that the Constitution gave management of Indian affairs to Congress. Writing as Sydney, he asked, “What can we reasonably to expect will be [the national government’s] conduct when possessed of the powers ‘to regulate commerce . . . with the Indian tribes,’ when they are armed with legislative, executive, and judicial powers, and their laws the supreme laws of the land?”<sup>165</sup> Yates answered, “It is . . . evident that this state, by adopting the new government,” would both “enervate their legislative rights,” and “totally surrender into the hands of Congress the management and regulation of the Indian trade . . . .”<sup>166</sup> Yates’s “legislative rights” language appears to refer to the Legislative-Right Exception in the Articles’ Indian Affairs Clause. And here, Yates suggests that the Constitution eliminates that Exception, thus expanding the National Government’s Indian affairs power. Both the federalists and the anti-federalists understood that the Constitution expanded the National Government’s power over Indian affairs.<sup>167</sup>

This history undermines Justice Thomas and Originalist Natelson’s view that the ratification debates provide no evidence that the ratifiers understood the Constitution “to confer anything resembling plenary power over Indian affairs.”<sup>168</sup> Justice Thomas and Natelson find support for their view in the fact that the Indian Commerce Clause was infrequently debated. But their view is historically and structurally tone-deaf. Under the Articles, states had undermined national power over Indian affairs by treating and warring with the Indian tribes independently from Congress.<sup>169</sup> The Constitution strengthened the federal government’s treaty and war powers

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<sup>161</sup> 2 ELLIOT’S DEBATES 21.

<sup>162</sup> Letter to James Madison from Horatio Gates, 26 November 1787, in *Founders Online*, National Archives, accessed Sept. 29, 2019, <https://founders.archives.gov/documents/Madison/01-10-02-0182> [<https://perma.cc/LX5Z-EHNU>].

<sup>163</sup> PATRICK HENRY, FOREIGN WARS, CIVIL WARS, AND INDIAN WARS—THREE BUGBEARS (1788).

<sup>164</sup> *Id.* While Henry was talking about a proposed treaty with Spain, the same concern applies to the Indians.

<sup>165</sup> Robert “Sydney” Yates, *Powers of National Government Dangerous to States*, NEW YORK DAILY PATRIOTIC REGISTER, June 13, 1788.

<sup>166</sup> *Id.*

<sup>167</sup> See *supra* Part II(B).

<sup>168</sup> *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 664–65 (2013) (Thomas, J., concurring); see also Natelson, *supra* note 7, at 248.

<sup>169</sup> See *id.*; see also Natelson, *supra* note 7.

and thereby strengthened the federal government's Indian affairs power, and both federalists and anti-federalists assumed that the Constitution strengthened the national government's power over Indian affairs.

### III. LIFE UNDER THE CONSTITUTION

Although some originalists, such as Natelson, argue that post-ratification history is irrelevant for constitutional interpretation,<sup>170</sup> Professor Amar argues the Washington Administration deserves special constitutional consideration because the Constitution's executive powers were crafted open-endedly with full knowledge that George Washington would be President.<sup>171</sup> Amar's points are especially forceful where, as here, the Founders designed the Constitution to enable the Federal government to immediately fix a problem—in this case, a potential Indian war—that it had been unable to resolve under the Articles. After all, the history of life under the Articles, the drafting of the Constitution, and the ratification debates all indicate that the Federal government now possessed a general Indian Affairs Power. If this thesis is correct, we would expect Washington and the First Congress to act accordingly. In fact, they did.

In his July 7, 1789 report to Congress, Knox proposed a policy that would later be adopted:

“Although the disposition of the people of the states to emigrate into the Indian country cannot be effectually prevented, it may be restrained by postponing new purchases of Indian territory, and by prohibiting the citizens from intruding on the Indian lands. It may be regulated by forming colonies under the direction of the government and by posting a body of troops to execute their orders.”<sup>172</sup>

Knox's proposal was perhaps the earliest formulation of an Indian strategy for the United States, and within the proposal lay a conundrum: Absent a treaty, under what legal grounds could the United States “prohibit[] the citizens from intruding on the Indian lands”? Surely, the United States could ban commercial trading on Indian land, but an intrusion on Indian lands falls outside of mere commercial trade. Nevertheless, as discussed in Part IV, within a few short years, the United States would implement Knox's proposal, and the Washington Administration and the First Congress would wrangle with justifying Knox's proposal under the powers of the Constitution.

The first step to implementing Knox's proposal began on August 22, 1789, the first and only time President Washington spoke to the Senate in person.<sup>173</sup> Reminding the Senate that North Carolina and Georgia had violated the Hopewell Treaties, Washington stated that the treaty Commissioners should reassure the southern Indian Tribes that the United State would take measure to establish trade relations pursuant to the treaties of Hopewell.<sup>174</sup>

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<sup>170</sup> See Natelson, *supra* note 7, at 248.

<sup>171</sup> Amar, *supra* note 8, at 307-315.

<sup>172</sup> 1 Mohr, *supra* note 78, at 171.

<sup>173</sup> 1 Mohr, *supra* note 78, at 152.

<sup>174</sup> 1 J. OF THE EXECUTIVE PROC. OF THE SENATE OF THE UNITED STATES OF AMERICA 22-24 (Aug. 22, 1789).

Washington went further and warned the Senate that “the case of the Creek nation is of the highest importance and requires an immediate decision.”<sup>175</sup> After recounting the history between Georgia and the Creek, President Washington sought the advice and consent of the Senate on several questions. One of these questions asked what the treaty Commissioners could do if they found that the Creek’s complaints were valid.<sup>176</sup> If Georgia bore responsibility, could the Commissioners pay the Creek fair compensation and guarantee the Creek both their remaining territory and a line of military posts?<sup>177</sup> These military posts were necessary, as Knox wrote Washington, to provide “military force” to deter “the lawless whites as well as Indians.”<sup>178</sup> After deliberation, the Senate answered in the affirmative.<sup>179</sup> Finally, the United States would have the power to decisively resolve the Southern Indian conflict.

Washington appointed Knox to take the lead in these treaties, and this appointment made sense. Knox had been Congress’ point person on Indian affairs for many years, and he had written to Congress in 1787 warning of the possibility of a “general Indian war.” He was not only familiar with Indian policy but also with the Indians themselves. Indeed, Knox’s presence had a tranquilizing effect on the Creeks.<sup>180</sup> In light of this experience, Washington wisely put Knox in charge of his Southern Indian policy.

A letter Knox sent to Washington during these treaty negotiations reveals the Administration’s view that the Constitution committed Indian affairs to the Federal Government. Knox noted that, under the Constitution, even “individual States claiming or possessing the right of preemption to territory inhabited by indians . . . would have to request the General Government to direct a treaty for that purpose.”<sup>181</sup> “[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,” Knox argued, “It is highly proper they should have the sole direction of all measures for the consequences of which they are responsible.”<sup>182</sup>

Knox’s presented a stronger view of federal power over Indian affairs than even the most ardent nationalist would have asserted under the Articles. While Madison believed that States possessed only a right of pre-emption under the Articles, even he admitted that states could

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<sup>175</sup> 1 J. OF THE EXECUTIVE PROC. OF THE SENATE OF THE UNITED STATES OF AMERICA 22-24 (Aug. 22, 1789).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Letter to George Washington from Henry Knox, 4 January 1790, in *Founders Online*, National Archives, accessed September 29, 2019, <https://founders.archives.gov/documents/Washington/05-04-02-0353> [<https://perma.cc/8LQ6-T6N5>].

<sup>179</sup> 1 J. OF THE EXECUTIVE PROC. OF THE SENATE OF THE UNITED STATES OF AMERICA (Aug. 22, 1789).

<sup>180</sup>1 Mohr, *supra* note 78, at 157.

<sup>181</sup> Letter to George Washington from Henry Knox, 4 January 1790, in *Founders Online*, National Archives, accessed September 29, 2019, <https://founders.archives.gov/documents/Washington/05-04-02-0353> [<https://perma.cc/8LQ6-T6N5>].

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

negotiate with Indians residing within their own territory.<sup>183</sup> Under Knox's view, states could no longer do so; rather, they would have to seek the Federal government's leadership.

President Washington's Secretary of State, Thomas Jefferson, agreed with Knox. In the course of negotiating with the Southern Indians, Knox had written Jefferson and asked for Jefferson's opinion on the legal status of land claimed by North Carolina but secured by the Treaty of Hopewell to the Cherokee.<sup>184</sup> In his answer, Jefferson argued that "N. Carolina . . . had only a right of preemption of these lands."<sup>185</sup> When North Carolina ratified the Constitution, it "convey[ed] them only this right of preemption, and the right of occupation could not be united to it till obtained by the U.S. from the Cherokees."<sup>186</sup> Jefferson's view thus mirrored Knox's: a state could not independently treat with the Indians, even for land within its own borders. Rather, it would have to wait for the Federal Government.

In contrast to the many years of unresolved Southern Indian conflict under the Articles, the Washington Administration quickly ameliorated the conflict with the Creeks. Roughly a year after appointing Knox, on August 12, 1790, Washington presented, and the Senate ratified, a treaty with the Creeks.<sup>187</sup> Ironically, this treaty was ratified by almost the same vote that had defeated the Southern District of Indian Affairs' 1787 report: 15-4.<sup>188</sup> The treaty provided that "in order to extinguish forever all claims of the Creek nation" to certain lands, the United States would pay the Creek money.<sup>189</sup> In light of Washington's previous question to the Senate, this clause indicates that the Commissioners believed that the Creek's grievances against Georgia were well founded.<sup>190</sup> The treaty also provided, "If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the Creeks lands, such person shall forfeit the protection of the United States, and the Creeks may punish him or not, as they please."<sup>191</sup> In less than a year, Knox had managed to solve, and, significantly, to *justly* solve, the threat of war with the Creek, a problem that had hung over the Nation for several years under the Articles. In light of this history, it is clear that the Constitution was meant to *strengthen* federal control over Indian affairs.

Nevertheless, a power gap still lurked in the Constitution's text: What if Congress sought to pass a non-economic law, and that law was not made pursuant to a treaty between the United States and an Indian tribe? No one appears to have considered this problem up to the Constitution's ratification. But they soon would.

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<sup>183</sup> Letter from James Madison to James Monroe, 27 November 1784, in *Founders Online*, National Archives, <https://founders.archives.gov/documents/Madison/01-08-02-0083> [<https://perma.cc/UX56-XHFH>] (If a state "claim a right of treating with Indians for the purchase of lands within her limits, she has the confederation on her side . . .").

<sup>184</sup> Letter from Thomas Jefferson to Henry Knox, 26 August 1790, *Founders Online*, National Archives, <https://founders.archives.gov/documents/Jefferson/01-17-02-0125> [<https://perma.cc/SH5U-CGJE>].

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> 1 J. OF THE EXECUTIVE PROC. OF THE SENATE OF THE UNITED STATES OF AMERICA 62 (Aug. 12, 1790).

<sup>188</sup> *Id.*

<sup>189</sup> Treaty of Peace and Friendship, U.S.-Creeks, Aug. 7, 1790, 7 Stat. 35.

<sup>190</sup> In the prior congressional session, Washington's questions indicated that the United States would have authority to pay the Creek money only if the Commissioners found that Georgia was in the wrong.

<sup>191</sup> Treaty with the Creeks, *supra* note 189.

#### IV. CONSTITUTIONAL POWER OVER INDIAN AFFAIRS

One problem lurked in the background, waiting to be answered: How would Congress regulate non-economic interactions with Indian tribes when no treaty was present? Although the Constitution was clearly intended to (and did) grant greater power over Indian affairs to the federal government, Article I only expressly gives Congress the power “to Regulate Commerce . . . with the Indian Tribes.”<sup>192</sup> Could Congress prohibit Americans from murdering Indians, in Indian territory, when the United States did not have a treaty with that tribe? On July 22, 1790, Congress passed, and the President signed into law, “An Act to regulate trade and intercourse with the Indian tribes.”<sup>193</sup> As the Act was the first significant legislation directed toward Indian affairs, a careful study of the Act reveals how extensive the First Congress viewed its power over Indians. The text of the Act makes clear that the First Congress viewed the Commerce Clause as broad enough to encapsulate interactions of any kind.

Sections One through Three of that Act regulated trade relations with the Indians. These Sections are easily valid under the Indian Commerce Clause.

Section Four declared that “no sale of lands made by any Indians . . . shall be valid” to any person, “or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.”<sup>194</sup> This Section accords with Knox and Jefferson’s view that the Constitution forbade states from independently treating with Indian tribes and provides powerful evidence that the First Congress also recognized that the Constitution increased—not decreased—federal power over Indian affairs.

Section Five provided that if “any citizen” should commit “any crime”—even a non-economic crime—against “any Indian” in “Indian territory,” that citizen would be guilty of that crime, even if no treaty existed.<sup>195</sup> While Section Five would have been easily justifiable under an Indian affairs power, since it is non-economic in nature, under the modern Court’s conception of the Commerce Clause, it appears that the Commerce Clause cannot justify its legitimacy. Several scholars have debated which constitutional provisions justifies Section Five. Professors Amar and Balkin argue that Section Five evinces a broad definition of “Commerce,” roughly equivalent to “intercourse,” or even “affairs.”<sup>196</sup> Robert Natelson argues that Section Five was passed pursuant to the Treaty Clause. Finally, Professor Gregory Ablavsky argues that Section Five is justified by a sort-of constitutional field preemption.<sup>197</sup> Of these, the text and structure of the statute clearly supports the Amar/Balkin approach. Subsequent Congresses endorsed this broad definition of

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<sup>192</sup> U.S. CONST. art. I, § 8, para. 3.

<sup>193</sup> An Act to Regulate Trade and Intercourse with the Indian Tribes, Act of July 22, 1790, ch. 33, 1 Stat. 137 (1790) (expired 1793).

<sup>194</sup> *Id.* at 138.

<sup>195</sup> An Act to Regulate Trade and Intercourse with the Indian Tribes, Act of July 22, 1790, ch. 33, 1 Stat. 137 (1790) (expired 1793).

<sup>196</sup> Amar, *supra* note 8; Balkin, *supra* note 8.

<sup>197</sup> Ablavsky, *supra* note 10, at 1012.



Commerce and adopted subsequent Trade and Intercourse Acts. Over the next forty years, later Congresses endorsed this broad definition of Commerce by adopting subsequent Trade and Intercourse Acts, forming a tradition which ultimately led Justice Marshall to recognize a broad definition of Commerce in two of the major Indian affairs cases in the history of the United States—*Cherokee Nation v. Georgia*<sup>198</sup> and *Worcester v. Georgia*.<sup>199</sup>

According to the Amar/Balkin view, “commerce” at the time of the founding had two definitions. The first meant roughly trade or economic activity, but the second was broader and meant “intercourse,” or “affairs.”<sup>200</sup> In fact, Samuel Johnson’s dictionary defined Commerce as, “Intercourse; exchange of one thing for another; interchange of any thing; trade; traffick [sic].”<sup>201</sup> Under this second, broader definition, Congress could regulate all interactions with the Indians, and Congress would therefore have approximately an Indian affairs power. Founding-era history, tradition, and precedent argue in favor of the Amar/Balkin approach.

In light of the pre-Constitutional history, the Constitution was meant to strengthen federal power over Indian affairs. Given this history and the enhanced federal Indian powers formed from the structure of the Treaty and War powers, it would be strange to read the Constitution as conferring only an economic, and therefore *lesser*, power over Indian affairs than the Articles of Confederation. Moreover, a broad reading of Commerce accords with the structural mandate given to the Committee of Detail “to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.”<sup>202</sup>

In fact, the Trade and Intercourse Act provide powerful evidence that the First Congress considered the Constitution as a whole and adopted a broad definition of “Commerce.” First, and most obviously, the title of the Act (“An Act to Regulate the *Trade* and *Intercourse* with the Indian Tribes”) literally mirrors the two definitions of “commerce.” Moreover, although Will Baude has observed that the Statutes at Large do not necessarily reflect the actual text of the law passed,<sup>203</sup> the Annals of Congress make clear that the title of the Act is in the original.<sup>204</sup> The Act’s authors thus seemed to have declared the power which justifies the Act: the Commerce Clause.

The contents of the Act also support this view. The first four sections of the Act deal with economic regulation, and the fifth section deals with intercourse. Section Five prohibits even non-economic crimes, so an economic definition of commerce cannot justify Section Five. And, as discussed, Section Five was not passed pursuant to a treaty, so the Treaty power cannot justify it. But Section Five regulates American intercourse with Indians, and so the second, broader definition of commerce can.

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<sup>198</sup> 30 U.S. 1 (1831).

<sup>199</sup> 31 U.S. 515 (1832).

<sup>200</sup> Amar, *supra* note 8; Balkin, *supra* note 8.

<sup>201</sup> SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London 1755).

<sup>202</sup> 1 FARRAND’S RECORDS 21.

<sup>203</sup> Will Baude, *Reminder: The United States Code is not the law*, WASH. PO. (May 15, 2017),

<https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/05/15/reminder-the-united-states-code-is-not-the-law/> [https://perma.cc/5MHP-BF32].

<sup>204</sup> 1 *Annals of Congress* 1051.

The First Congress was not alone in adopting this broad definition of “Commerce;” George Washington also viewed the national government’s power over Indians affairs to extend to “regulating an intercourse with [the Indians].”<sup>205</sup> And in his Fourth Annual Message to Congress, Washington explained that he could not “dismiss the subject of Indian affairs without again recommending to your consideration the expediency of more adequate provision for . . . restraining the commission of outrages upon the Indians; without which all pacific plans must prove nugatory.”<sup>206</sup> Recognizing the Committee of Detail’s mistake in failing to give Congress an Indian affairs power, the First Congress and George Washington recognized that “commerce” and “affairs” were synonyms and adopted the broader definition of commerce.

This broad definition of Commerce was adopted by later Congresses, who passed six consecutive Trade and Intercourse Acts—each continuing Section Five’s non-economic criminal prohibitions.<sup>207</sup> Likewise, in House debates in the decade after the founding, the phrase “commerce with the Indians” was often used synonymously with “intercourse with the Indians.”<sup>208</sup>

By the time the Supreme Court first discussed the Trade and Intercourse Acts some forty years later, this broad definition of commerce had become a tradition—and a tradition which Justice Marshall recognized in doctrine in both *Cherokee Nation v. State of Georgia*<sup>209</sup> and *Worcester v. State of Georgia*.<sup>210</sup> In *Cherokee Nation*, Justice Marshall discussed the Trade and Intercourse Acts and then affirmed the plaintiff’s contention for a federal Indian affairs power by citing the Commerce Clause:

[T]he word ‘Indian tribes’ were introduced into the article, empowering congress to regulate commerce, for the purpose of removing the doubts in which the management of Indian affairs was involved in the language of the ninth article of the confederation. Intending to give the whole power of managing those affairs to the government about to be instituted, the convention conferred it explicitly.<sup>211</sup>

Removing all doubt on the textual basis for this Indian affairs power, Justice Marshall then wrote that the Commerce Clause conferred on Congress the “power of regulating *intercourse*.”<sup>212</sup> Justice Marshall returned to this argument in *Worcester*,<sup>213</sup> where ten times he wrote of Congress’s power

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<sup>205</sup> *Letter from George Washington to Thomas Mifflin (Sept. 4, 1790)*, in 6 THE PAPERS OF GEORGE WASHINGTON 396.

<sup>206</sup> Washington’s Fourth Annual Address to Congress, Nov. 6, 1792, <https://millercenter.org/the-presidency/presidential-speeches/november-6-1792-fourth-annual-message-congress> [<https://perma.cc/326P-2WKD>].

<sup>207</sup> 1 Stat. 137 (1790); 1 Stat. 329 (1793); 1 Stat. 469 (1796); 1 Stat. 743 (1799); 2 Stat. 139 (1802); 3 Stat. 332 (1816).

<sup>208</sup> *See, e.g.*, DEBATES IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES DURING THE FIRST SESSION OF THE FOURTH CONGRESS pt. 2, 1, 254 (Bioren & Madan 1796).

<sup>209</sup> 30 U.S. 1 (1831).

<sup>210</sup> 31 U.S. 515 (1832) (Marshall, J.).

<sup>211</sup> *Cherokee Nation*, 30 U.S. at 14.

<sup>212</sup> *Id.* (emphasis added)

<sup>213</sup> *Worcester*, 31 U.S. at 515.

to “*regulate . . . intercourse.*”<sup>214</sup> These repeated assertions mirror the Article I clause giving Congress the power “to *regulate* Commerce.”<sup>215</sup> Thus, in two of the most important historical Indian law cases, Justice Marshall explicitly recognized that the Commerce Clause conferred on Congress the power to regulate *intercourse*—not merely trade or economic activity.

Natelson takes a different approach and argues that Section Five merely implemented the Treaties of Hopewell.<sup>216</sup> However, while the Treaties of Hopewell have similar commercial and criminal provisions as the Trade and Intercourse Acts, the two documents are irreconcilably different. Article Nine of the Treaties specified that “the United States . . . shall have the sole and exclusive right of regulating trade with the Indians.”<sup>217</sup> Article Nine of the Treaties corresponds to Sections One through Three of the Act. And Article Seven of the Treaties said, “If any citizen of the United States . . . shall commit a robbery or murder or other capital crime, on any Indian, such offender shall be punished . . . .”<sup>218</sup> Like Article Seven, Section Five of the Act prohibits crimes against “any Indian.”

However, unlike Article Nine of the treaties, Section Five does not limit itself to capital crimes. And Section Five prohibits crimes against *all Indians*, not merely the signatory Indian tribes.<sup>219</sup> Admitting that Section Five applies to more than merely the signatory tribes, Natelson argues that the “all Indian” language of the Treaties’ Section Nine signified a commitment by Congress to pass a criminal provision that applies to *all* tribes.<sup>220</sup>

Natelson’s interpretation is untenable. Article Nine’s “all Indians” language clearly referred to all Indians *belonging to the signatory tribe*, not all Indians whatsoever. In each of the Hopewell Treaties, the first three Articles established that the treaty was between the United States and the respective Indian tribe. Only after these Articles did the unqualified phrase “any Indian” occur, and the context of these latter Articles makes clear the limited nature of the Treaties.<sup>221</sup> For example, Article Six of the Treaty of Hopewell with the Cherokee specifies, “If any Indian . . . shall commit a robbery, or murder, or other capital crime on any citizen of the United States . . . .”<sup>222</sup> Surely, the Cherokee were not purporting to bind every Indian, whether or not part of the Cherokee, from committing a capital crime against the United States. The inverse is also true: If a New Yorker murdered an Iroquois Indian, surely the Cherokee could not claim that the United States violated the Treaty of Hopewell. And Natelson’s interpretation suffers from an even more obvious flaw: The Trade and Intercourse Act prohibits a much broader class of crimes than the Treaties of Hopewell. While similarities exist between the Treaties and the Act, it is wrong to say that the Act implemented the Treaties.

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<sup>214</sup> See, e.g., *id.* at 559 (emphasis added).

<sup>215</sup> U.S. Const. art. I, sec. 8.

<sup>216</sup> Natelson, *supra* note 7, at 251-254.

<sup>217</sup> See, e.g., Treaty of Hopewell, U.S.-Cherokees, arts. IX, Nov. 28, 1785, 7 Stat. 18.

<sup>218</sup> *Id.* at Art. 7.

<sup>219</sup> An Act to Regulate Trade and Intercourse with the Indian Tribes, Act of July 22, 1790, ch. 33, 1 Stat. 137 (1790) (expired 1793).

<sup>220</sup> Natelson, *supra* note 7.

<sup>221</sup> An Act to Regulate Trade and Intercourse with the Indian Tribes, Act of July 22, 1790, ch. 33, 1 Stat. 137 (1790) (expired 1793).

<sup>222</sup> *Id.*

Although Natelson does not suggest it, could a combination of the Treaty and Necessary and Proper Clauses justify Section Five? After all, the history of the Trade and Intercourse Acts indicates that they were passed to assist the Washington Administration in negotiating future Indian treaties.<sup>223</sup> Past efforts to build treaties had been frustrated by white settlers killing Indians.<sup>224</sup> So long as these atrocities continued, the United States would be unable to negotiate treaties. Among other things, the Trade and Intercourse Act was meant to assist Washington in treaty negotiations by putting a stop to these atrocities. Indeed, mere minutes before passing the first Trade and Intercourse Act, the President signed into law “An Act providing for holding a Treaty or Treaties to establish Peace with certain Indian tribes.”<sup>225</sup> The first Trade and Intercourse Act specified that it would be valid for a period of two years,<sup>226</sup> and as this two year period expired, Washington addressed Congress in the Fourth Annual Message to Congress.<sup>227</sup> Washington explained that he could not “dismiss the subject of Indian affairs without again recommending to your consideration the expediency of more adequate provision for . . . restraining the commission of outrages upon the Indians; without which all pacific plans must prove nugatory.”<sup>228</sup> Congress responded quickly and, on March 1, 1793, enacted the second Trade and Intercourse Act.<sup>229</sup> Notably, the Act’s criminal provisions prohibited “any citizen” from committing “any crime,” while in Indian territory, against “any *friendly* Indian.”<sup>230</sup> The Act thus ensured that Americans would not commit crimes against friendly Indians—whether or not those Indians had a treaty with the United States. Over the next several decades, Congress updated the Trade and Intercourse Acts, but the Acts’ criminal prohibitions never disappeared. Based off this history, perhaps a combination of the Treaty and the Necessary and Proper Clauses could justify Section Five. So long as crimes were committed against otherwise friendly Indian tribes, the United States would be unable to enter treaties with those tribes. Thus, restraining those crimes was necessary and proper to exercise the treaty power.

However, this necessary and proper argument suffers from two shortcomings, one theoretical and one textual. For starters, only an extraordinarily expansive conception of the necessary and proper clause could justify Section Five. Section Five never even mentions the word “treaty,” even in reference to future treaties.<sup>231</sup> Section Five thus applied even when the United States had no active treaty plans. Under this view of the necessary and proper clause, the United States has power to regulate any conduct that *might someday* interfere with a treaty negotiation, even if that conduct never actually posed a threat to a treaty negotiation—quite an expansive view

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<sup>223</sup> See *supra* Part I.

<sup>224</sup> See Prucha, *supra* note 54, at 74.

<sup>225</sup> An Act to Regulate Trade and Intercourse with the Indian Tribes, Act of July 22, 1790, ch. 32, 1 Stat. 137 (1790).

<sup>226</sup> *Id.* at 138.

<sup>227</sup> Washington’s Fourth Annual Address to Congress, Nov. 6, 1792, <https://millercenter.org/the-presidency/presidential-speeches/november-6-1792-fourth-annual-message-congress> [<https://perma.cc/326P-2WKD>].

<sup>228</sup> *Id.*

<sup>229</sup> An Act to Regulate Trade and Intercourse with the Indian Tribes, Act of Mar. 1, 1793, ch. 19, 1 Stat. 329 (1793).

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

<sup>231</sup> An Act to Regulate Trade and Intercourse with the Indian Tribes, Act of July 22, 1790, ch. 33, 1 Stat. 137 (1790) (expired 1793).

of the Necessary and Proper Clause indeed. Second, and more fundamentally, this necessary and proper theory flies in the face of the plain text of the statute, whose title expressly disclaims which power justifies the Act—the Commerce Clause.

Finally, Professor Ablavsky argues that a holistic reading of the Constitution shows that, because of a combination of the Treaty, War, Commerce, and Supremacy Clauses, the realm of Indian affairs was reserved to the federal government in a manner akin to modern day field pre-emption.<sup>232</sup> In support of this view, Ablavsky cites correspondence between members of the Washington Administration, such as Knox and Jefferson, who argued that the Constitution’s War, Treaty, Commerce, and Supremacy Clauses conferred all power over treaty negotiations on the national government.<sup>233</sup>

But Ablavsky’s view suffers from theoretic flaws. Most importantly, Ablavsky’s view divides the Indian affairs’ power into several component parts, and this division creates gaps that render the Trade and Intercourse Act unconstitutional. That Act prohibits non-economic criminal behavior in a foreign nation with whom the United States did not yet have a treaty. Thus, under an economic definition of Commerce, no clause of the Constitution can justify the Act.

History also contradicts Ablavsky’s view. In support of his argument, Ablavsky cites members of the Washington administration, such as Knox and Jefferson, who suggested that the Constitution’s War, Treaty, and Commerce powers gave the federal government exclusive power over Indian affairs.<sup>234</sup> These correspondences, however, took place while the Washington administration was in the midst of, or had just resolved, treaty negotiations.<sup>235</sup> The Washington Administration was obviously correct that the federal government had the sole prerogative to *negotiate treaties* with the Indian tribes. But Section Five’s non-economic criminal prohibition applied without a treaty—or even a planned treaty negotiation.

Perhaps tacitly recognizing this distinction, Ablavsky claims that “Congress did not state which power it exercised in enacting the [Trade and Intercourse Act].”<sup>236</sup> But this is clearly false. The very caption of the Act expressly disclaims the power which justifies it—the Commerce Clause.

The First Congress, like the Southern District of Indian Affairs before it, viewed the power to regulate Indian affairs as “indivisible,”<sup>237</sup> and “commerce” can mean “intercourse” which can mean “affairs.” The simplest way to “solve” the Indian affairs gap is to do as the First Congress did and read the word “commerce” broadly.

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<sup>232</sup> Ablavsky, *supra* note 10.

<sup>233</sup> Ablavsky, *supra* note 10, at 1041-45.

<sup>234</sup> Ablavsky, *supra* note 10, at 1041-45.

<sup>235</sup> For example, Knox’s letter to Washington concerned ongoing treaty negotiations with the Creek. *See supra* note 178 and accompanying text. Likewise, Jefferson’s letter to Knox concerned Treaty negotiations with the Hopewell tribe. *See supra* note 184 and accompanying text.

<sup>236</sup> Ablavsky, *supra* note 10, at 1043.

<sup>237</sup> 33 J. OF CON’T CONG 454 (Aug. 3, 1787).

## V. CONCLUSION AND APPLICATION TO OTHER AREAS

Far from suggesting—as Justice Thomas and several scholars have argued—that the Constitution reduced Federal power over Indian affairs,<sup>238</sup> the structure of the Constitution—as well as the history, tradition, and judicial doctrine of the early Republic—demonstrate that the Constitution strengthened and solidified federal power over Indian affairs. Towards that end, “Commerce” was interpreted broadly to mean “intercourse.” This conclusion has implications for federal Indian law as well as the Foreign and Interstate Commerce Clauses. The Court currently holds that the federal government exercises plenary authority over the Indian tribes.<sup>239</sup> While a broad definition of Commerce seems to confer an Indian affairs power on the federal government, it is unclear whether this power could justify plenary power over the purely *internal* affairs of Indian tribes, and future research should further flesh out the doctrinal implications of an Indian Intercourse power. In relation to the Foreign and Interstate Commerce Clauses, what Prakash calls “the presumption of intrasentence uniformity”<sup>240</sup> suggests that “commerce” should mean the same thing in all three Commerce Clauses. Nevertheless, Adrian Vermeule has pointed out that each of the three Commerce Clauses has a unique relationship to history and the other structures of the Constitution, and that each clause might therefore mean something different.<sup>241</sup> The same historical and structural features that argue in favor of a broad definition of the Indian Commerce Clause also argue in favor of a broad definition of the Foreign Commerce Clause, and Balkin has shown that a broad definition of Commerce provides firmer textual footing to the Court’s foreign affairs and immigration doctrines. But these historical and structural features appear at first glance to be absent from the Interstate Commerce Clause. Still, Balkin has demonstrated that a broad definition of Commerce maps well onto Interstate Commerce doctrine,<sup>242</sup> and Amar has shown how such a definition would justify federal power to regulate in a global pandemic, such as the Coronavirus.<sup>243</sup> Future research should examine the applicability of a broad definition of Congress to the Foreign and Interstate Commerce Clauses.

The Supreme Court has long endorsed the view that the federal government enjoys plenary power over the Indian tribes.<sup>244</sup> Plenary power, in the Court’s view, means both exclusive federal power over Indian affairs<sup>245</sup> and absolute authority over Indian tribes, including their internal

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<sup>238</sup>Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 229 (2007); Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1089-90 (2004) (“Therefore, the fact that the Constitution never grants Congress the power to manage Indian affairs indicates that the Constitution does not mean for Congress to have such a power.”).

<sup>239</sup> See, e.g., *U.S. v. Lara*, 541 U.S. 193, 200 (2004).

<sup>240</sup> Prakash, *supra* note 13.

<sup>241</sup> Adrian Vermeule, *Three Commerce Clauses? No Problem*, 55 ARK. L. REV. 1175 (2003).

<sup>242</sup> Balkin, *supra* note 14.

<sup>243</sup> Amar, *The Constitution Today*, *supra* note 15.

<sup>244</sup> See, e.g., *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)).

<sup>245</sup> *Id.*

affairs.<sup>246</sup> In support of this power, the Court routinely cites the Indian Commerce Clause.<sup>247</sup> But this citation is unsatisfying in light of the Court’s insistence that “commerce” refers to economic activity.<sup>248</sup>

While “intercourse” may mean “affairs,” it is not clear that the power to regulate intercourse or affairs implies plenary powers over a tribe’s internal matters. “Intercourse” implies interaction between the Indian tribes and the United States, but the plenary power doctrine includes the totally internal affairs of the Indians, at least on state land. For example, in *Kagama*—the case that established the modern plenary power doctrine—the Court held that Congress had the power to prohibit the murder of one Indian by another Indian on an Indian reservation.<sup>249</sup> The power to regulate intercourse, therefore, may be less spacious than a plenary power over Indians. And future research should investigate the extent of an intercourse power over Indian affairs.

The perhaps more interesting implication of this research lies in its application to the Foreign and Interstate Commerce Clauses. Given the “presumption of intrasentence uniformity,”<sup>250</sup> if “commerce” means “intercourse” in the Indian Commerce Clause, then it should also mean intercourse in the other two Commerce Clauses. Moreover, the same structural features underlying a broad reading of the Indian Commerce Clause apply to the Foreign Commerce Clause. In the context of Indian affairs, the Constitution sought to solidify America’s geostrategic position by strengthening the federal government’s power. And this geostrategic strengthening is visible in the structure formed by the War, Treaty, and Commerce powers, amongst others. This same geostrategic reasoning applies to foreign affairs. Just as “commerce” should be interpreted broadly to better effectuate the Constitution’s structural geopolitical purpose in Indian affairs, so too should it be read broadly to effectuate that structural purpose in foreign affairs. Moreover, Professor Balkin has demonstrated that a broad definition of the Foreign Commerce Clause provides an analytically satisfying explanation for the power to regulate Immigration and Foreign Affairs.<sup>251</sup> Future research could further investigate the validity of a broad definition of Commerce to the Foreign Commerce Clause and apply this research to the Court’s Foreign Affairs doctrine.

Perhaps the most interesting question is whether this broad definition of Commerce applies equally to the Interstate Commerce Clause. As Professor Balkin has shown, a broad reading of Commerce in the Interstate Commerce Clause maps well onto current Commerce Clause doctrine.<sup>252</sup> Further, since an Interstate Intercourse Power would cover any problem that flows over state lines, that power would justify federal authority to legislate in cases of a pandemic—such as the Coronavirus.<sup>253</sup>

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<sup>246</sup> See, e.g., *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 290-91 (1955); *Lara*, 541 U.S. at 200; *U.S. v. Kagama*, 118 U.S. 375 (1886).

<sup>247</sup> See citations in note 221.

<sup>248</sup> See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>249</sup> 118 U.S. 375 (1886).

<sup>250</sup> Prakash, *Our Three Commerce*, *supra* note 13.

<sup>251</sup> See Balkin, *supra* note 8, at 26-30.

<sup>252</sup> Balkin, *supra* note 8.

<sup>253</sup> Amar, *The Constitution Today*, *supra* note 8.

There are several reasons to adopt this broad definition of Commerce for the Interstate Commerce Clause. First, Prakash is correct that it is natural to read one word as meaning the same thing throughout a single sentence.<sup>254</sup> Second, as Professor Balkin has argued, a broad reading of Commerce in the Interstate Commerce Clause accords with the structural mandate given to the Committee of Detail “to legislate in all cases to which the separate States are incompetent . . . .”<sup>255</sup> Finally, a broad definition of Commerce provides a more analytically satisfying explanation of current Commerce Clause doctrine.<sup>256</sup>

On the other hand, many of the historical and structural features supporting a broad reading of the Indian Commerce Clause appear lacking in the Interstate Commerce Clause. It is not immediately clear that regulating interstate intercourse was a problem under the Articles of Confederation that the founders sought to remedy. The Interstate Commerce Clause also lacks the structural support that the Foreign and Indian Commerce Clauses find in the War and Treaty Clauses. Unlike Foreign Nations and Indian Tribes, other states are recognized in the Constitution as distinct American sovereignties; federalism may argue for a narrower reading of the Interstate Commerce Clause. Further, originalist research has established that both the general public and internal government documents normally used interstate “commerce” in its narrow economic sense.<sup>257</sup> And the great majority of Interstate Commerce Clause cases in the first century after the founding concerned either state or federal economic regulations<sup>258</sup>—although this doctrine may be merely a function of the Courts institutional limitation in deciding cases or controversies. Finally, the Constitution may be precisely the type of text where the presumption of intrasentence uniformity does not apply. As Adrian Vermeule has noted, the Commerce Clause is in fact three clauses, each with its own unique history and relationship to the other provisions of the Constitution.<sup>259</sup> This Note supports Vermeule’s points, and it is entirely possible that Commerce may have a different definition in each. Future research can expand on these arguments and map a broad definition of Commerce onto current doctrine.

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<sup>254</sup> Prakash, *Our Three Commerce*, *supra* note 6.

<sup>255</sup> Balkin, *supra* note 8.

<sup>256</sup> *Id.*

<sup>257</sup> Robert G. Natelson, *The Legal Meaning of “Commerce” in the Commerce Clause*, 80 ST. JOHN’S L. REV. 789 (2006).

<sup>258</sup> See, e.g., *Brown v. State of Maryland*, 12 Wheat. 419 (1827) (imported goods subject to state tax); *Thurlow v. Com. Of Mass.*, 46 U.S. 504 (1847) (state laws requiring business licenses); *Smith v. Turner*, 48 U.S. 283 (1849) (New York regulation of vessels entering New York); *Veazie v. Moor*, 55 U.S. 568 (1852) (congressional act regulating the ‘coasting trade’); *The License Tax Cases*, 72 U.S. 462 (1866) (congressional act requiring licenses for vendors of lottery tickets); *Southern S. S. Co. of New Orleans v. Portwardens*, 73 U.S. 31 (1867) (Louisiana law charging fees for every vessel arriving in port); *Ward v. State*, 79 U.S. 418 (1870) (Maryland law regulating in-state and out-of-state traders); *Welton v. State of Missouri*, 91 U.S. 275 (1875) (Missouri law requiring licenses for out-of-state traders); *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U.S. 1 (1877) (congressional act prohibiting states from excluding or discriminating against out-of-state telegraphic companies).

<sup>259</sup> Vermeule, *supra* note 241.