

RECOGNITION, CONSTITUTION BUILDING AND THE INDIAN NATIONS OF NORTH AND NORTHWEST UNITED STATES 1775-1795: THE IMPORTANCE OF INDIAN NATIONS TO THE FRAMING OF THE US CONSTITUTION

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INTRODUCTION

In the words of the Declaration of Independence, Native American Indian peoples in the eighteenth century were viewed as “merciless . . . Savages, whose known Rule of Warfare, is an undistinguished Destruction of all Ages, Sexes and Conditions.”¹ This perception led one visitor to Pennsylvania in the 1780s to comment that “[t]he Country taulks of Nothing but killing Indians, & taking possession of their lands.”² The acquisition of land was of vital importance to the Union,³ in order to accommodate the growing population of the Union and to, through the proceeds of the sale of lands acquired, sustain the increasing financial requirements of the Union.⁴ As a result, one would be forgiven for expecting that the issue of Indian affairs was in the forefront of the Framers’ minds both in the lead-up to, and during, the Philadelphia Convention in 1787.

Notwithstanding the preoccupation with the Indian peoples in

¹ THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776).

² PETER RHOADS SILVER, *OUR SAVAGE NEIGHBORS: HOW INDIAN WAR TRANSFORMED EARLY AMERICA* 276 (2008); PATRICK GRIFFIN, *AMERICAN LEVIATHAN: EMPIRE, NATION, AND REVOLUTIONARY FRONTIER* 241–44 (2007) (stating that “one idea that ran through all emerging facets of a popular frontier commonwealth vision and lent them all meaning was the hatred of Indians. . . . If government failed to protect and, just as significant, failed to decimate Indians—the form that people insisted sovereignty had to take—the people owed no obedience.”).

³ FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS, THE INDIAN TRADE AND INTERCOURSE ACTS 1790-1834* 139 (1962) [hereinafter, PRUCHA, *AMERICAN INDIAN POLICY*].

⁴ Reginald Horsman, *American Indian Policy in the Old Northwest, 1783-1812*, 18(1) *WM. & M. Q.* 35, 36 (1961) [hereinafter, Horsman, in *WM. & M. Q.*].

the borderlands, the issue of Indian affairs⁵ was discussed little during the Philadelphia Convention.⁶ The Constitution which resulted mentions Indian peoples only twice.⁷ It was “as if the presence of Indians on the frontiers had slipped the minds of the Founding Fathers and provisions made for carrying on relations with the” Indian peoples were but an afterthought.⁸ Perhaps unsurprisingly therefore, historical accounts of the Constitution have largely omitted a discussion of the relevance of Indian affairs to its framing.⁹

The conventional account of the Framing, as it relates to domestic matters, largely focuses on the import of James Madison and his discussion in *Federalist 10* of a schema of proper, restrained federal government.¹⁰ The conventional account supposes that international forces,¹¹ such as relations with Indian peoples,¹² were a catalyst for calling the Philadelphia Convention. And, it was there that the influence of international forces ended. The conventional account then turns to focus on the Framers’ concern with building a powerful “fiscal–military state.”¹³ As a

⁵ I adopt the definition of this term in Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L. J. 999, 1004 (2014) [hereinafter, Ablavsky, *Savage Constitution*] (treaty-making, land title, trade and war and peace between the Union and the several Indian tribes).

⁶ See MAX FARRAND (ed.), 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, rev. ed., 99 (1937) (Benjamin Franklin) [hereinafter, FARRAND]; *Id.* at 107 (Pierce Butler); *Id.* at 297 (Alexander Hamilton); *Id.* at 326 (James Madison); *Id.* at 448 (James Madison); *Id.* at 326 (James Madison); 3 FARRAND 208 (Luther Martin).

⁷ See U.S. CONST. art. I, § 2; *id.* at § 8, cl. 3.

⁸ PRUCHA, AMERICAN INDIAN POLICY, *supra* note 3, at 41.

⁹ See Ablavsky, *The Savage Constitution*, *supra* note 5, at 1007 n.8 (2014) (for an overview of numerous histories of the Constitution which omit the discussion of Indian affairs).

¹⁰ David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 934 (2010) (summarizing that “[a]ccording to the conventional account, the purpose of the Constitution was to establish a republican frame of government that would safeguard the American people from domestic tyranny, promote respect for individual rights, and avoid encroachments on the autonomy of the states. In short, the framers created the Constitution for internal purposes, and its intended audience was the American people.”).

¹¹ *Id.* at 935.

¹² See FARRAND, *supra* note 6, at 326 (recording a speech by James Madison: “What is the object of a confederation? It is two-fold – 1st, to maintain the union; 2dly, good government. Will the Jersey plan secure these points? No; it is still in the power of the confederated states to violate treaties – Has not Georgia, in direct violation of the confederation made war with the Indians, and concluded treaties? Have not Virginia and Maryland entered into a partial compact?”).

¹³ See MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE (2003); *see also*,

result of the import of the issue of Indian affairs at the time of the Framing, core constitutional understandings may be fundamentally altered if the history of relations with the Indian nations was accounted for in narratives of the Framing.

Two recent accounts have confronted the disconnect between the impact of the issue of Indian affairs from its historical import at the time of the Framing. The first account, by Leonard Sadosky, argues that the Constitution that resulted from the Philadelphia Convention provided for a “stronger Union that could allow American diplomats to effect meaningful and desirable outcomes” both with regard to European and Indian nations.¹⁴ As a result, Sadosky argues, the strengthened Union was in a stronger negotiating position and could establish a new set of norms in order to guide its dealings with the Indian peoples in the Northwest, divorced from the baggage of the British colonial approach.¹⁵

In that way, Sadosky’s account also forms a part of yet another recent development in the discourse surrounding the historic interpretation of the Constitution. This development advances an account which analyses the import of the influence of international forces to the Framing of the Constitution. In doing so, it views the Constitution as an international document, a document that allowed the United States to gain entry into the North Atlantic “civilized” world.¹⁶

The fundamental requirement for any new nation-state to obtain entry into that world was recognition “in the practical and legal sense, as a ‘civilized state’ worthy of equal respect in the international community.”¹⁷ While the Declaration of Independence, and the use of other international instruments such as treaties,¹⁸ had taken the Union some way toward achieving *de*

John Brewer, *THE SINEWS OF POWER: WAR, MONEY AND THE ENGLISH STATE, 1688–1783* (1989) (discussing British fiscal-military model); CHRISTOPHER STORRS, (ed.), *THE FISCAL-MILITARY STATE IN EIGHTEENTH-CENTURY EUROPE: ESSAYS IN HONOUR OF P.G.M. DICKSON* (2009) (discussing fiscal-military state as pan-European eighteenth-century phenomenon); Ablavsky, *Savage Constitution*, *supra* note 5.

¹⁴ LEONARD J. SADOSKY, *REVOLUTIONARY NEGOTIATIONS: INDIANS, EMPIRES, AND DIPLOMATS IN THE FOUNDING OF AMERICA* 121, 149 (2009). *See also* ELIGA H. GOULD, *AMONG THE POWERS OF THE EARTH: THE AMERICAN REVOLUTION AND THE MAKING OF A NEW WORLD EMPIRE* (2012).

¹⁵ *Id.* at 121.

¹⁶ *Id.* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 *YALE L. J.* 1012, 1067 (2015) [hereinafter, Ablavsky, *Beyond the Indian Commerce Clause*].

¹⁷ Golove & Hulsebosch, *supra* note 10, at 935.

¹⁸ SADOSKY, *supra* note 14, at 72.

jure recognition, the question of *de facto* recognition remained unresolved.¹⁹ The main impediment to *de facto* recognition, this international focused account tells us, lay with the short sightedness of local interests²⁰ arising “out of the dynamics of republican government.”²¹ In order to achieve *de facto* recognition responsibility for ensuring compliance with treaties and the law of nations had to be insulated from the whims of local interests.²² One way to insulate in that way was to place foreign (and Indian affairs) firmly in the hands of the federal government.

Sadosky’s account adds to the international focused discourse by clarifying that the international influence was born of the Union’s interaction with *all* nations – in both the Old World and the New.²³

The second account, by Gregory Ablavsky, re-asserts that the Framers’ aim, as seen by the comments and actions of various of the Framers between 1776 and ratification, was to build a “powerful centralized state.”²⁴ Ablavsky argues that Indian affairs was directly in the crosshairs of the founding generation, in that one justification of the need for a “powerful centralized state” was to enable the Union to “conquer and dispossess” both the Indian nations and their peoples.²⁵ Thus, the Constitution that resulted was “committed in part to the violent expropriation of the western borderlands.”²⁶ In developing that claim, Ablavsky argues that there were two, non-mutually exclusive,²⁷ “approaches” to Indian affairs taken by the Framers. And, these “approaches” ultimately

¹⁹ Golove & Hulsebosch, *supra* note 10, at 936; SADOSKY, *supra* note 14, at 3–4, 120–21; Anthony J. Bellia Jr. and Bradford R. Clark, *The Law of Nations As Constitutional Law*, 98(4) VA. L. REV. 729, 753 (2012).

²⁰ Golove & Hulsebosch, *supra* note 10, at 936. *See also*, THE FEDERALIST No. 10, (James Madison) (Jacob E. Cooke ed., 1961).

²¹ Golove & Hulsebosch, *supra* note 10, at 939.

²² *Id.*

²³ SADOSKY, *supra* note 14, at 3.

²⁴ Ablavsky, *Savage Constitution*, *supra* note 5, at 1006. *See also* Ablavsky, *Beyond the Indian Commerce Clause*, *supra* note 16, at 1018–19 (arguing that a proper understanding of the Federal Government’s power over Indian peoples can be achieved through a historic analysis with particular reference to the way in which the Washington Administration interpreted the Constitution with respect to its power over Indian peoples).

²⁵ *See* Ablavsky, *Savage Constitution*, at 1082 (arguing that the Constitution did not set about to restrain government, rather the framers consciously created a powerful nation state crafted to deal with “a world marked by a seemingly perpetual crisis of authority on the frontier.”).

²⁶ *Id.* at 1008.

²⁷ *Id.* at 1007 n.23 (stating “although the two views diverged, they were not mutually exclusive; Madison and Hamilton, as well as many other nationalists, embraced elements of both perspectives at various points.”).

led to a “savage” constitution and the “history of national violence against Indians that followed ratification.”²⁸ The first, the “Madisonian” approach, was “paternalist[ic]: it envisioned a strengthened federal government that would protect and restrain Indians and states alike.”²⁹ The second, the “Hamiltonian” approach, was a “militarist constitutional solution to Indian affairs [which] sought a fiscal-military state that would possess the means to dominate the borderlands at the Indians’ expense.”³⁰

This article argues that both accounts have missed an important nuance inherent in the founding generation’s quest for recognition.³¹ While the Sadosky account is correct, in so far as it recognizes that the foundation for the Constitution was recognition, direct efficacy in diplomatic outcomes is only half of the story. As for the Ablavsky account, this article agrees that the issue of Indian affairs was front-and-center in the minds of the founding generation and that there were humanitarian and more forceful aspects to the vision for Indian affairs. However, the account over generalizes and misses the subtleties that are visible from in a detailed analysis of the contemporaneous material as to how the “Madisonian” and “Hamiltonian” “approaches” played out both before and immediately after ratification.³²

Indian affairs and recognition had an important symbiotic relationship for the Union. Recognition and entry into the “civilized” world would have two important consequences for Indian affairs.³³ First, recognition from the Indian nations would enable the Union to treat with them in order for it to acquire Indian land. Second, recognition by other “civilized” nations, in particular Britain, France and Spain, would stop them from interfering in the Union’s relationship with the Indian nations. Thus, recognition would mean success in the acquisition of Indian land.

²⁸ *Id.* at 1007–08.

²⁹ *Id.* at 1007.

³⁰ *Id.*

³¹ See Golove & Hulsebosch, *supra* note 10, at 955–59.

³² See Ablavsky, *Savage Constitution supra* note 5, at 1008; Golove & Hulsebosch, *supra* note 10 (treating the first and second Washington administrations as part of an “extended Founding”).

³³ See Golove & Hulsebosch, *supra* note 10 (for a discussion of the importance of recognition more generally); Ablavsky, *Beyond the Indian Commerce Clause, supra* note 16, at 1018–19 (for a more detailed contemporary analysis by the same author of how the Washington Administrations interpreted the Federal Government’s role vis-à-vis Indian peoples. Nor does it discuss either a Madisonian or Hamiltonian approach to Indian affairs.).

Importantly, the successful acquisition of land also meant recognition itself. So, too, would the proper conduct of the Union in its dealings with the Indian nations. As a result, the Union had to utilize its rights as a nation-state while adhering to its obligations under the law of nations in dealing with the Indian nations. Thus, recognition had a duality of tension: it led not only to a pragmatic, success oriented objective but also a legalistic and humanitarian one. In contrast to both Sadosky and Ablavsky's accounts,³⁴ which focus on a rupture in the vision of Union-Indian policy between 1775 and 1795,³⁵ this article argues that the same objectives guided the form of government vis-à-vis Indian affairs between 1775 and 1795. In other words the tensions that resulted from the founding generation's desire for recognition would shape not only the executive's direction of Indian affairs in the North and Northwest³⁶ between 1775 and 1795, through the formation of treaties,³⁷ but also the very Framing of the Constitution at the Philadelphia Convention. Seen in that light, the proper handling of Indian affairs was of vital importance to the new nation and the Constitution was not intended to provide a savage, militaristic response to Indian affairs at all.³⁸

As Part II discusses, the Union began balancing the two tensions (acquisition of land and humanitarian motivations) prior to the Philadelphia Convention. This Part shows an approach that initially saw the Indian peoples as potential ally that, after many of the Six Nations went to war against the Union on the side of the British, turned to perpetual foe. It then maps the post-Revolution approach to Indian affairs, an approach that took a strict legalistic attitude toward the Indian nations, which relied on the Union's rights under the law of nations. While, initially, the Union

³⁴ See Sadosky, *supra* note 14; Ablavsky, *Savage Constitution*, *supra* note 5, at 1007–08.

³⁵ These dates are significant for the North, being between the consideration of the Articles of Confederation at the start, and the signing of the Treaty of Greenville in 1795, which marked the end of the first major Indian war in the North West. See Ablavsky, *Beyond the Indian Commerce Clause*, *supra* note 16, at 1073.

³⁶ While much could be said, and has been said, of relations with the several Indian nations of the South, these have been omitted given the limited scope of this paper. See Ablavsky, *Savage Constitution*, *supra* note 5, at 1009.

³⁷ As Part III shows, notwithstanding that art. I, § 8, cl 3 empowers Congress to deal with "Commerce with the Indian Tribes," the Washington administration primarily took the lead in determining Indian-Union relations through the treaty power. See, Ablavsky, *Savage Constitution*, *supra* note 5, at 1043–44.

³⁸ Cf. Ablavsky, *Savage Constitution*, *supra* note 5 (which ends its analysis at ratification of the Constitution).

asserted its claim to land under the law of nations doctrine of conquest, when that stance was unsuccessful in obtaining the westward expansion that the Union sought, it was abandoned and the Union adopted a less forceful posture.

Part III discusses how the issue of Indian affairs was received at the Philadelphia Convention through to 1795.³⁹ It argues that the Articles of Confederation, and their experiment at preserving “state-level agency” in so far as they dealt with Indian affairs,⁴⁰ embarrassed “the ‘*sole and exclusive*’ right of the national government in Indian affairs” to achieve its vision.⁴¹ As a result, rather than being a reflection of the unimportance of Indian affairs, the relative brief consideration of the powers of the federal government with regard to Indian affairs is readily understandable – all were agreed that Indian affairs had to be conducted by the federal government, particularly given the maturation of policy toward Indian affairs. The maturation of the policy toward Indian affairs of this period was primarily motivated by an increased concern with the Union’s perception both at home and abroad. Maturation ends, however, when the need for recognition arising out of success overcomes its humanitarian adherence to the law of nations.

I. PRE-CONVENTION

A. Preemption

The foundation for the Union’s (and the Crown’s, before it) right to Indian land arises out of the law of nations doctrine of preemption. In short, preemption was a principle developed by European nations – a “*Jus gentium* for America” – as a way of defining a European sovereign’s right to land inhabited by indigenous peoples.⁴² The doctrine held that while a European

³⁹ In doing so, it adopts a longer temporal perspective to the Framing of the Constitution as adopted in *e.g.* MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE*, 1, 3–4 (2004); DANIEL HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830*, 207–08 (2005); ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM*, 1–2 (2010); Golove & Hulsebosch, *supra* note 10, at 955–59.

⁴⁰ SADOSKY, *supra* note 14, at 87.

⁴¹ Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 *ARIZ. ST. L. J.* 113, 128 (2002).

⁴² H.A. WASHINGTON, *THE WRITINGS OF THOMAS JEFFERSON: BEING HIS AUTOBIOGRAPHY, CORRESPONDENCE, REPORTS, MESSAGES, ADDRESSES, AND OTHER*

sovereign could demarcate land in the Americas as its own, which would make any invasion of it by another European sovereign an act of war, it did not give any “right of soil against the native possessors.”⁴³

In that way, it was a “Species of Sovereignty which the United States claim over the Indians within their boundaries in exclusion of every other Sovereign.”⁴⁴ Importantly, it was not sovereignty in the sense that Indian nations were co-equal nations to the Union.⁴⁵ The European sovereign obtained the exclusive right to purchase the land from the Indigenous peoples, or could extinguish the ‘native possessors’ rights through a just war, by way of conquest.⁴⁶

The right also carried with it an important duty:⁴⁷ the duty to protect the Indigenous peoples both as against the advances of other European sovereigns, but also against one’s own citizens.⁴⁸ The indigenous peoples in North America, therefore, had a form of sovereignty, albeit not a form equivalent to that of the Union or European nations.⁴⁹

B. Nation Forming

WRITINGS, OFFICIAL AND PRIVATE 425, 429 (1972). See *Johnson v. M’Intosh*, 21 U.S. 543, 574–75 (1823). See, e.g., S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 1, 20–23 (2d ed. 2004) (describing Vattel’s implications for indigenous peoples). □

⁴³ See WASHINGTON, *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 42, at 429.

⁴⁴ *Letter from Secretary of War Timothy Pickering to Governor Blount* (Mar. 23, 1795), 4 *TERRITORIAL PAPERS OF THE UNITED STATES* 386, 387 (Clarence Edward Carter ed., 1934).

⁴⁵ Ablavsky, *Beyond the Indian Commerce Clause*, *supra* note 16, at 1064 (describing this concept of sovereignty as ‘shared sovereignty’).

⁴⁶ *Letter from Secretary of War Timothy Pickering to Governor Blount*, *supra* note 44, at 148–49.

⁴⁷ That is, of course, to say nothing of whether the duty was welcomed, or required, by the Indian nations themselves. See ALAN TAYLOR, *THE DIVIDED GROUND: INDIANS, SETTLERS AND THE NORTHERN BORDERLAND OF THE AMERICAN REVOLUTION* 404 (2006) (arguing that preemption should not be seen as “anything more than a partisan fiction asserted to dispossess native people”); *Letter from Gen. Council of Indian Nations to the Comm’rs of the United States* (Aug. 16, 1793), in 1 *AMERICAN STATE PAPERS: INDIAN AFFAIRS* 356 (Walter Lowrie and Matthew St. Clair Clarke, eds., 1832) (for an example of one Indian nation’s views on the purported altruistic side of the doctrine of preemption). □

⁴⁸ See *Letter from Secretary of War Timothy Pickering to Governor Blount*, *supra* note 44, at 148–49 (stating that the terms “peace” and “protection” are descriptive of the “Species of Sovereignty which the United States claim over the Indians within their boundaries in exclusion of every other Sovereign”).

⁴⁹ Ablavsky, *Beyond the Indian Commerce Clause*, *supra* note 16, at 1064.

Throughout 1775 and 1776, the Continental Congress sought to replicate the British form of management of Indian peoples by respecting the limits and obligations of the doctrine of preemption through the creation of Indian Departments and Commissioners.⁵⁰ Those departments were charged with maintaining ‘cordial relations’ with the Indian peoples within their department,⁵¹ and took the front foot in regulating the relationship between Indian peoples and the colonists in North America.⁵²

Following the outbreak of armed conflict in 1775, the Second Continental Congress was beset with the issue of “the Canadians and the Indians.”⁵³ The focus then turned to regularizing the relationship between the former colonies under a formal union. Both Benjamin Franklin’s (read before Congress on July 21, 1775)⁵⁴ and John Dickinson’s (presented to Congress on July 12, 1776)⁵⁵ draft Articles of Confederation attempted to codify the British form of management of Indian affairs.⁵⁶ Importantly, both provided for an offensive and defensive alliance with the Six Nations,⁵⁷ and the preservation and protection of the sovereignty of Indian nations over their lands.⁵⁸

The landscape soon changed after the Iroquois broke their treaty

⁵⁰ SADOSKY, *supra* note 14, at 85; WORTHINGTON CHAUNCEY FORD (ed.), 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, 174-77 (1904) [hereinafter, JCC].

⁵¹ SADOSKY, *supra* note 14, at 73.

⁵² *Id.* at 75.

⁵³ *Letter from John Adams to James Warren* (June 7, 1775), in 3 PAPERS OF JOHN ADAMS 17 (C. James Taylor ed., 2008) (stating that “[w]e have been puzzled to discover, what we ought to do, with the Canadians and Indians. Several Persons, have been before the Congress who have lately been in the Province of Canada, particularly Mr. Brown and Mr. Price, who have informed us that the French are not unfriendly to us. And by all that we can learn of the Indians, they intend to be neutral. . . . The Nations of Indians inhabiting the Frontiers of the Colonies, are numerous and warlike. They seem disposed to Neutrality. . . . The Indians are known to conduct their Wars, So entirely without Faith and Humanity, that it would bring eternal Infamy on the Ministry throughout all Europe, if they should excite these Savages to War. . . . To let loose these blood Hounds to scalp Men, and to butcher Women and Children is horrid. Still it [is] Such Kind of Humanity and Policy as we have experienced, from the Ministry.”).

⁵⁴ Franklin, *Proposed Articles of Confederation* (July 21, 1775) in 22 THE PAPERS OF BENJAMIN FRANKLIN 122-23 (William B. Willcox ed., 1982).

⁵⁵ THE AVALON PROJECT, JOURNALS OF THE CONTINENTAL CONGRESS - ARTICLES OF CONFEDERATION AND PERPETUAL UNION; JULY 12, 1776.

⁵⁶ SADOSKY, *supra* note 14 at 88.

⁵⁷ THE AVALON PROJECT, *supra* note 55 (Dickinson’s provided for an alliance with all Indian nations).

⁵⁸ Franklin, *supra* note 54, at 124, art. XI; JOURNALS OF THE CONTINENTAL CONGRESS - ARTICLES OF CONFEDERATION AND PERPETUAL UNION.

with Congress to remain neutral in the Revolution.⁵⁹ Despite Franklin and Dickinson's best efforts to codify the British form of management, the desire to preserve state sovereignty overcame those efforts.⁶⁰ What resulted were the Articles of Confederation, which specifically dealt with Indian peoples in two ways. First, art. VI provided that "[n]o State shall engage in any war without the consent of the United States."⁶¹ Second, art. IX provided that Congress was to have the "sole and exclusive right and power" of "regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated"⁶².

While there was some dissent from states, such as South Carolina who wanted to administer her own Indian policy, there was little discussion of Indian affairs in the debates in which the Articles were considered.⁶³ That there was little discussion of Indian affairs reflects the general understanding that the states, individually, dealing with the Indian nations would be unproductive. That was in no small part because the Indian nations "refused to recognize any superior authority, and only the United States in Congress assembled could hope to deal with them effectively."⁶⁴ Notwithstanding that general understanding, compromise had to be made around the fringes. The final form of the Articles clearly left some agency with the individual states to manage some forms of Indian affairs.⁶⁵

C. Post-Revolution

The Revolution ended with the Treaty of Paris, in which the Union's sovereignty was confirmed. Despite the Treaty's significance, it contains no mention of the Indian nations or peoples. Importantly for future Indian-Union relations, it

⁵⁹ Bernard W. Sheehan, *The Indian Problem in the Northwest: From Conquest to Philanthropy*, in LAUNCHING THE "EXTENDED REPUBLIC": THE FEDERALIST ERA 191, 191 (Ronald Hoffman and Peter J. Albert eds., 1996).

⁶⁰ SADOSKY, *supra* note 14 at 88.

⁶¹ ARTICLES OF CONFEDERATION OF 1781, art. VI.

⁶² *Id.* at art. IX.

⁶³ FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 38 (1994) [hereinafter, PRUCHA, AMERICAN INDIAN TREATIES].

⁶⁴ *Id.*

⁶⁵ *Id.*; SADOSKY, *supra* note 14, at 85; Ablavsky, *Savage Constitution*, *supra* note 5, at 1012. See *infra* notes 145–46 and associated text.

purported to relinquish the Crown's claim to any territory within the United States,⁶⁶ west to the Mississippi river.⁶⁷ At that time, the states owned little land west of the Appalachians.⁶⁸ The lands were, for the most part, occupied by Indian nations,⁶⁹ many of whom either had been, or still were, at war against the United States.⁷⁰ Perhaps disingenuously, the British later assured their Indian allies that all that the Crown had ceded to the Union was the right of preemption.⁷¹

Notwithstanding the failure to codify the British form of management of Indian affairs in the Articles of Confederation, following the Crown's relinquishment of its claim to territory in the United States the Union maintained the British approach, for the time being. As a result, the Union continued to rely on its rights under the law of nations doctrine of preemption,⁷² albeit with a slightly different tone.⁷³ That different tone was reflected in the emergence of two forms of Union-Indian diplomacy, which continued through to the time of the first Washington Administration. The first form involved a reliance on claims of conquest. What that meant was that the Union could assert that it had extinguished the Indian peoples' title to the relevant land. But, somewhat paradoxically, the Union did not exercise that right over all of Indian lands.⁷⁴ Following a lack of success with the first,

⁶⁶ TREATY OF PARIS, art. 1, U.S.-U.K., Sept. 3, 1783, 8 Stat. 80, 81–82.

⁶⁷ *Id.* at art. 2.

⁶⁸ REGINALD HORSMAN, EXPANSION AND AMERICAN INDIAN POLICY, 1783-1812, 4–15 (1967).

⁶⁹ See James H. Merrell, *Declarations of Independence: Indian-White Relations in the New Nation*, in THE AMERICAN REVOLUTION: ITS CHARACTER AND LIMITS 197, 201 (Jack P. Green ed., 1987) (approximately 150,000 Indians lived in the Trans-Appalachian West in 1783). See also GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815 123 (2009) (for an estimate of 100,000 Indians living in the Trans-Appalachian West); SUSAN B. CARTER et al. (eds.), 1 HISTORICAL STATISTICS OF THE UNITED STATES: EARLIEST TIMES TO THE PRESENT (2006) (stating that by the time of the 1790 census, the population of the Union was almost four million).

⁷⁰ COLIN G. CALLOWAY, THE AMERICAN REVOLUTION IN INDIAN COUNTRY: CRISIS AND DIVERSITY IN NATIVE AMERICAN COMMUNITIES 275–91 (1995).

⁷¹ COLIN G. CALLOWAY (ed.) 18 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES & LAWS, 1607-1789, 279 (1994) [hereinafter, 18 EARLY AMERICAN INDIAN DOCUMENTS].

⁷² Cf. SADOSKY, *supra* note 14, at 120–21; SADOSKY, *id.* at 130 (stating the Committee on Indian Affairs “prefigured the policies of ‘benevolence’ and ‘civilization’ that would gain currency in the 1790s.”).

⁷³ Cf. PRUCHA, AMERICAN INDIAN POLICY, *supra* note 3, at 142 (stating that America had inherited “an established procedure in Indian relations and in the acquiring of Indian lands.”).

⁷⁴ Cf. Matthew L. M. Fletcher, *Preconstitutional Federal Power*, 82 TULANE L.

a second form emerged: a continued assertion of conquest but an acceptance, on the part of the Union, that it should pay for any land over which conquest was asserted.⁷⁵

The genesis of the Union's Indian affairs policy between 1783 and 1787 can be found in the report of the Committee of Indian Affairs, led by James Duane.⁷⁶ The report was largely influenced by the views of George Washington and General Philip Schuyler (who was an Indian Commissioner), who both wrote a number of letters to Duane.⁷⁷ Schuyler advised that a war would be ill advised as it would not likely succeed in the long term.⁷⁸ A better policy, in his view, was to take the land necessary for present purposes, "[f]or, as our settlements approach their country, they must from the scarcity of game . . . retire farther back . . . and thus leave us the country without the expence of a purchase."⁷⁹ Washington agreed with Schuyler's approach and added that the interests of effective westward expansion lay in peace with the Indian nations, not in further conflict.⁸⁰ Therefore, "the settlem[en]t of the Western Country and making a Peace with the Indians are so analogous that there can be no definition of the one without involving considerations of the other."⁸¹

The context of Duane's report was clear: land was a necessity "because the faith of the United States stands pledged to grant

REV. 509, 555–60 (2007) (arguing that the federal officials demanded that Indian peoples "acknowledge the United States to be the sole and absolute sovereigns of all the territory ceded to them by a treaty of peace, made between them and the King of Great Britain.").

⁷⁵ Ablavsky, *Beyond the Indian Commerce Clause*, *supra* note 16, at 1057–58 (arguing that "[b]y the summer of 1787 the disasters of Indian policy under the Articles of Confederation led Congress to abandon its assertions of conquest").

⁷⁶ *Report of the Committee on Indian Affairs*, (15 Oct. 1783) in 25 JCC *supra* note 50, at 681–83.

⁷⁷ 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 71, at 278, 279; Reginald Horsman, *American Indian Policy in the Old Northwest, 1783-1812*, in THE AMERICAN INDIAN: PAST AND PRESENT 137, 139 (Roger L. Nicholas ed., 1986).

⁷⁸ Reginald Horsman, *American Indian Policy in the Old Northwest, 1783-1812*, in THE AMERICAN INDIAN: PAST AND PRESENT 37, 39 (Roger L. Nicholas ed., 1986) [hereinafter, Horsman in THE AMERICAN INDIAN].

⁷⁹ *Id.*

⁸⁰ *Letter from George Washington to James Duane* (Sept. 7, 1783), in 10 THE WRITINGS OF GEORGE WASHINGTON 303, 306 (Worthington Chauncey Ford ed., 1890) (writing "[T]he settlem[en]t of the Western Country and making a Peace with the Indians are so analogous that there can be no definition of the one without involving considerations of the other. . . . [T]he gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey tho' they differ in shape.").

⁸¹ *Id.*

portions of the uncultivated lands as a bounty to their army, . . . and the public finances do not admit of any considerable expenditure to extinguish Indian claims upon such lands.”⁸² The report firmly advised that the basis on which the Union had any right to land occupied by Indian peoples, under the law of nations, was conquest, a basis that “the Indians themselves [cannot] have any reasonable objections against.”⁸³ But, stepping down from brinkmanship and deferring to pragmatism in the face of right, the report advised that “if they should appear dissatisfied at the lines which it may be found necessary to establish, rather to give them some compensation for their claims than to hazard a war.”⁸⁴ For, it was generally accepted that the expense of land would likely be “trifling” in comparison to the cost of war.⁸⁵

In October 1783, the Continental Congress appointed Arthur Lee, Richard Butler and Oliver Wolcott as its first Indian Commissioners.⁸⁶ They were to negotiate a treaty with the Six Nations in the North and the Indian nations in the Northwest that had taken up arms against the Union in the Revolution. The Committee resolved that the Indians were to be informed that Britain had “relinquished to the United States all claim to the country.”⁸⁷ Further, referencing the fact that the Six Nations had breached their earlier treaty with the Union as to neutrality, the Committee resolved that:

[A] less generous people than Americans . . . [might compel the Indians] to retire . . . beyond the Lakes;⁸⁸
But as we prefer clemency to rigor, . . . as the country is large enough to contain and support us all, and as we are disposed to be kind to them, to supply their wants, and to partake of their trade;

⁸² *Report of the Committee on Indian Affairs*, (15 Oct. 1783) in 25 JCC *supra* note 50, at 681–83.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Horsman in *THE AMERICAN INDIAN*, *supra* note 78, at 139.

⁸⁶ *Report of the Committee on Indian Affairs*, (15 Oct. 1783) in 25 JCC *supra* note 50, at 681–83.

⁸⁷ *Id.* Initially the Committee had written that Britain had “ceded all the lands.” But this was struck out.

⁸⁸ *The New Nation, 1783-1815: Government Policy Toward Native Americans*, LIBR. OF CONG., <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/newnatn/nativeam/report.html> (stating that Schuyler had advised Duane that should the Indians be pushed into Canada they would “add strength to Great Britain.”) (last visited Nov. 27, 2016).

we . . . from motives of compassion, draw a veil over what is passed; and will establish a boundary line between them and us . . . ⁸⁹

In the lead-up to the Commissioners' arrival at Fort Stanwix, Pennsylvania recognized their jurisdiction for the purpose of treating with Indian nations, in so far as any land may fall within its borders.⁹⁰ New York, on the other hand, was not so acquiescent.⁹¹ In July/August 1784, James Duane, who was by that time the Mayor of New York City, wrote to the Governor of New York, George Clinton, as to his views on New York State-Indian negotiations.⁹² In his letter, Duane advised that in order for the State of New York to have jurisdiction under art. IX of the Articles of Confederation to negotiate with the Six Nations resident in New York State, "[t]here is . . . an indispensable Necessity that these Tribes should be treated as antient Dependants on this State, placed under its protection, with all their territorial Rights, by their own consent publickly manifested in solemn and repeated Treaties."⁹³ Following Duane's advice, when Governor Clinton met with the Six Nations in September of 1784 he tried to convince them to treat with New York State.⁹⁴ The Six Nations met Clinton's claims with an element of confusion as to the locus of power within the Union. Joseph Brant, one of the Mohawk leaders, said, "[h]ere lies some Difficulty in our Minds, that there should be two separate Bodies to manage these Affairs, for this does not agree with our ancient Customs."⁹⁵ Notwithstanding New York's attempts to undermine the Union's authority, the Six Nations already had a sound understanding of

⁸⁹ *Id.* at 292.

⁹⁰ *Resolution of Congress* (Oct. 30, 1783), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 71, at 296.

⁹¹ *Instructions for Major Peter Schuyler*, in PUBLIC PAPERS OF GEORGE CLINTON: FIRST GOVERNOR OF NEW YORK, at 379 (Hugh Hastings, ed. 1904) (instructing Major Schuyler to "use your most undivided influence to Counteract and frustrate" the proceedings if they are "Detrimental to the State").

⁹² See *James Duane's Views on Indian Negotiations* (July/August 1784), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 71, at 299.

⁹³ *Id.*

⁹⁴ See *Extracts From the Proceedings of the Treaty of Fort Stanwix Between New York and the Six Nations* (Sept. 4, 1784), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 71, at 305 [hereinafter, *The Proceedings of the Treaty of Fort Stanwix*].

⁹⁵ *Id.* at 308.

the Articles of Confederation,⁹⁶ and decided to wait for the Union's Commissioners.

The Commissioners arrived at Fort Stanwix, New York on October 3, 1784 to meet with the Seneca, Mohawk, Onondaga and Cayuga nations.⁹⁷ Upon their arrival, they made their position with regard to the relationship between the Indian nations and the Union clear.⁹⁸ The Commissioners said, "you may be satisfied that the United States are the sole sovereigns within the limits just now described to you in the" Treaty of Paris.⁹⁹ To the Union, the Indian nations were not "free and independent nation[s]".¹⁰⁰ Rather, they were "a subdued people" who "have been overcome in a war which you entered into with us, not only without provocation, but in violation of most sacred obligations."¹⁰¹ Then came the crystallization of the conquest claim: "[w]hen we offer you peace on moderate terms, we do it in magnanimity and mercy. If you do not accept it now, you are not to expect a repetition of such offers".¹⁰² As a result, the claim of conquest asserted the national government's power over Indian peoples and avoided the issue that the Six Nations resided almost entirely within New York State on the basis that they could not be dependent on a state that they had fought against. The Union was going to rely on its rights under the law of nations in order to force the Indian peoples within the Union to recognize it.¹⁰³ As Big Tree, Cornplanter and Half-Town, three prominent figures in the Six Nations, later summarized the proceedings in a letter to President Washington in 1790, "[y]ou then told us we were in your hand & that by closing it you could crush us to nothing."¹⁰⁴ Eventually, the representatives present

⁹⁶ *Id.* (recording that "[y]ou again spoke and made Us acquainted that the powers of managing Indian Affairs at large belonged to Congress, and that they had appointed Commissioners for this Purpose, and that You were appointed by this particular State, to manage Indian Affairs with Indians residing within the Bounds thereof, in Consequence of which You appear here at this Place.").

⁹⁷ See generally HENRY MANLEY, THE TREATY OF FORT STANWIX 1784 (1932) (offering a comprehensive discussion on the treaty).

⁹⁸ See *Proceedings of the United States and the Six Nations at Fort Stanwix* (Oct. 3, 1784), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 71, at 316.

⁹⁹ *Id.* at 317.

¹⁰⁰ *Id.* at 323.

¹⁰¹ *Id.*

¹⁰² *Id.* at 324.

¹⁰³ See Golove & Hulsebosch, *supra* note 10, at 967.

¹⁰⁴ *To George Washington from the Seneca Chiefs* (Dec. 1, 1790), FOUNDERS ONLINE, NATIONAL ARCHIVES <http://founders.archives.gov/documents/Washington/05-07-02-0005> (last modified Oct. 5, 2016) [Original source: *The Papers of George Washington*, PRESIDENTIAL SERIES, vol. 7, 1 December 1790–21 March 1791,

acceded to the United States' terms,¹⁰⁵ which terms followed much the standard form of treaties at that time incorporating both the purchase of land but also providing for the protection of Indian peoples.¹⁰⁶

Notwithstanding that a treaty was made between the Confederation and the Indian nations, New York began to defeat its terms in the 1780s.¹⁰⁷ Further, there was some concern amongst observers that New York's attempts to undermine the Commissioners may have an adverse effect in both the Indians and Great Britain respecting the sovereignty of Congress.¹⁰⁸ And,

ed. Jack D. Warren, Jr. Charlottesville: University Press of Virginia, 1998, pp. 7–16].

¹⁰⁵ See *Treaty of Fort Stanwix*, in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 71, at 327. *But see* 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 71, at 280 (noting however, that the Six Nations never ratified the treaty).

¹⁰⁶ See *generally* PRUCHA, AMERICAN INDIAN TREATIES, *supra* note 63 (discussing many of the treaties signed of the era); *Treaty of Fort Stanwix*, in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 71, at 326 (for example, in the Treaty of Fort Stanwix, the parties agreed “The United States of America give peace to the Senecas, Mohawks, Onondagas and Cayugas, and receive them into their protection” upon the conditions in the treaty).

¹⁰⁷ See SADOSKY, *supra* note 14, at 138. See, e.g., *Treaty at Fort Schuyler Between the Onondagas and New York*, in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 71, at 468; *Id.* at 472 (in which the Onondagas ceded all “their Lands to the People of the State of New York forever”); *Brant and Other Indians to the Governor of New York* (July 30, 1789), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 71, at 531. See *generally* ALAN TAYLOR, THE DIVIDED GROUND: INDIANS, SETTLERS AND THE NORTHERN BORDERLAND OF THE AMERICAN REVOLUTION, 169–202 (2006).

¹⁰⁸ See *Letter to James Madison From James Monroe* (Nov 15, 1784), FOUNDERS ONLINE, NATIONAL ARCHIVES (last modified Oct. 5, 2016) <http://founders.archives.gov/documents/Madison/01-08-02-0074> (stating that:

whether on the other hand this is not a description of those whose manag'ment is committed by the confideration to the U S. in Congress assembled? In either event the land held by these *Indians*, having never been ceded either by *N. York* or *Massachussetts* belongs not to the *U. States*; the only point then in wh. *N. York* can be reprehensible is, for preceding by a particular [state treaty], the general *Treaty*. This must be attributed to a suspicion that there exists in *Congress* a design to injure her. The transaction will necessarily come before us, but will it not be most expedient in the present state of our affairs to form no decision thereon? I know no advantages to be deriv'd from one. If the general *treaty* hath been obstructed the injury sustain'd in that instance is now without remedy. A decision either way, will neither restore the time we have lost nor remove the impressions wh. this *variance* hath made with the *Indians* & in the *Court of G. Britain* respecting us. If the right of *Congress* hath been contraven'd shall we not derive

under the Articles of Confederation, there was little that the federal government could do to protect its authority.¹⁰⁹ Following Fort Stanwix, the Commissioners turned their sights west, and signed a similar treaty at Fort McIntosh with the Wyandot, Delaware, Chippewa and Ottawa nations.¹¹⁰ Again, the Commissioners claimed land on the basis of conquest.¹¹¹ In a further attempt to dispel any ambiguity, when the Indian representatives said to the Commissioners that they were pleased that the Six Nations had given the United States part of their country, they were told: “it is quite the contrary. We have given the hostile part of the Six Nations some of the country which we conquered from them.”¹¹²

This treaty was also not honored on both sides. But this time it was due to the federal government’s inability to control its settlers. In the Northwest, settlers continued to venture into land reserved by, and for, the Indian nations.¹¹³ As a result, the Indian nations became reticent of making any future treaty with the Union,¹¹⁴ and began to threaten war once again.¹¹⁵ Following two unsuccessful treaties, and one more in 1786,¹¹⁶ there was agitation for a change to policy on both sides. On December 18, 1786, a group of Six Nations chiefs delivered a speech to Congress.¹¹⁷ Their main concern was with the Union’s surveyors on the northern side of the Ohio River – a boundary that was, for them, non-negotiable. To

greater injury by urging it to the reprehension of *New York* who holds herself aggriev’d in other respects than by suffering our sense of that delinquency to lay dormant? Our purchases must be made without her bounds & those *Indians* whose alliance we seek inhabit a country to which she hath no claim.)

¹⁰⁹ Ablavsky, *Savage Constitution*, *supra* note 5, at 1036.

¹¹⁰ *Treaty of Fort McIntosh*, in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 71, at 329.

¹¹¹ PRUCHA, AMERICAN INDIAN TREATIES, *supra* note 63, at 50.

¹¹² Horsman, *supra* note 4, at 39 (quoting *The Fort McIntosh Treaty Journal*, LIX TIMOTHY PICKERING PAPERS I22–23 (Massachusetts Historical Society)).

¹¹³ See generally STEPHEN ARON, HOW THE WEST WAS LOST: THE TRANSFORMATION OF KENTUCKY FROM DANIEL BOONE TO HENRY CLAY 29–57 (1996).

¹¹⁴ Ablavsky, *Savage Constitution*, *supra* note 5, at 1025 (suggesting that the Indian’s view was that if they made an agreement with the federal government that “the Kentuck people would brake it immediately.”).

¹¹⁵ *Id.* at n.149 (stating that “[t]he Alarms of an Indian War are growing more & more serious.”).

¹¹⁶ Horsman in WM. & M. Q., *supra* note 4, at 39 (noting that the final treaty based on the concept of conquest was that of Fort Finney in 1786 with the Shawnee).

¹¹⁷ *Speech of the United Indian Nations to Congress* (Dec. 18, 1785), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 71, at 356–58.

resolve matters, they suggested a general treaty between the Union and all of the Indian nations concerned.¹¹⁸

On the Union's side, contrary to the idea of two separate mainstream interpretations,¹¹⁹ it was becoming apparent to the founding generation that while,¹²⁰ technically, conquest may have applied, given the Indian nations' history of dealing by treaty with the British, and the fact that the federal government could not support its position with force, something had to change.¹²¹ Care had to be taken in the change, however – it could not be taken as a sign of defeat. Moreover, the Union still had its obligations to adhere to under the law of nations.

In response, the United States took two steps that indicated the necessary change in its policy. First, the Committee on Indians Affairs reevaluated its advice to Congress and cautioned Congress in the following way: “war . . . would [not] be consistent with Justice or humanity” nor would it be “consistent with the interest and policy of the Union.”¹²² Further, as for the proper approach to treaties in the future, the Committee advised that “[i]nstead of a language of superiority and command; may it not be *politic and Just to treat with the Indians more on a footing of equality*, convince them of the Justice and humanity as well as power of the United States and of their disposition to promote the happiness of

¹¹⁸ *Id.* at 357.

¹¹⁹ *Cf.* Ablavsky, *Savage Constitution*, *supra* note 5, at 1036–38.

¹²⁰ *Id.* (relies, for the proposition that many blamed the failure of Indian policy under the Articles on the inability of the Union to “overawe the Native nations that controlled the borderlands”); *From George Washington to Lafayette* (May 10, 1786), FOUNDERS ONLINE, NATIONAL ARCHIVES, <http://founders.archives.gov/documents/Washington/04-04-02-0051> (last modified Oct. 5, 2016) (stating that:

I have not the smallest doubt but that every secret engine . . . is continually at work to inflame the Indian mind, with a view to keep it at variance with these States for the purpose of retarding our settlements to the Westward, & depriving us of the fur & peltry trade of that country.” Letters such as that must be taken in their full context. The proper context of that letter was an expression of frustration of the conduct of “Britain at the other Courts of Europe, respecting those States”. The “secret engine” was Britain. That example was used as another opportunity taken by Britain to disrespect the Union. A state that Washington was “not without hopes that matters will soon take a favourable turn in the f[e]deral constitution.”)

¹²¹ *See* Merrell, *supra* note 69, at 203–04 (discussing the Continental Congress's new course of Indian policy).

¹²² *Report of the Committee on Northern Indians* (Aug. 9, 1787), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 71, at 455, 456.

the Indians?”¹²³

The second was the Northwest Ordinance, passed in July 1787. Article 3 of that Ordinance returned to the ideas of Franklin and Dickinson in their respective draft Articles of Confederation.¹²⁴ Article 3 provided that:

[t]he utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.¹²⁵

These two steps, therefore, set the sea change in the midst of the Philadelphia Convention for a move away from a policy based on conquest to one rooted in compact. The newly appointed Governor of the Northwest Territory, Arthur St. Clair, would undertake the new approach's first test.

Following the Committee's report, Congress directed Governor St. Clair to “carefully . . . “examine into the real temper of the Indian tribes, inhabiting” the North West Territory.¹²⁶ The Governor was to treat with the Indian nations in order to “remove[] all causes of controversy, so that peace and harmony may continue between the United States and the Indian tribes, the regulating trade, and settling boundaries.”¹²⁷ He was further directed, “[f]or these purposes, you will do everything that is *right and proper*.”¹²⁸

On December 29, 1788, Governor St. Clair met with the Wyandot, Delaware, Ottawa, Chippewa, Pottawatomi, Sac and Six Nations peoples at Fort Harmar. By this time, the land across the Ohio was a necessity to the Union, as there was an “amazing increase flowing into the western world from the old Atlantic

¹²³ *Id.* at 457 (emphasis added). See also *Report of the Secretary of War* (May 2, 1788), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 71, at 460 (advising that contrary to the posture adopted in the treaty of Fort Stanwix, that if the Commissioners are bound by instructions to “adhere rigidly to the principle of conquest, and the limits of territory stated at the former treaties, an abrupt departure of the Indians, and hostilities in consequence thereof, may be expected.”).

¹²⁴ See generally Franklin, *supra* note 54; THE AVALON PROJECT, *supra* note 55.

¹²⁵ 4 KAPP 1065; 1 Stat. 52.

¹²⁶ *Instructions to Governor Arthur St. Clair* (Oct. 26, 1787), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 71, at 458.

¹²⁷ *Id.*

¹²⁸ *Id.* (emphasis added).

states.”¹²⁹

St. Clair said to the nations gathered: “it is the wish of the United States to live in peace with all the World. I have told You likewise that if you will have War You may have war, but that you may be convinced I am earnest in my desires for peace”.¹³⁰ St. Clair’s somewhat internally inconsistent approach, contrary to the recommendations of the Committee, was that the Union would pay for any new boundary, but he remained of the view that the United States had a right to the land as a result of conquest regardless.¹³¹ The result was unsatisfactory all round. The contentious middle ground adopted by St. Clair both antagonized the Indian peoples and failed to obtain any pragmatic advantage for the Union.

Thus, the transition to the first Washington administration would not be a smooth one. The Treaties of Fort Harmar did no more than confirm the boundaries of the unsuccessful treaties at Fort Stanwix and Fort McIntosh and still did not provide a comprehensive treaty with all relevant Indian nations.¹³²

II. PHILADELPHIA AND BEYOND

A. *The Convention*

Against the above background, the topic of Indian affairs received little discussion at the Philadelphia Convention in 1787, and most of the noise arose from one corner, that occupied by James Madison.¹³³ Notwithstanding that, that the issue of Indian affairs was an important one for the time is shown by the circular letters, written by Members of the House in the first, second and

¹²⁹ FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 62 (1984) (noting that:

Major Doughty at Fort Harmar wrote to Knox that between April 6 and May 16, 1788 that a total of ‘181 boats, 406 souls, 1,588 horses, 314 horned cattle, 223 sheep and 92 wagons’ had passed his post. ‘it will give you some idea’ he added ‘of the amazing increase flowing into the western world from the old Atlantic states’).

¹³⁰ *Proceedings at Fort Harmar*, (Dec. 29, 1788), in 18 *EARLY AMERICAN INDIAN DOCUMENTS*, *supra* note 71, at 481, 486.

¹³¹ *Id.* at 484, 485 (“none of you know any thing about [how the King came to get this land] nor when it was that your lands were given to him”; the United States offered “You peace [as a result of their role in the Revolution] upon the Condition of Surrendering a part of Your Country.”).

¹³² PRUCHA, *AMERICAN INDIAN TREATIES*, *supra* note 63, at 57.

¹³³ See Farrand, *supra* note 6.

third Congresses.¹³⁴ Of the 11 preserved short circular letters only two do not mention Indian issues.¹³⁵ The Congressmen's preconception with the war in the Northwest, which had continued off and on since the signing of the treaty of Paris,¹³⁶ suggests that the matter cannot have escaped the delegates at the Philadelphia Convention.

For some time, James Madison had been concerned about the states' reading down of art. IX of the Articles of Confederation.¹³⁷ Consequently, he was concerned with the states' interference with the delicate balance required in Indian affairs.¹³⁸ He said in one letter, that the states' limited interpretation of art. IX would "destroy the authority of Congress altogether."¹³⁹ The actions of New York surrounding the Treaty of Fort Stanwix stand testament to that. For Madison, the matter was one concerning the "character of our Country."¹⁴⁰ Thus, when the New Jersey Plan was proposed on June 19, Madison criticized it for its lack of any clear assertion of exclusive national power to deal with the Indian peoples.¹⁴¹

Madison's June criticism came to naught until mid-August when

¹³⁴ The circular letters were reports on the proceedings of Congress and on national affairs sent periodically to their constituents by certain members of Congress, Mostly Southern and Western representation. See Noble E. Cunningham, Dorothy Hagberg Cappel (eds.), CIRCULAR LETTERS OF CONGRESSMEN TO THEIR CONSTITUENTS 1789-1829 xv (1978).

¹³⁵ *Id.* at 3-29.

¹³⁶ See generally FRANCIS PAUL PRUCHA THE SWORD OF THE REPUBLIC: THE UNITED STATES ARMY ON THE FRONTIER 1783-1846 (1969) (communication in June 1790) [hereinafter, PRUCHA, THE SWORD OF THE REPUBLIC].

¹³⁷ *From James Madison to Thomas Jefferson* (Oct. 17, 1784) in 8 THE PAPERS OF JAMES MADISON, *supra* note 118 (James Madison had been at Fort Stanwix early on in the Commissioner's negotiations and so was aware of New York's plays for power in the North).

¹³⁸ See *supra* note 108.

¹³⁹ *Letter from James Madison to James Monroe*, (Nov. 27, 1784) in 8 PAPERS OF JAMES MADISON, *supra* note 108 at 156, 156-57.

¹⁴⁰ *James Madison to William Wirt* (October 12, 1780) in Jacob T. Levy, *Indians in Madison's Constitutional Order in JAMES MADISON AND THE FUTURE OF LIMITED GOVERNMENT* 121, 124 (John Samples ed., 2002) (Madison writing that "[f]rom the aspect of the publick proceedings towards the Indians within the bounds of the States, there is much danger that the character of our Country will suffer.").

¹⁴¹ 2 FARRAND, *supra* note 6, at 181-82 (Madison asked "[w]ill . . . [the New Jersey Plan] prevent encroachments on the federal authority? A tendency to such encroachments has been sufficiently exemplified among ourselves, as well as in every other confederated republic antient and Modern. By the federal articles, transactions with the Indians appertain to Cong[ress]. Yet in several instances, the States have entered into treaties & wars with them.").

Madison again took up the mantle of asserting the need for clear provision for Indian affairs in the Constitution.¹⁴² What resulted was, what is now known as, the Indian Commerce Clause.¹⁴³ On this occasion Madison proposed that Congress should have the power “[t]o regulate affairs with the Indians as well within as without the limits of the United States”.¹⁴⁴ To little opposition, the addition was included in the Constitution – if only for the reason that there was, by now, a strongly held view by the majority that control had to be centralized in the federal government.¹⁴⁵

Madison’s (and, it seems, Congress’s)¹⁴⁶ view was that the Articles of Confederation had left with “the States their right of preemption of lands from the Indians.”¹⁴⁷ To Madison’s mind, “[n]o government could give us tranquility and happiness at home, which did not possess sufficient stability and strength to make us respectable abroad.”¹⁴⁸ Madison’s concern, which was directed

¹⁴² 2 FARRAND, *supra* note 6, at 247; Ablavsky, *Beyond the Indian Commerce Clause*, *supra* note 16, at 124 (noting that “no substantive discussion of Indian affairs occurred” between June and August 1787).

¹⁴³ See U.S. CONST., art. I, § 8, cl 3 (Congress shall have the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

¹⁴⁴ 2 FARRAND, *supra* note 6, at 247.

¹⁴⁵ Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1146–47 (1994-1995) [hereinafter Clinton, *The Dormant ICC*]; PRUCHA, AMERICAN INDIAN POLICY, *supra* note 3, at 41 (stating that “[t]he lack of debate on the question [of Indian matters] indicates, perhaps, how universally it was agreed that Indian matters were to be left in the hands of the federal government.”); Bethel Saler, *An Empire For Liberty, A State For Empire: The U.S. National State Before and after The Revolution of 1800*, in THE REVOLUTION OF 1800: DEMOCRACY, RACE, AND THE NEW REPUBLIC 360, 372 (James Horn, Jan Ellen Lewis and Peter S. Onuf eds., 2002) (stating that “[t]he total lack of debate over any issue of Indian affairs suggests consensus among the representatives that such colonial concerns should remain under the control of the national government.”).

¹⁴⁶ *Resolution of Congress* (Sept. 20, 1783) in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 71, at 289 (resolving “That Congress have no objection to a conference being held on behalf of the State of Pennsylvania with the Indians on their borders for the sole purpose of making a purchase by and at the expence of the said State of lands within the limits thereof.”).

¹⁴⁷ *Letter from James Madison to James Monroe*, *supra* note 138; Cf. Thomas Jefferson, *To Henry Knox* (Aug. 10, 1791) in 22 THE PAPERS OF THOMAS JEFFERSON: MAIN SERIES 27-2, (Julian Boyd, ed., 1961) (arguing that “neither under the present Constitution, nor the antient Confederation had any State or person a right to Treat with the Indians without the consent of the General Government.”); Clinton, *The Dormant ICC*, *supra* note 145, at 1147 (1994-1995); *The Proceedings of the Treaty of Fort Stanwix*, *supra* note 94, at 308 (stating that “without the authority of Congress no business can be valid that may be attempted by particular people or States.”).

¹⁴⁸ James Madison, Edward J. Larson, Michael P. Winship, THE CONSTITUTIONAL CONVENTION: A NARRATIVE HISTORY FROM THE NOTES OF JAMES

particularly at art. IX, was that the Articles had “considerately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States.”¹⁴⁹ Thus, contrary to Ablavsky’s “Madisonian” and “Hamiltonian” approaches to Indian affairs,¹⁵⁰ Madison’s concern in remedying that was not so much to provide for the protection of Indians, as it was to provide for the protection of the integrity of the federal government – all in an attempt to protect the Union’s reputation.¹⁵¹ Thus, Madison’s concern is also equally consistent with Hamilton’s vision for a strong central government.¹⁵² Indeed, there is no contemporaneous evidence to support Ablavsky’s, so characterized, “Madisonian” and “Hamiltonian” “approaches.”

As Ablavsky notes, the Indian Commerce Clause was somewhat of an “ambiguous success” as, for one, it did not expressly endorse federal supremacy over Indian affairs.¹⁵³ In any event, as can be seen by its subsequent interpretation, that authority was exclusively invested by it in the federal government came with little opposition.¹⁵⁴ Exactly how the power would be exercised by

MADISON, 64 (2011). See *From Henry Knox*, (July 7, 1789) in 3 PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 143 (Dorothy Twohig ed., 1989) (The Indian Commerce Clause means that “the general Sovereignty must possess the right of making all treaties in the execution or violation of which depend peace or war.”).

¹⁴⁹ THE FEDERALIST No. 42 (James Madison), *supra* note 20.

¹⁵⁰ See *supra* notes 27 to 30 and associated text.

¹⁵¹ Cf. *supra* note 29. See also THE FEDERALIST No. 15 (Alexander Hamilton), *supra* note 20, at 91–92 (stating that “[t]here is scarcely anything that can wound the pride or degrade the character of an independent nation which we do not experience.”).

¹⁵² See also Ablavsky, *Beyond the Indian Commerce Clause*, *supra* note 16, at 1059 (noting that the Washington Administration embraced “law and restraint over claims of conquest, [it] drew on the law of nations to determine Native status. As a result, federal officials framed nearly all issues of Indian affairs, including the question of land title, through the international law concept of sovereignty.”).

¹⁵³ Ablavsky, *Savage Constitution*, *supra* note 5, at 1041.

¹⁵⁴ *To Thomas Mifflin* (Sept 4, 1790) 6 PAPERS OF GEORGE WASHINGTON, *supra* note 147, at 393, 393–94; *From George Washington to the Seneca Chiefs* (Dec. 29, 1790) in THE WRITINGS OF GEORGE WASHINGTON: PT. IV. LETTERS OFFICIAL AND PRIVATE, FROM THE BEGINNING OF HIS PRESIDENCY TO THE END OF HIS LIFE: (Jared Sparks ed., 1839) (“the case is now entirely altered—the general government only has the power to treat with the Indian nations, and any treaty formed and held without its authority will not be binding.”); Ablavsky, *Beyond the Indian Commerce Clause*, *supra* note 16, at 1036 (quoting Sydney, *To the Citizens of State of New York*, N.Y.J., June 14, 1788, reprinted in 20 DOCUMENTARY HISTORY OF RATIFICATION 1153, 1158 (Merrill Jensen ed., 1976) (the author, stating that ratification of the Constitution would “totally surrender into the hands of Congress the management and regulation of the Indian affairs, and expose the Indian trade to an improper government.”); cf. Taylor, *supra* note 107, at 231–34; LAURENCE M HAUPTMAN, CONSPIRACY OF INTERESTS: IROQUOIS DISPOSSESSION

the heavily Hamiltonian influenced Washington administration, at that time, remained to be seen.¹⁵⁵

B. The Washington Administration

Henry Knox continued as Secretary of War under the first and second Washington administrations.¹⁵⁶ Knox would become the main driver of the new administration's policy toward the Indian nations.¹⁵⁷ In his first report to the President about the Indian peoples in the Northwest, Knox considered that the federal government had now, following the position it took in the Treaties of Fort Harmar,¹⁵⁸ waived its right to rely on conquest as a basis for extinguishing Indian land rights.¹⁵⁹ As a result, "the dignity and interest of the nation will be advanced by making [the policy of the purchase of Indian land] the basis of the future administration of justice towards the Indian tribes."¹⁶⁰ And, that policy was communicated by the Administration to its commissioners.¹⁶¹ Knox continued, in a subsequent letter to President Washington, "in future, the obligations of policy, humanity, and justice, together with that respect which every nation sacredly owes to its own reputation, unite in requiring a noble. Liberal, and disinterested administration of Indian

AND THE RISE OF NEW YORK STATE 58–97 (1999) (discussing how states such as New York continued to bypass the federal government and push for land sales with individual Indians); DEBORAH A ROSEN, *AMERICAN INDIANS AND STATE LAW: SOVEREIGNTY, RACE AND CITIZENSHIP - 1790-1880* 19–77 (2007).

¹⁵⁵ See, e.g., *John Adams to Thomas Jefferson* (July 1813), in 6 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 42, at 157, 158 (stating that "[t]he truth is, Hamilton's influence over [Washington] was so well known, that no man fit for the office of State or War would accept either.").

¹⁵⁶ HENRY KNOX BIOGRAPHY, BIOGRAPHY.COM (last updated April 2, 2014), www.biography.com/people/henry-knox-9367191.

¹⁵⁷ SADOSKY, *supra* note 14, at 156.

¹⁵⁸ *Report of Henry Knox on the Northwestern Indians* (June 15, 1789) in DOCUMENTS OF UNITED STATES INDIAN POLICY 12 (Francis Paul Prucha ed., 2000) [hereinafter, DOCUMENTS OF UNITED STATES INDIAN POLICY] (That is, of course, notwithstanding the actual content of Governor St. Clair's speech to the nations gathered).

¹⁵⁹ DOCUMENTS OF UNITED STATES INDIAN POLICY 12 (Francis Paul Prucha ed., 2000) [hereinafter, DOCUMENTS OF UNITED STATES INDIAN POLICY].

¹⁶⁰ *Id.* at 13.

¹⁶¹ *Instructions to Brigadier General Rufus Putnam* (May 22, 1792) in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 47, at 234, 234 (Knox saying that "[y]ou will make it clearly understood, that we want not a foot of their land, and that it is theirs, and theirs only; that they have the right to sell, and the right to refuse to sell, and that the United States will guaranty to them their said just right.").

affairs.”¹⁶²

That the Administration was conscious of the image that the Union projected internationally is underpinned by its dealing with the Indian nations at this time. While it attempted to use military force to speed up the settlement process, the Administration was aware of the limitations of the effectiveness of the use of force, as well as the future ramifications of any over use of it.¹⁶³

While policy remained the gradual encroachment by increasing white settlement, the Administration continued to use force to ensure the progression of the process. However, it was ineffective.¹⁶⁴ Not yet a year after he expressed his views to President Washington, Knox directed General Harmar, who was posted to the Northwest, to “extirpate, utterly, if possible” the Indian peoples. The result was military action on a large scale, which caused havoc on the frontier.¹⁶⁵ But, General Harmar was unsuccessful in extirpating the Indian peoples of the Northwest. And, after Harmar suffered several defeats, leadership was handed to Governor St. Clair.¹⁶⁶ Somewhat presumptively, Thomas Jefferson wrote to another, “I hope we shall drub the Indians well this summer and then change our plan from war to bribery.”¹⁶⁷ What followed was the utter drubbing of the Union’s army at the hands of the Indians in the Northwest.¹⁶⁸ In response, St. Clair was removed and Washington selected General Wayne to succeed him.¹⁶⁹ While Wayne was organizing his soldiers,¹⁷⁰

¹⁶² See *From Henry Knox*, *supra* note 147; ANNIE H. ABEL, PROPOSALS FOR AN INDIAN STATE 34 (Larry S. Watson 1994).

¹⁶³ See *From Henry Knox*, *supra* note 147.

¹⁶⁴ *Report of Henry Knox on the Northwestern Indians*, *supra* note 158, at 13 ([a]s the settlements of the whites shall approach near to the Indian boundaries established by treaties, the game will be diminished, and the lands being valuable to the Indians only as hunting grounds, they will be willing to sell further tracts for small considerations. By the expiration, therefore, of the above period, it is most probable that the Indians will, by the invariable operation of the causes which have hitherto existed in their intercourse with the whites, be reduced to a very small number.).

¹⁶⁵ PRUCHA, THE SWORD OF THE REPUBLIC, *supra* note 136, at 20.

¹⁶⁶ See generally *id.*

¹⁶⁷ *To James Monroe* (17 April 1791), 20 PAPERS OF THOMAS JEFFERSON, *supra* note 146, at 234.

¹⁶⁸ PRUCHA, THE SWORD OF THE REPUBLIC, *supra* note 136, at 29.

¹⁶⁹ *Id.*

¹⁷⁰ Gerald Clarfield, *Protecting the Frontiers: Defense Policy and the Tariff Question in the First Washington Administration*, 32 WM. & MARY Q. 443, 449

Washington's Cabinet set about for one last bid at peace, and in the autumn of 1792 the Indian nations in the Northwest agreed to meet again in the spring of 1793 at Sandusky, in what would become Ohio.¹⁷¹

Notwithstanding those attempts at the use of force, Knox remained of the view that for the honor of the Union, war ought to be avoided to any extent possible. As he directed one of his generals, if Americans continued to “destroy the tribes, posterity will be apt to class the effects of our Conduct and that of the Spaniards in Mexico and Peru together.”¹⁷² Thus, national honor became of the utmost importance, and the goal became to absorb land with the least discredit possible on the government.¹⁷³ Further, as Prucha suggests, “there was a deep consciousness that the United States was a Christian nation and that not only would it lose its religious innocence by dealing unfairly with the Indians but that God in his justice would punish the nation if it left the path of righteousness by violating ‘sacred’ treaties.”¹⁷⁴

From the North, since the prospect of a meeting with the Indian nations was mooted, the Washington administration faced a concerted attempt to undermine its sovereignty by the British¹⁷⁵ and the Indians.¹⁷⁶ Both suggested that the British ought to mediate any treaty between the Indian nations and the Union. Alexander Hamilton¹⁷⁷ and Thomas Jefferson¹⁷⁸ rebuffed the British suggestion. Hamilton's view was that mediation would “diminish the importance of the United States in the estimation of the Indians.”¹⁷⁹ Presumably, Hamilton was also concerned that

(1975) (stating that “[o]n January 8, 1792, Washington sent Knox to the House of Representatives with a confidential report relating to the progress of the Indian war and proposing a large increase in the army.”).

¹⁷¹ Letter From Alexander Hamilton To George Hammond (Dec. 29, 1792), in 13 THE PAPERS OF ALEXANDER HAMILTON 382, 383 (Harold C. Syrett ed., 1967).

¹⁷² DAVID J. WEBER, BARBAROS: SPANIARDS AND THEIR SAVAGES IN THE AGE OF ENLIGHTENMENT 2 (2005).

¹⁷³ Horsman, *American Indian Policy in the Old Northwest*, *supra* note 4, at 42–44; PRUCHA, AMERICAN INDIAN TREATIES, *supra* note 63, at 16.

¹⁷⁴ PRUCHA, AMERICAN INDIAN TREATIES, *supra* note 63, at 16.

¹⁷⁵ See *Conversation with George Hammond* (May 28–29, 1792), in 11 PAPERS OF ALEXANDER HAMILTON, *supra* note 171, at 446, 449 n.2.

¹⁷⁶ See *Conversation with George Hammond* (Nov. 22, 1792), in 13 PAPERS OF ALEXANDER HAMILTON, *supra* note 171, at 213, 215 n.5.

¹⁷⁷ *Id.*

¹⁷⁸ *Conversation with George Hammond* (Dec. 15–28, 1792), in 13 PAPERS OF ALEXANDER HAMILTON, *supra* note 171, at 326–28 n.2.

¹⁷⁹ *Conversation with George Hammond* (Nov. 22, 1792), *supra* note 171. Interestingly, the Commissioners at Fort Stanwix had attempted to use the

mediation would also diminish the respect of the Union further afield.¹⁸⁰ As a result, how the United States would approach this opportunity to treat with the Indian nations in the Northwest took on increased importance.

By this time, the law of nations right to preemption had become a vitally important principle in the Americas. Indeed, the only treaty of the period not ratified by the Senate was a treaty with an Indian nation that did not enshrine the right to preemption in it.¹⁸¹ It was becoming clear, though, that pure reliance on their rights under the law of nations was both not succeeding in achieving peace with the Indian nations or in achieving a fluid and efficient westward expansion. Success required flexibility and adaptation. Above all, success required humility. So, in February 1793, President Washington called a meeting of his cabinet to consider, among other things, one important question: does the law of nations permit a treaty which relinquishes back to the Indian nations land which has already been validly obtained by former treaties?¹⁸² Interestingly, the debate centered not around pride in the retention of territory, but around the law of nations itself, as balanced with New World pragmatism.

Arising out of his interpretation of the right to preemption,¹⁸³ Jefferson remained firm that no part of the government could alienate a part of the Union's territory.¹⁸⁴ Hamilton, on the other hand, had a more purposive view of the law of nations. Hamilton

Indians' predilection for French noblemen to their advantage there, obtaining the services of General Lafayette to speak to the Indians of the value of treating with the Union. *See supra* note 136.

¹⁸⁰ *See supra* text accompanying note 147.

¹⁸¹ Horsman, *American Indian Policy in the Old Northwest*, *supra* note 4, at 46.

¹⁸² *Cabinet Meeting. Opinion Respecting the Proposed Treaty with the Indians Northwest of the Ohio* (Feb. 25, 1793), in 14 PAPERS OF ALEXANDER HAMILTON, *supra* note 171, at 142–44; H.A. WASHINGTON, 1 THE WRITINGS OF THOMAS JEFFERSON: BEING HIS AUTOBIOGRAPHY, CORRESPONDENCE, REPORTS MESSAGES, ADDRESSES, AND OTHER WRITINGS, OFFICIAL AND PRIVATE 218–20 (Paul Leicester Ford ed., 1853).

¹⁸³ *See supra* text accompanying notes 42–46.

¹⁸⁴ *Cabinet Meeting*, *supra* note 182, at 143 n.1. Presumably, this was in reliance of MONSIEUR DE VATTEL, LAW OF NATIONS: OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 31 (Joseph Chitty trans., 1863) (stating that territory transfers “can never take place without the express and unanimous consent of the citizens, with the right of really alienating or subjecting the state to another body politic.”). *See* Stéphane Beaulac, *Vattel's Doctrine on Territory Transfers in International Law and the Cession of Louisiana to the United States of America*, 63 LA. L. REV. 1327, 1341–45 (2003) (discussing property transfers under the law of nations).

agreed with Jefferson's point in principle, as applied to Europe.¹⁸⁵ However, Hamilton argued for a development of that law of nations principle, as applicable to North America.¹⁸⁶ He argued that the principle was "founded on the universality of settlement [in Europe], that is that one could not lop off territory "without a lopping off of citizens, which required their consent."¹⁸⁷ Whereas, that position ought not to follow in "our unsettled country", so long as the land had not already been granted to settlers.¹⁸⁸ Knox and Edmund Randolph, the Attorney-General, agreed with Hamilton.¹⁸⁹ Importantly, however, the Cabinet resolved that this was to be a last resort, only if necessary to maintain peace.¹⁹⁰ As a result, the Senate's opinion would not be sought for fear that the opinion would be leaked to the British and the United States would lose its ability to force an ultimatum.¹⁹¹

For Knox,¹⁹² Washington,¹⁹³ and Hamilton,¹⁹⁴ the land rights element of preemption was not the only aspect of the law of nations

¹⁸⁵ *Cabinet Meeting*, *supra* note 182, at 143 n.1. See also ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 128 (1954) (stating that territory transfers were not uncommon up until the end of the eighteenth century in Europe).

¹⁸⁶ *Cabinet Meeting*, *supra* note 182, 143 n.1.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* Cf. *Conversation with George Hammond*, (May 28-29), *supra* note 171. Hamilton responds to the British suggestion of an Indian "buffer state" between Canada and the United States:

Mr. Hamilton having heard me with great attention, did not attempt to enter into any discussion of the arguments I had alledged, but replied briefly and coldly, that he wished me to understand that any plan, which comprehended any thing like a cession of territory or right or the allowance of any other power to interfere in the disputes with the Indians, would be considered by this government as absolutely impracticable and inadmissible. *Id.*

¹⁸⁹ *Cabinet Meeting*, *supra* note 182, at 143 n.1.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² See *From Henry Knox*, (July 7, 1789) *supra* note 147; *Instructions to Brigadier General Rufus Putnam* (22 May 1792), in UNITED STATES CONGRESS, 2(1) AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES, 234, 235 (stating that "the United States are highly desirous of imparting to all the Indian tribes the blessings of civilization, as the only mean of perpetuating them on the earth.").

¹⁹³ PRUCHA, AMERICAN INDIAN POLICY, *supra* note 3, at 213-15 (in Washington's address to Congress in 1791 and 1792 he pushed for Congress to undertake experiments for bringing civilization to the Indians.)

¹⁹⁴ See *Draft of George Washington's Fourth Annual Address to Congress*, (Oct. 15-31, 1792) in 12 PAPERS OF ALEXANDER HAMILTON, *supra* note 171, at 558-66.

available to adaptation to the circumstances of the New World – so too was the protection element. If the slow encroachment of settlements was not possible, “civilization” of the Indian peoples was the answer;¹⁹⁵ an approach that could only be achieved through a strong, unified government. For Knox, therefore, it was important that the Federal government coordinate all efforts toward civilization. A fractured, state based approach could not achieve such delicate ends. Those efforts included having agents reside among the Indian communities, and regularizing commercial interaction with the Indian peoples. Hamilton, too, emphasized efforts toward making “more adequate provision, for giving energy to the laws throughout our Interior Frontier, so as effectually to restrain depredations upon the Indians, without which every pacific system must prove abortive.”¹⁹⁶ Hamilton wrote that “[i]f some efficacious plan could be devised for carrying on Trade with the Indians upon a scale adequate to their wants and under regulations calculated to protect them from extortion and imposition, it would prove hereafter a powerful mean of preserving peace and a good understanding with them.”¹⁹⁷

For Knox, Washington, and Hamilton, therefore, the answer to how to adapt the protection element of the law of nations was, while not simple, clear: positive interactions between Indians and settlers could lead to the harmonious future of the Union. It is this interaction that would enable the fulfillment of Knox’s “great object in managing Indians”.¹⁹⁸ Knox said,

[a] little perseverance in such a system, will teach the Indians

¹⁹⁵ See Sheehan, *supra* note 59 (discussing the philanthropic ends of the Washington administration); PRUCHA, AMERICAN INDIAN POLICY, *supra* note 3, at 213–15. The idea of giving “tools of husbandry” was mooted first by the *Report of the Committee on Northern Indians*, *supra* note 71, at 458.

¹⁹⁶ See *Draft of George Washington’s Fourth Annual Address to Congress*, *supra* note 194. Although, this part of Hamilton’s draft was left out of Washington’s address to Congress: *Address to the United States Senate and House of Representatives*, (Nov. 6, 1792) in 11 PAPERS OF GEORGE WASHINGTON, *supra* note 148, at 342–51.

¹⁹⁷ *Draft of George Washington’s Fourth Annual Address to Congress*, *supra* note 194. See also *George Washington to House of Representatives and Senate*, (Dec. 3, 1793), in 14 PAPERS OF GEORGE WASHINGTON, *supra* note 148, at 462, 466 (arguing that the Union needs to establish commerce with the Indians in order to promote conciliation of attachment).

¹⁹⁸ *Henry Knox to William Blount*, (Apr. 22, 1792) in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 47, at 252–53 (Knox saying that “[t]he great object in managing Indians, or indeed any other men, however enlightened, is to obtain their confidence. This cannot be done but by convincing them of an attention to their interests.”).

to love and reverence the power which protects and cherishes them. The reproach which our country has sustained will be obliterated, and the protection of the helpless ignorant Indians, while they demean themselves peaceably, will adorn the character of the United States.¹⁹⁹

Thus, the civilizing approach would not only adhere to the Union's law of nations duty to protect the Indian peoples, but also further enhance the honor of the Union.²⁰⁰

Of course, there was still a role for force to play. To the founding generation, respect also depended upon strength.²⁰¹ Such an approach, however, does not amount to a "savage constitution",²⁰² or an inhumane attempt to "dominate the borderlands at Indians' expense."²⁰³ Rather, recognition, on an international level, required success. If it could not be achieved through, primarily, peaceable means, the military was available as a back up – but only if there was a degree of certainty of efficacy in the use of force. As Knox commented "all treaties with the Indian nations however equal, and just they may be in their principles will not only be nugatory but humiliating to the Sovereign unless they shall be guaranteed by a body of troops".²⁰⁴

C. *The Final Attempt at Peace*

Once the negotiators arrived in Sandusky in late spring of 1793, the Indian nations gathered made their position clear: the line in the sand was the Ohio River.²⁰⁵ Indeed, they had won all of the major battles in recent times leading up to that point, so there was

¹⁹⁹ *Id.*

²⁰⁰ In the result, many of these ideas were codified in the Indian Trade and Intercourse Acts. *See, e.g.*, Act of July 22, 1790, ch. 33, 1 stat. 137 (establishing a licensing scheme for Indian traders, barred treaty making with Indian peoples without federal approval, and extended state laws over Europeans travelling onto Indian land).

²⁰¹ *See, e.g.*, *supra* notes 147, 162 and associated text. *Cf.* Horsman, *in* WM. & M. Q. *supra* note 4, at 44 (noting that the irony cannot have been lost on the Washington administration was its attempted benevolence is that the result was a five year-long war against the Indians).

²⁰² *See supra* notes 24–28 and accompanying text.

²⁰³ Ablavsky, *Savage Constitution*, *supra* note 5, at 1007.

²⁰⁴ *See From Henry Knox*, (Jul. 7, 1789) *supra* note 147. That approach is also consistent with THE FEDERALIST No. 24 (Alexander Hamilton) (stating that "[i]f we mean to be a commercial people, or even to be secure on our Atlantic side, we must endeavor, as soon as possible, to have a navy.").

²⁰⁵ Henry Knox, *Northwestern Tribes*, (Dec. 4, 1793) *in* 1 AMERICAN STATE PAPERS, *supra* note 47, at 340, 341.

little incentive for compromise.

The Commissioners were charged with obtaining a proper conveyance of all lands already received (if the nations gathered did not believe that they had received adequate consideration for previous bargains), confirming a boundary line and obtaining the entry of agents to live within the Indian nations, “as their protectors and friends.”²⁰⁶ While the Commissioners clarified that the Union’s position was that it had no right to Indian soil arising out of the Treaty of Paris, and that all that was obtained was the right of preemption,²⁰⁷ the Indian representatives gathered did not budge from their position. In the end, the Commissioners did not even discuss the prospect of the return of land.

As soon as word was communicated of the failed attempt at a negotiated peace, General Wayne initiated a further campaign; the result, a further two years of war, which finally ended with the Treaty of Greenville in 1795. The Indian wish for a line at the Ohio was gone, in its place a boundary ostensibly the same as that in the Treaty of Fort Harmar.²⁰⁸ But, the result was a less powerful confederation of Indian tribes and guaranteed proximity of settlers to Indian peoples, leading to a future of incursions on that line,²⁰⁹ along with a stronger and more resolute Union now on the front foot in the offensive into Indian land.

CONCLUSION

Alexis de Tocqueville observed during his travels in the United States, “[t]he Union treats with the Indians with less cupidity and rigor than the . . . several States, but the two governments are alike destitute of good faith . . . [T]he tyranny of the States obliges the savages to retire, the Union, by its promises and resources, facilitates their retreat; and these measures tend to precisely the same end.”²¹⁰

²⁰⁶ *Id.* (Knox’s instruction with respect to the relinquishing of land was that “if the relinquishment of any lands, in the said space, should be an ultimatum with the said Indians, and a line could be agreed upon which would be free from dispute, you may, in order to effect a peace, make such relinquishment.”).

²⁰⁷ *Speech of the Commissioners of the United States to the Deputies of the Confederated Indian nations, assembled at the rapids of the Miami river* (July 31, 1793), in 1 AMERICAN STATE PAPERS, *supra* note 47, at 352, 354.

²⁰⁸ PRUCHA, THE SWORD OF THE REPUBLIC, *supra* note 136, at 38.

²⁰⁹ *Id.* at 40.

²¹⁰ ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 408–09 (Henry Reeve trans., 1898).

Notwithstanding the nineteenth century approach to it, as is apparent from the Union's dealings with the Indian nations of the North and Northwest, there are important, consistent strands running throughout the Framing, albeit from sparse pre-Philadelphia material, with regard to Indian affairs. While the exact form of policy would change, the principles of success and adherence to the rights and obligations under the law of nations would guide its development.

The principles arise out of the founding generation's preoccupation with recognition. That generation was aware of its powers and obligations under the law of nations, which they exploited to achieve recognition by the civilized world. This led the founding generation to focus not only on efficacy in diplomatic outcomes but also to adherence with the Union's law of nations obligations as a nation co-equal with European sovereigns.

Indian affairs, therefore, were central to the founding generation's desire for entry into the "civilized" world. As such, the relative obscurity that Indian affairs assumed at the Philadelphia Convention could not have been due to omission. Rather, it was clear to all that the only way to effectively achieve the Union's vision was for a central, unified, coordinated policy toward Indian affairs.